MASSACHUSETTS EMPLOYMENT & LABOR

LAW REPORT

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E-Mail Notice of Arbitration Policy Found Inadequate

Last September's *Report* included an article on a decision by the U.S. District Court in Massachusetts ("District Court"), *Campbell v. General Dynamics*, holding that an employer's attempt to use e-mail to notify its employees of a new policy requiring the arbitration of employment-related disputes failed to contractually bind the plaintiff. General Dynamics appealed that decision to the First Circuit Court of Appeals ("First Circuit"), but lost again. While the First Circuit's decision clarifies that an electronic communication may satisfy the Federal Arbitration Act's ("FAA") requirement of a written arbitration provision — an issue left open by the lower court's decision — it leaves unanswered some important questions surrounding the use of electronic means to create contractual obligations.

On April 30, 2001, General Dynamics notified its employees, via an e-mail from the president, of a new Dispute Resolution Policy ("DRP"), which would become effective the next day. While the subject line referred to a "New Dispute Resolution Policy," the e-mail did not mention whether or how the DRP would affect an employee's right to use a judicial forum to resolve workplace disputes, and did not indicate that "workplace disputes" included federal statutory claims. The e-mail urged employees to review the "enclosed" materials — an apparent reference to two links embedded in the e-mail that accessed the DRP in the employee handbook and a two-page flyer describing its key provisions.

On December 30, 2002, General Dynamics terminated Roderick Campbell's employment for persistent absenteeism and tardiness. Campbell sued General Dynamics for disability discrimination under the ADA, alleging that his absenteeism and tardiness stemmed from a medical condition. General Dynamics moved to compel arbitration, relying on its DRP implemented sixteen months before the termination. Campbell claimed that he had never read the e-mail or accessed the links, and argued that: 1) the policy was not enforceable because the notice was insufficient, and, therefore, he could not be held to have agreed to it; and 2) an electronic notice is insufficient to satisfy the FAA's requirement of a written agreement. The District Court agreed with Campbell's first argument and declined to address the second argument.

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Retaliatory Harassment Exposes Employer to Liability

In *Noviello v. City of Boston*, the First Circuit held that the creation of a pervasive hostile work environment following an employee's complaint of sexual harassment can constitute a retaliatory adverse employment action under Title VII. This decision adds to the split among the Federal Courts of Appeals on the viability of a claim of hostile work environment as a retaliatory adverse employment action. The First Circuit also opined that the Massachusetts Supreme Judicial Court ("SJC") would reach the same result under M.G.L. c. 151B ("Chapter 151B"), though the SJC has not yet had the opportunity to consider the question.

Christi Noviello, a parking enforcement officer for the City of Boston, was riding in a city-owned van with her immediate superior when, after first announcing his intentions, he forcibly unhooked her brassiere, ripped it from her body, and hung it on the van's outside mirror. He also yelled a crude sexual remark to a fellow employee on the street. After Noviello lodged a complaint of sexual harassment against her superior, the City conducted an investigation, and ultimately terminated his employment. In the months immediately following this incident, Noviello's co-workers subjected her to a steady stream of abuse, including false accusations of misconduct, exclusion from workplace activities, physical threats, insults and taunting remarks.

Noviello brought sexual harassment and retaliation claims in the District Court against the City under Title VII and Chapter 151B. The District Court granted summary judgment in favor of the City. The District Court, while recognizing that Noviello had been subjected to a "series of distasteful, unpleasant, non-empathetic acts … by a series of subordinate officials," nevertheless held that her retaliation claims failed because none of the incidents were an "adverse employment action" that impacted Noviello's terms and conditions of employment.

The First Circuit vacated that part of the summary judgment decision in favor of the City pertaining to the retaliation claims. The First Circuit rejected the City's argument that Noviello could not prove a retaliation claim because she did not suffer any adverse employment action

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In addressing whether the Company could compel arbitration, the First Circuit focused its analysis on two intertwined issues: 1) whether a valid agreement to arbitrate existed; and 2) whether the employer's e-mail announcement was sufficient notice to Campbell that his continued employment would constitute a waiver of his right to pursue ADA claims in court. In answering these questions, the First Circuit focused on the totality of the circumstances, considering the method of communication, the workplace context and the content of the communication.

Applying those factors, the First Circuit found that the employer's notice was not sufficient. In particular, the Court relied on the following facts: 1) the Company could not show that e-mail had previously been used to alter the terms of the workplace relationship; 2) the Company had not required an affirmative response that would have signaled to employees that the DRP was contractual in nature; 3) the text of the e-mail failed to put the employees on notice of the contractual significance of the change; and 4) the tone and choice of words in the e-mail downplayed its importance.

While the District Court had expressed skepticism that e-mail could effectively be used to establish a contractually binding arbitration policy, the First Circuit clarified that under some circumstances an e-mail communication can be sufficient, and specifically noted that the federal "E-Sign Act" establishes that an electronic communication may satisfy the written provision requirement. Unfortunately, the First Circuit did not address the requirements set forth in the E-Sign Act for entering into a contractual agreement through electronic means.

Companies are increasingly using electronic means to communicate with employees. This case highlights the need for employers to assess whether the means used are effective. Employers who would like to use electronic means to communicate and create contractual obligations with their employees are advised to consult with legal counsel.

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such as discharge, demotion or loss of pay. The First Circuit concluded that the creation and perpetuation of a hostile work environment can be an adverse employment action sufficient to support a retaliation claim. The First Circuit noted that when co-workers are responsible for the creation of the hostile work environment, an employer may face liability if it was, or should have been, aware of the harassment and failed to take prompt and effective corrective action. The First Circuit was careful to note that commonplace indignities typical of the workplace such as tepid jokes, teasing, or aloofness, or even rudeness or ostracism, standing alone, typically will not suffice to show a retaliatory hostile environment. Instead, the harassment must: (1) stem from a desire to retaliate; (2) be severe or pervasive; (3) materially alter the conditions of employment; and (4) be offensive both to a reasonable person and to the complaining employee.

This case serves as a reminder to employers of the importance of maintaining confidentiality, to the extent practicable, during an investigation, cautioning involved persons that retaliation is unlawful and will not be tolerated, and taking prompt corrective action in response to retaliatory acts.

Federal Appeals Court Holds Pharmacists are Exempt Professionals

In *De Jesus-Rentas v. Baxter Pharmacy Services Corp*., the First Circuit decided that "compound pharmacists" charged with filling drug prescriptions were exempt from overtime pay requirements pursuant to the Fair Labor Standards Act ("FLSA"). Generally, the FLSA requires employers to pay employees overtime for hours worked in excess of 40 hours per week, but specifically exempts employees working in a *bona fide* professional capacity. Baxter had classified the pharmacists as professionals.

The plaintiffs, five licensed compound pharmacists who facilitated Baxter's manufacturing and distribution of intravenous antibiotics, dialysis medication, and chemotherapy drugs, performed duties requiring them to analyze, approve, and fill prescription requests. They rotated through three duty stations — data entry, compounding, and labeling. At the data entry stage, the pharmacists determined whether a prescription was appropriate for the particular patient based on the nature of the prescription and the patient's medical profile. At the compounding stage, the pharmacists supervised pharmacy technicians in the preparation of the requested drug compounds. At the labeling stage, they worked with technicians to confirm that the final product met pharmacological standards, was accurately labeled and included the required documentation. In performing their tasks, the pharmacists followed Baxter's Standard Operating Procedures ("SOPs"). The SOPs combined sources of pharmacological data about the various drugs sold by Baxter and established the protocols that Baxter employees follow in performing their duties. The pharmacists participated annually in updating the SOPs to reflect changing practices and new pharmacological information.

Baxter paid the plaintiffs on a salary basis and considered them exempt professionals under the FLSA. The plaintiffs challenged their exempt status. Following discovery, the District Court awarded Baxter summary judgment and dismissed the case, holding that the plaintiffs were exempt professionals because they consistently exercised discretion and judgment in performing their duties.

The First Circuit affirmed the District Court's decision. Pursuant to the Department of Labor's regulations in force prior to August 2004, an exempt professional is someone "(a) [w]hose primary duty consists of the performance of: (1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, . . . and (b) [w]hose work requires the consistent exercise of discretion and judgment in its performance." Conceding that they met the advanced learning and knowledge portion of the test, the pharmacists argued that they did not meet the second part of the test requiring discretion and judgment because they were bound to follow the SOPs in performing their duties.

The First Circuit rejected the pharmacists' argument, noting that their jobs involved a significant amount of discretion and

judgment. For example, with little supervision, the pharmacists used their specialized knowledge to make numerous discretionary decisions, including how to follow up with a physician over a questionable prescription; when a drug should not be dispensed because of a potential danger to the patient; and how to assign, supervise, and review the work of the technicians. Further, the Court noted that the pharmacists reviewed the SOPs and provided suggestions for modification and improvement during the SOP formulation process.

For exemptions requiring the exercise of discretion and judgment, including the professional and administrative exemptions, this decision clarifies that an employee's use of policies, SOPs or manuals will not necessarily prevent the classification of the employee as exempt. However, as with all wage and hour determinations, the proper classification of employees as exempt or non-exempt requires a fact-specific inquiry into the specific job duties performed by the employees.

Arbitration Agreement Need not be Invoked During Agency Investigation

In *Marie v. Allied Home Mortgage Corp*., the First Circuit recently held that an employer does not waive its right to enforce an arbitration agreement by waiting until an Equal Employment Opportunity Commission ("EEOC") investigation is concluded before seeking to enforce the agreement to arbitrate.

Martha Marie worked for Allied Home Mortgage Corporation as a mortgage loan processor. Marie's employment contract with Allied contained an arbitration clause by which either party had to initiate arbitration within sixty days of the action, inaction or occurrence at issue. Marie's boyfriend, Joseph Thompson, a branch manager for Allied, hired Marie and supervised her during her employment. After their relationship soured, Allied terminated Marie's employment. Marie filed a sexual discrimination claim with the EEOC and the Massachusetts Commission Against Discrimination ("MCAD") against Allied and Thompson. During the EEOC investigation, Allied did not file a demand for arbitration. The EEOC dismissed the charge for a lack of cause and issued Marie a right-to-sue letter. Marie subsequently brought a civil action against Allied and Thompson asserting, among other claims, one for sexual harassment under Title VII. Within sixty days of service of the court action, Allied both filed a demand for arbitration with the American Arbitration Association, and moved to compel arbitration and stay the court proceedings.

The District Court denied Allied's motion to compel arbitration, but the First Circuit reversed the lower court's decision and ordered the arbitration of all claims. The First Circuit relied on the Supreme Court's 2002 holding in *EEOC v. Waffle House*, in which the Court held that an employer could not preclude the EEOC from bringing a public enforcement action against an employer by invoking an arbitration agreement between the employer and an employee. Applying the same logic, the First Circuit concluded that an arbitration agreement also could not halt a preliminary EEOC investigation. Based on this premise, the Court reasoned that if an employer could not stop the EEOC's investigation by invoking an arbitration agreement, then forcing the employee and employer to begin an arbitration proceeding during the pendency of that investigation would result in two simultaneous proceedings concerning the same issue. Duplicative proceedings would be inefficient and wasteful. Moreover, the EEOC investigation might definitively resolve the claim. The First Circuit concluded that Allied's failure to initiate arbitration during the pendency of the EEOC proceedings merely reflected a desire to avoid inefficiency, and thus, Allied's decision not to initiate arbitration at that time was not an action inconsistent with a desire to arbitrate.

The First Circuit also held that Allied's failure to initiate arbitration after the EEOC concluded its investigation and dismissed the claim was not a waiver of its right to arbitration. The Court reasoned that Allied did not know at that time whether Marie would file suit, and a preemptive, pre-suit demand for arbitration would have been wasteful and futile.

This decision clarifies that employers with arbitration agreements need not, and should not, demand arbitration during the pendency of an EEOC or MCAD action. Employers, however, should file a demand for arbitration promptly after a current or former employee has filed suit so that the Court does not deem the employer's actions inconsistent with a desire to arbitrate, a finding that could waive the employer's right to arbitration.

Limited Benefits for Mentally Disabled "Suspect" Under ADA

In *Fletcher v. Tufts University and Metropolitan Life Insurance Company*, the District Court held that a long-term disability ("LTD") plan that provides fewer benefits for participants with mental disabilities than those with physical disabilities is "suspect" under the American with Disabilities Act ("ADA"). The LTD plan at issue in *Fletcher* capped benefits for mental disabilities at two years unless the participant is institutionalized. In contrast, the LTD plan provided that benefits for physical disabilities continue until the participant reaches age 65. In denying the motion to dismiss, the District Court allowed Fletcher to pursue her claim that Tufts University ("Tufts") and its plan administrator Metropolitan Life ("MetLife") violated the ADA by adopting and maintaining such a plan. In arriving at its conclusion, the District Court followed the precedent set in *Iwata v. Intel Corp*., a case involving a similar LTD plan that capped receipt of LTD benefits for mental disabilities, a limitation common to many plans. In *Iwata*, the District Court held that the plaintiff could state a claim for disability discrimination because the LTD plan's distinction between mental and physical disabilities could be motivated by stereotypes about mental disabilities (i.e., that they are "less real" than physical disabilities), rather than actuarial considerations. Like *Iwata*, the District Court's decision raises questions about the legality of limiting mental disability benefits in an LTD plan.

Madeleine Fletcher was a professor at Tufts and participated in its LTD plan. In April 1998, Fletcher wrote a letter to one of her classes triggering concerns about her mental health. Soon after, Fletcher was admitted to a hospital and diagnosed with bipolar disorder, manic type, with psychotic features. The two psychiatrists who treated Fletcher concluded that she

had an ongoing psychotic disorder rendering her "grossly disabled." After four months of medical leave, MetLife approved Fletcher's LTD benefits from February 1999 until February 2001. At the end of two years, Fletcher's LTD benefits terminated.

In July 2001, a physician evaluated Fletcher's ability to return to work and concluded that Fletcher had a continuing disability rendering her incapable of performing the essential functions of her job, and that no accommodation could be made that would allow her to work. Based on this physician's report, Tufts informed Fletcher that she could not return to her position.

Ten months later, Fletcher that MetLife review its decision to terminate her benefits. Before Fletcher made this request, a MetLife representative told her attorney that MetLife "could probably" waive the 60-day deadline for requesting a review of the benefits termination. Despite this assurance, MetLife denied as untimely, the request for review. On the same day, Fletcher filed an administrative charge of discrimination with the EEOC asserting violations of the ADA by Tufts and MetLife.

First, the District Court found that Fletcher was indeed a "qualified individual with a disability" under Title I of the ADA. The District Court rejected Tuft's argument that Fletcher fell outside the protection of the ADA because she admittedly was unable to perform the essential functions of her job, even with reasonable accommodation, instead finding that "former employees, who were able to perform the essential functions of the employment position for a period sufficient to qualify for long-term benefits and who allege that they are discriminated against with respect to long-term disability benefits on the basis of their disability, have standing to assert a claim."

The District Court then found that Fletcher stated a claim under Title I, reasoning that the ADA forbids discrimination among classes of persons with disabilities, and concluded that the LTD plan at issue was "suspect." Specifically, this Court adopted the rationale of the *Iwata* Court that the LTD plan's distinction between mental and physical disabilities could be motivated by stereotypes, rather than actuarial considerations.

Fletcher also alleged that the denial of "full and equal enjoyment" of her LTD benefits constituted a violation of her Title III rights under the ADA. MetLife argued that typically Title III of the ADA applies only to "places of public accommodation" and not to LTD benefit plans. The Court rejected this argument, noting that the First Circuit had previously recognized the right of a plaintiff to challenge an employee health benefit plan under both Title I and Title III of the ADA. Thus, the District Court refused to dismiss her discrimination claims.

This decision calls into question the common practice of providing different benefits for mental and physical disabilities. As this case proceeds, the Court may issue further guidance on this important issue.

OFCCP and EEOC Square-off on Definition of "Job Applicant"

Throughout the last decade, the increasing role of technology and the internet has had a significant effect on many facets of the workplace, including the job application process. More and more applicants take advantage of web-based recruiting agencies. In the wake of increased internet recruiting and electronic submissions to employers from potential job seekers, employers struggle with how to define an "applicant" for the purpose of affirmative action and other mandatory recordkeeping. In response, the Office of Federal Contract Compliance Programs ("OFCCP") issued a proposed rule that attempts to clarify the definition of "job applicant" for government contractors and subcontractors who are subject to the affirmative action laws and obligated to keep statistical records for all job applicants. In addition, employers must consider the slightly different definition of "job applicant" proposed in the Uniform Guidelines on Employee Selection Procedures created by the EEOC and other federal agencies. Balancing these inconsistent definitions can be confusing for employers, who must be aware of the key differences between the two definitions.

The OFCCP's proposed definition of "Internet Applicant" has four requirements: 1) the job seeker has submitted an expression of interest in employment through the Internet or related electronic technologies; 2) the employer considers the job seeker for employment in a particular open position; 3) the job seeker's expression of interest indicates the individual possesses the advertised, basic qualifications for the position; and 4) the job seeker does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual. The proposed rule would also require contractors to retain records of all submissions of interest through the Internet or related electronic technologies.

In contrast, the Uniform Guidelines which the EEOC will likely adopt, characterize an individual as an "applicant" if the following conditions are met: 1) the employer has acted to fill a particular position; 2) the individual has followed the employer's standard procedures for submitting applications; and 3) the individual has indicated an interest in the particular position.

These two definitions clearly place divergent burdens on employers who are required, as government contractors or subcontractors, to comply with the affirmative action laws. For such employers, having two different definitions of applicant would be administratively unworkable. Therefore, employers should consult with their counsel to develop a single definition of "applicant" synthesizing the criteria utilized in both definitions.

Crafting a working definition is essential and should take into account the typical volume of online or electronic applications received by the employer. For a large employer that receives thousands of internet applications, the definition of job applicant should be carefully drafted to avoid being over-inclusive, but nonetheless comply with affirmative action recordkeeping requirements. In developing online position descriptions and job postings, employers should consider: 1) specifically listing the

required minimum or basic job requirements; 2) inserting a notice that applications will not be accepted unless the employer has an actual vacancy, or that the applicant will not be "considered" for a position until there is a vacancy (if the employer chooses to store applications in a database or file for future reference or use); and 3) including a notice that only properly completed internet applications will be considered and accepted for review. These steps may assist in limiting recordkeeping obligations to "true" applicants, consistent with the legal definitions likely to be adopted by the OFCCP and EEOC.

Each employer, when implementing an applicant definition and recordkeeping process, will want to consider its size and resources. Such factors as an employer's administrative and technological capabilities to track and record internet application data and the extent to which it relies on the internet for recruitment purposes will influence a company's development of a workable recordkeeping process. If you have any questions concerning affirmative action or other recordkeeping requirements, please contact your Seyfarth Shaw attorney.

Superior Court Judges Disagree on Whether Chapter 151B Actions Survive the Death of a Party

Does a discrimination claim under Chapter 151B survive the death of a party? Two Superior Court judges recently disagreed on the answer to this question. In *Rowley v. Associates For International Research*, two plaintiffs brought an action against their former employer and its directors for age discrimination. After one of the directors died, the plaintiffs brought their claims against her estate. The defendants moved to dismiss plaintiffs' claims against the estate on the grounds that Chapter 151B claims do not survive the death of a party. The Superior Court agreed and dismissed the action against the estate. However, in *Gasior v. Massachusetts General Hospital*, decided a month later, a different Superior Court Judge reached the opposite conclusion, rejecting defendant's motion to dismiss a disability discrimination claim following the death of the plaintiff insofar as the complaint sought compensatory damages.

In order for an action to survive the death of a party, it must be either specifically listed under the Massachusetts Survival Statute M.G.L. c. 228, §1 (the "Survival Statute"), or a type of action that survives under common law. The Survival Statute does not expressly mention Chapter 151B, but identifies certain tort claims, among others, as actions that survive. Under common law, contract actions survive a defendant's death, but tort claims do not. Accordingly, the only types of tort claims that survive are those that fall within an exception identified in the Survival Statute.

In *Rowley*, the defendants argued that aiding and abetting discrimination was essentially a civil rights tort, which did not fall within the Survival Statute exceptions. The Superior Court disagreed with that characterization, relying on the SJC's statement in a very recent case, *Ayash v. Dana-Farber Cancer Institute*, that "it cannot be said . . . that claims arising under M.G.L. c. 151B are causes of action in tort." Nonetheless, the Superior Court dismissed the claims against the estate, finding, without any discussion, that Chapter 151B claims are also not contract-based. The Superior Court declined to examine plaintiffs' public policy arguments, citing the SJC's "unwillingness" to do so in *Alba v. Raytheon*, where the SJC stated: "[g]iven that survivability of discrimination claims may have important ramifications with respect to the policies of deterrence and remediation that underlie G.L. c. 151B, we commend the issue to the Legislature's attention."

The *Gasior* Court found that employment discrimination claims are not "torts," also citing the *Ayash* decision. The Court, however, engaged in further analysis and, unlike the *Rowley* Court, examined the legislative intent and public policy interests behind the Survival Statute and Chapter 151B. The Superior Court held that a Chapter 151B action in which a plaintiff seeks emotional distress damages survives under the general "other damage to the person" tort category of the Survival Statute because "damage to the person" encompasses a person's mind and emotions, in addition to physical injury. The Superior Court also found that the plaintiff's claims could be deemed contractual or quasi-contractual in nature "as it is predicated upon the plaintiff's 20 year employment relationship with the defendant and seeks to recover lost wages resulting from the defendant's breach of contract" by terminating plaintiff or failing to reinstate him following his leave. In reaching its decision, the *Gasior* Court did not reference either the *Alba* or *Rowley* decisions. Clearly recognizing the need for clarity on this issue, the Gasior Court reported the issue of survivability of Chapter 151B actions and its decision to the Appeals Court.

Arbitration Clauses in Employment Contracts are Unenforceable in MCAD Proceedings

Two recent cases analyze the effect on MCAD proceedings of arbitration clauses contained in employment agreements. In *Konda v. CyberBills, Inc.* and *Addanki v. CyberBills, Inc.*, the complainants, Vijaya Konda and Vijay Addanki, filed complaints with the MCAD alleging that CyberBills unlawfully terminated them based on their race, color, and national origin. In each case, CyberBills filed a motion to stay the proceedings in favor of arbitration, claiming that Konda and Addanki each knowingly and willingly entered into employment agreements that contained an arbitration clause. The clause provided that any dispute between CyberBills and its employees related to the employment relationship, including the termination of that relationship and any allegations of unfair or discriminatory treatment arising under state or federal law, would be resolved by binding arbitration. Konda and Addanki opposed CyberBills' motion and argued that the MCAD, which was not a party to their employment agreements, was not bound by the terms of those private agreements.

Relying on the U.S. Supreme Court decision, *EEOC v. Waffle House,Inc.*, the MCAD agreed with the complainants. In *Waffle House*, the Supreme Court held that an employment agreement to arbitrate employment-related disputes does not preclude the EEOC, a non-party to the agreement, from providing victim-specific relief.

Accordingly, the MCAD determined that "regardless how an employer and employee chose to resolve their private disputes, this does not extinguish the MCAD's statutory authority to pursue relief in the public interest and to eradicate discrimination practices."

The Complainants also pursued separate claims against the employer in arbitration proceedings, which apparently concluded in the employer's favor while the MCAD proceeding remained pending. Accordingly, three years after it filed its motions to stay the proceedings in favor of arbitration, CyberBills moved to dismiss both Konda's and Addanki's charges of discrimination on *res judicata* grounds, claiming that the arbitrator had already issued a final award on the claims arising from their complaints with the MCAD. In opposition, Konda and Addanki argued that the arbitrator ruled on their breach of contract claims only and that neither employee had presented any evidence about his discrimination allegations during the arbitration proceeding. Moreover, the arbitrator specifically found that the discrimination complaints pending before the MCAD were not before her. The MCAD, therefore, denied CyberBills' motions to dismiss.

Employers should be aware that, even if their employment agreements contain an arbitration provision, such clauses do not preclude administrative agency investigations into allegations of discrimination.

Volunteer Worker May Sue for Sexual Harassment

Reversing a lower court decision, the Massachusetts Appeals Court has held in *Lowery v. Klemm* that an unpaid volunteer worker at a swap shop operated by the town of Falmouth could sue her supervisor for sexual harassment. The volunteer, Lorraine Lowery, filed suit against Francis Klemm claiming that over a three-year period, he routinely made sexual advances and subjected her to "verbal and physical conduct of a sexual nature," despite her requests that he leave her alone. Instead of suing under Chapter 151B, which applies to discrimination and harassment in the traditional employment context, Lowery brought her claims under M.G.L. c. 214, § 1C ("Section 1C"), another statute which provides that "[a] person shall have the right to be free from sexual harassment."

The Appeals Court noted that, where Chapter 151B applies, it creates an exclusive remedy and bars all other claims, including claims under Section 1C. The Appeals Court found, however, that Chapter 151B did not apply to Lowery's harassment claims because, as an unpaid volunteer, she was not an employee for purposes of that statute.

The Appeals Court next considered whether Section 1C provides a private right of action for sexual harassment outside of the traditional employment context. The Appeals Court found that Section 1C allows victims of harassment that occurs outside of the traditional employment context to sue their harassers. The Appeals Court initially focused on the legislative purpose of Section 1C and noted that it is a broad-based remedy designed to ensure "that all employees are protected against sexual harassment in the workplace, whether or not their employers fit within the definition in c. 151B." Further supporting its application as to volunteers was the fact that Section 1C previously had been used to fill in gaps, where needed, to guard against sexual harassment, such as in cases of harassment occurring in workplaces with fewer than six employees, which are beyond the reach of Chapter 151B. The Appeals Court also recognized the broad reach of Section 1C which explicitly grants to all "persons" the right to be free from sexual harassment. Finally, the Appeals Court was persuaded that sound public policy compels that volunteer workers have the same protections in the workplace as traditional employees.

While this case makes clear that Massachusetts courts will extend statutory prohibitions against sexual harassment beyond the traditional employment context, it leaves some important questions unanswered. A suit under Section 1C does not have the same requirement of a pre-suit administrative filing at the MCAD applicable in Chapter 151B cases. Defendants in Section 1C cases, therefore, do not have the same opportunity to investigate and conciliate harassment claims in a less formal administrative setting before court proceedings begin. It is also possible that such suits have a 3-year statute of limitations period, unlike Chapter 151B cases, which require that an administrative charge be filed within 300 days. Finally, the principles of vicarious liability in Section 1C cases are unclear. For example, it is not clear whether Lowery could also have sued the town for Klemm's alleged harassment.

2005 Edition of Federal and State Employment Discrimination Laws in the United States and 2005 Edition of Class Action Report

Each year our Labor & Employment Practice Group prepares an annual survey of federal and state employment discrimination laws in the United States. The 2005 edition, which contains summaries of new legislation enacted nationwide that became effective during 2004 and/or as of January 1, 2005, is available.

Seyfarth Shaw also recently prepared a study of all federal and state court class action rulings in 2004 on workplace legal issues. The report is part of the collective knowledge our firm uses in defending employers and class actions throughout the United States.

The report is 134 pages in length, and examines 145 class action rulings on a circuit-by-circuit and state-by-state basis. The discussion is divided into chapters on leading class action settlements, federal law rulings, and state law rulings. The substantive areas examined include Title VII, the Americans With Disabilities Act, EEOC pattern or practice cases, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act, and state law rulings in employment law, wage & hour, and breach of contract cases.

These reports are available in CD-ROM format. To request your copies send an e-mail, with your complete contact information, to: seyfarthshaw@seyfarth.com.

Table of Cases

Addanki v. CyberBills, Inc., MCAD Docket No. 01130386 (2005).

Alba v. Raytheon Co., 441 Mass. 836 (2004).

Ayash v. Dana-Farber Cancer Institute, 443 Mass. 367 (2005).

Campbell v. General Dynamics Gov't Sys. Corp., No. 04-1828, 2005 WL 1208136 (1st Cir. May 23, 2005).

De Jesus-Rentas v. Baxter Pharmacy Serv. Corp., 400 F.3d 72 (1st Cir. 2005).

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

Fletcher v. Tufts Univ. and Metropolitan Life Ins. Co., No. 02-10923-RCL, 2005 U.S. Dist. LEXIS 7237 (D. Mass. 2005).

Gasior v. Massachusetts Gen. Hosp., No. 2001-2772H, (Mass. Super. Mar. 25, 2005).

Iwata v. Intel Corp., 349 F. Supp. 2d 135 (D. Mass. 2004).

Konda v. CyberBills, Inc., MCAD Docket No. 01130388 (Apr. 29, 2005).

Lowery v. Klemm, 63 Mass. App. Ct. 307 (2005).

Marie v. Allied Home Mortgage Corp., 402 F.3d 1 (1st Cir. 2005).

Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005).

Rowley v. Associates for Int'l Research, Inc., No. 01-03955-D, 2005 Mass. Super. LEXIS 90 (Feb. 28, 2005).

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