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SJC Declines to Apply Charitable Immunity to Retaliation Claims

In *Ayash v. Dana-Farber Cancer Institute*, the Supreme Judicial Court declined to limit damages awarded against a hospital for unlawfully retaliating against a doctor who filed a gender discrimination claim. The plaintiff, Dr. Lois Ayash, was the attending physician when a patient, a *Boston Globe* health columnist, died after mistakenly receiving an overdose of a toxic chemotherapy drug during an experimental breast cancer treatment study at Dana-Farber. The *Globe* ran a series of articles in which Ayash was the only doctor named in connection with the overdose. After being placed on administrative leave, Ayash filed a charge with the MCAD alleging gender discrimination and later brought her claim in the Superior Court. On at least three occasions, Ayash's supervisors at Dana-Farber referred to her lawsuit and suggested she work from home "to avoid awkwardness." Dana-Farber did not renew Ayash's employment when her three-year appointment expired.

After trial, the jury found Dana-Farber liable for violation of Ayash's right to privacy, breach of the covenant of good faith and fair dealing in its employment contract with Ayash, and unlawful retaliation in violation of G.L. c. 151B, the Massachusetts anti-discrimination statute. In addition to damages for lost compensation, injury to business reputation, and punitive damages, the jury awarded Ayash over \$1 million for emotional distress. The trial court granted Dana-Farber's post-trial motion to apply the charitable limit set forth in G.L. c. 231, § 85K and reduced the judgment against Dana-Farber to \$20,000. On appeal, the SJC vacated the judgments against Dana-Farber and directed a verdict in its favor on the invasion of privacy and breach of the covenant of good faith and fair dealing claims. The SJC affirmed the verdict against Dana-Farber for retaliation, holding that the \$20,000 statutory charitable limit does not apply to damage awards for unlawful retaliation under Chapter 151B.

The Court rejected Ayash's argument that Dana-Farber invaded her statutory right to privacy, pursuant to G.L. c. 214, § 1B, when it released medical peer review information about Ayash to the *Globe*. The Court found that the disclosures about Ayash's professional conduct "were part of a matter of intense public interest and were not ... of an exceedingly personal or intimate nature."

See "Retaliation Claims," page 2

Massachusetts Limits Independent Contractor Classification

Just as employers were working to comply with the U.S. Department of Labor's new exempt status regulations, Massachusetts enacted legislation that substantially limits a company's ability to classify workers as "independent contractors." The new law, entitled "An Act Further Regulating Public Construction in the Commonwealth" (the "Act"), Chapter 193 of the Acts of 2004, amends the Independent Contractor Law, G.L. c. 149, §148B, and exposes members of a company's management to individual civil and criminal liability for misclassifying workers as independent contractors. See Chapter 193 of the Acts of 2004, §26.

While there has long been a presumption in Massachusetts that a person performing services is an employee rather than an independent contractor, the Act excludes many more workers from independent contractor status. Under the old independent contractor law, whether a worker could properly be classified as an independent contractor involved weighing such factors as the nature of the work done by the individual, the type of business, and how and where the services were performed. The Act is far more restrictive than traditional tests such as the Internal Revenue Service's "20 Factors Test." Therefore, the new law requires that any person performing services must be classified as an employee under Massachusetts law unless each of the following three prongs is met:

1. The individual must be free from "control and direction" in performing the job, both under his or her contract and in fact. Thus, an employment contract or job description must indicate that the individual is free from supervisory control and the individual must carry out his or her duties with actual independence and autonomy.
2. The service must be performed outside the employer's usual course of business. This prong substantially differs from the old law, in which a worker could be an independent contractor if he or she provided services either outside the usual course of the business or outside all places of the business. Now, a worker must be classified as an employee if he or she does the type of work that is a part of the usual services or products delivered, regardless of where it is performed.

See "Independent Contractor," page 2



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Retaliation Claims, cont'd from page 1

The SJC also rejected Ayash's claim that Dana-Farber breached the implied covenant of good faith and fair dealing in the employment relationship by failing to notify Ayash, in writing, of her right to a hearing after it assigned her to administrative duties. Even though the jury reasonably could have found that Dana-Farber violated its own bylaws by denying Ayash a hearing, Ayash did not prove that she suffered compensable damages because of the breach.

Before *Ayash*, the SJC had not addressed the question of whether the statutory limit on damages shields charitable institutions from "the full effects of liability" for unlawful retaliation in the employment context under Chapter 151B. The charitable immunity statute imposes a mandatory \$20,000 limit on tort-based liability "if the tort was committed in the course of any activity carried on to accomplish directly or indirectly the charitable purposes of such corporation." See G.L. c. 231, § 85K. Although the Court acknowledged its frequent reference to tort-like aspects of discrimination claims, it held that Chapter 151B claims are not causes of action in tort within the meaning of the charitable immunity statute. Therefore, it declined to extend the charitable limit to damages awarded for successful retaliation claims and remanded the case to the Superior Court for a new trial on damages.

The SJC's ruling signifies the end of charitable immunity for damages awarded for unlawful retaliation. It remains to be seen, however, whether the Court will similarly refuse to apply the charitable immunity statute to limit damages awarded for discrimination claims.

Independent Contractor, cont'd from page 1

3. The individual must be customarily engaged in an independently established trade, occupation, profession, or business that is "similar in nature" to the service at issue.

An employer violates the Act when it improperly classifies an employee as an independent contractor and violates a provision of the Independent Contractor Law, such as failure to make timely payment of wages, pay overtime, withhold taxes, provide workers' compensation coverage, or pay for unemployment insurance coverage.

As a result of this new law, Massachusetts businesses should carefully reexamine their independent contractor positions and consider whether individuals should be reclassified. The Massachusetts Attorney General has issued an Advisory that provides a detailed discussion of the new law. This Advisory and other helpful publications discussing the employer-employee relationship in Massachusetts are available at www.ago.state.ma.us.

Appeals Court Considers Joint Employer Status in Health Care Industry

In *Commodore v. Genesis Health Ventures, Inc.*, the Appeals Court considered whether the owner and licensee of a nursing home could be deemed a joint employer for purposes of Chapter 151B liability. The plaintiff, Ruthlyn Commodore, a black woman of West Indian origin, alleged she was unlawfully terminated from her position as director of nursing at a nursing home because of her race, color, and national origin, in violation of the

Massachusetts anti-discrimination law, Chapter 151B. She also sought relief under the Massachusetts health care whistleblower statute, G.L. c. 149, § 187, for objecting to new patient admissions and inadequate staffing that, she alleged, endangered patient care and safety at the nursing home.

Commodore brought her action against Omega, the owner of the nursing home, and Genesis, the health care management company Omega selected to manage the facility. Pursuant to the management contract between Omega and Genesis, Genesis agreed to select and employ a director of nursing who would be a Genesis employee but would exclusively service facilities owned and operated by Omega. Genesis also agreed to hire, supervise, and discharge, as necessary, a staff of nurses, as well as establish employee benefits and personnel policies, and comply with applicable laws, including anti-discrimination regulations.

The Court dismissed Genesis from the case because of its involvement in Chapter 11 bankruptcy proceedings. Thereafter, the Superior Court granted Omega's motion for summary judgment on the ground that it was not Commodore's employer. On appeal, Commodore argued that she had presented enough evidence to create a triable issue of fact regarding her claim that Omega was her joint employer.

The SJC has imposed joint employer status under Chapter 151B on companies that possess "sufficient control over the work of the employees" of another company. The "sufficient control" test is purely a fact-based analysis that examines one company's level of control over the terms and conditions of another company's employees. The Appeals Court acknowledged that issues of joint employment are particularly complicated in heavily regulated environments, such as the health care industry where licensees maintain certain nondelegable responsibilities. The Court found that the contract between Omega and Genesis was ambiguous because Omega, as owner and licensee, negotiated for the creation of Commodore's position, retained substantial financial control over the nursing home, and reserved the right to inspect and be consulted monthly regarding operational decisions. Accordingly, the Court determined that the Superior Court had incorrectly ruled that Commodore had no reasonable expectation of proving that Omega was a joint employer.

Commodore also alleged that Omega violated the health care whistleblower statute, which prohibits a "health care facility" from terminating or taking any retaliatory action against a health care provider for disclosing an activity that he or she reasonably believes violates the law. The Court concluded that the whistleblower statute's focus is broader than the determination of employer status. Therefore, Omega, as owner and licensee, fit within the definition of "health care facility" and could be held liable under the whistleblower statute even if it is ultimately determined at trial not to be a joint employer pursuant to Chapter 151B. The Court reversed the grant of summary judgment on the discrimination and whistleblower claims and remanded the case to the Superior Court.

Even though the Appeals Court did not rule on whether Omega was subject to liability as a joint employer, its decision suggests that the question of joint employer status in heavily regulated industries requires an analysis beyond the SJC's fact-based "sufficient control" test. When considering joint employment in industries subject to regulatory requirements, those regulations must be integrated into the "sufficient control" analysis to determine whether a company is a joint employer.

SJC Recognizes Defamation by Conduct

Although not expressly recognized in prior Massachusetts case law, the SJC recently acknowledged defamation by conduct as a cause of action. The Court held, however, that an employee could not sue his or her employer for defamation by conduct without offering evidence about the way in which other employees interpreted the employer's actions.

In *Phelan v. May Department Stores*, Filene's conducted an investigation into alleged accounting irregularities by Michael Phelan, the Company's assistant director of accounts payable. During the investigation, Filene's assigned a security guard to watch Phelan and prevent him from influencing or intimidating his subordinates, who were also being questioned as part of the investigation. Throughout the day, the security guard relocated Phelan to several available offices and conference rooms, escorted him to the bathroom and cafeteria, and did not permit him to use the telephone. At the end of the day, a Filene's executive escorted Phelan from the building and he was subsequently terminated.

Phelan sued Filene's for false imprisonment and defamation and prevailed on both counts at trial. The trial court granted Filene's motion for judgment notwithstanding the verdict and the Appeals Court reversed. A discussion of the Appeals Court's decision is included in the online edition of Seyfarth Shaw's *Massachusetts Employment & Labor Law Bulletin*, Vol. V, No. 3 (September 2004).

Now on appeal to the SJC, the Court announced for the first time that defamation under Massachusetts law may result from the physical actions of a defendant, even in the absence of written or spoken communication. In order to prevail on his defamation claim, however, Phelan would have to show that at least one of his co-workers who had observed Filene's conduct understood that conduct to be defamatory. The SJC explained that certain defamatory conduct, including chasing, grabbing, restraining, or searching, may convey "a clear and commonly understood meaning" to a third party. Here, the Court found that the Company's non-verbal conduct in escorting Phelan around the office was ambiguous and did not necessarily convey that Phelan had engaged in criminal wrongdoing. Phelan's testimony that he was embarrassed and humiliated, without more, was insufficient. Accordingly, the Court reversed the Appeals Court's decision and the Superior Court's post-trial decision in favor of Filene's dismissing Phelan's claim.

The important lesson for employers from this decision is that common practices, such as having security personnel present while an employee is interviewed or escorting a terminated employee from the workplace, may give rise to liability if the conduct is unambiguous or viewed as defamatory by co-workers or other third parties. Employers may be able to protect themselves by evaluating whether such conduct is necessary and whether an employee should be sent home during an investigation rather than remaining at work. If potentially defamatory conduct as described above is required, the employer should proceed in a way that minimizes exposure to co-workers and other third parties.

Employee's Wage Claim Barred by Valid Release

In *Gordon v. Millivision Holdings, LLC*, the Superior Court held that an employee was barred from bringing a wage claim against his employer because the employee had signed a valid release waiving such a claim. The plaintiff, David Gordon, was a design engineer at Millivision Holdings, LLC, a start-up technology company. Millivision had difficulty solidifying investor funding, which sometimes prevented it from paying all wages owed to its employees. Gordon and other employees were not paid a portion of their salary and benefits during 1998 and 1999, but the Company remained optimistic that funding would be forthcoming, and Gordon continued to work.

Gordon voluntarily quit Millivision without receiving all of the wages that he was owed. He later returned to the Company after it was purchased by a new investor group, which offered him full-time employment with a salary increase and additional benefits in exchange for releasing Millivision from all claims for unpaid wages. Gordon understood that signing the release was a precondition to Millivision's offer of full-time employment, and he voluntarily signed the release.

Gordon later brought an action against Millivision for failure to pay wages in violation of the Massachusetts Payment of Wages Act, G.L. c. 149, §148. Millivision moved for summary judgment seeking the dismissal of Gordon's claims based on the release that he had signed. The Court granted Millivision's motion in its entirety, finding that the release was unambiguous and that Gordon did not allege any evidence of fraud or duress.

Although Gordon acknowledged that he knowingly and voluntarily signed the release, he argued that the Payment of Wages Act prohibits employers and employees from executing such releases. The Court rejected Gordon's argument by drawing a distinction between a waiver of rights, which the statute expressly prohibits, and a release of claims. The Court ruled that the statute does not prohibit the release of an established claim, "particularly when it is to the benefit of the employee." Accordingly, since Gordon voluntarily signed the release with full knowledge of his wage claim against Millivision, he was barred from later bringing a claim to recoup the unpaid wages.

This case draws a distinction between waiver of a future claim and release of an existing claim for payment of wages. While many practitioners have been wary of advising employers to rely on the release of wage claims under Massachusetts law, this Superior Court decision supports the position that a valid, voluntary release is sufficient. A definitive ruling on this issue, however, will await appellate review.

Federal Court Questions Limit on Mental Disability Benefits

A recent decision by the U.S. District Court in Massachusetts raises new questions about the legality of limiting mental disability benefits pursuant to a long-term disability (LTD) plan. The plan at issue in *Iwata v. Intel Corp.* capped receipt of LTD benefits for mental disabilities, a limitation common to many plans. Although the case is still in the early stages of litigation, the Court issued a detailed decision denying the employer's motion to dismiss the plaintiff's disability discrimination claims, thus opening the door to legal scrutiny of LTD plans that provide different benefits for mental and physical disabilities.

The plaintiff, Jeanne Iwata, was an occupational health nurse at Intel. Her duties included reviewing the medical condition of other employees following a medical leave of absence. When an employee returning from leave expressed hostility toward management and talked about getting a gun permit, Iwata became concerned and reported the incident to company security. Before resigning, the employee sent an email asking Iwata whether she had reported his comments to the company. Iwata felt threatened by the email and "experienced panic." After being diagnosed with depression and Post-Traumatic Stress Disorder, she took a leave of absence and received short-term disability benefits. When those benefits expired, her application for LTD benefits was denied because the plan terms limited mental disability benefits to cases in which hospitalization was required. Iwata was later terminated due to her inability to return to work. She sued her employer and the plan administrator, alleging violations of the Americans with Disabilities Act (ADA), the Employee Retirement Income Security Act (ERISA), and state constitutional law.

The Court dismissed Iwata's claim that she was fired for seeking LTD benefits, in violation of ERISA's anti-retaliation provision, finding that she had admitted that she was unable to work. The Court allowed the remaining ERISA claims to proceed. Although ERISA does not expressly prohibit a plan from treating mental and physical disabilities differently, it prohibits interference with other federal statutes, including the ADA. The Court noted that, as this case progresses, if Iwata demonstrates that a portion of the plan violates the ADA, then the Court may strike that term from the plan.

Regarding Iwata's ADA claims, the defendants argued that Iwata was not a "qualified individual with a disability," since she was admittedly unable to work. The Court rejected this argument, noting that the ADA applies to fringe benefits and that the defendants' approach would effectively prevent any totally disabled person from challenging the discriminatory distribution of benefits.

The Court then evaluated whether the LTD plan's limitation on mental disability benefits constituted disability discrimination under federal law. The Court held that since 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, Iwata could state a claim for disability discrimination. Thus, the 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.

Court Refuses to Enforce Restrictive Covenant on Public Policy Grounds

In *L-3 Communications Corp. v. Reveal Imaging Technologies, Inc.*, the Business Litigation Session of the Superior Court refused to enforce non-competition agreements signed by several former L-3 employees who went to work for a competitor. The employees signed non-competition agreements with their employer, PerkinElmer. L-3 later acquired the subsidiary of PerkinElmer, for which the employees worked, but the individual defendants did not sign any employment agreements with L-3. After several of these employees subsequently left L-3 to work for a competitor, L-3 sued to enforce the PerkinElmer agreements. The Court dismissed the suit because the agreements, as drafted, prohibited the employees from competing with PerkinElmer or its affiliates, which included any subsidiaries or successors that control a majority of PerkinElmer's voting shares. The Court found that because PerkinElmer continued to exist after L-3 acquired its subsidiary, L-3 did not have the right to enforce the PerkinElmer employment agreements.

The Court also noted that the injunctive relief L-3 sought might affect national security. The employees at issue designed Explosive Detection Systems used to screen luggage in airports. The Court found that prohibiting these employees from working might impair their new employer's ability to respond to the increased demand for such screening devices and, therefore, pose a threat to national security. The Court noted that "[w]hile courts are hesitant to invalidate contracts on ... public policy grounds," this case presented "a public interest component of vastly greater significance than any yet seen by this Court."

This decision is unusual for its reliance on the public interest and national security as grounds for denying injunctive relief. Even though the Court determined that L-3 could not enforce the non-competition agreements the employees signed while working for PerkinElmer, this case reminds employers to carefully assess the enforceability of restrictive covenants in the context of a merger or acquisition.

Table of Cases

Ayash v. Dana-Farber Cancer Inst., No. 09236, 2005 Mass. LEXIS 14 (2005).
Commodore v. Genesis Health Ventures, Inc., No. 03-P-1623, 2005 Mass. App. LEXIS 168 (2005).
Gordon v. Millivision Holdings, LLC, No. 03-086 (Franklin Super. Ct. 2005).
Iwata v. Intel Corp., 349 F. Supp. 2d 135 (D. Mass. 2004).
L-3 Communications Security and Detection Systems Corp. v. Reveal Imaging Technologies, Inc., 2004 Mass. Super. LEXIS 519 (2004).
Phelan v. May Dep't Stores Co., 443 Mass. 52 (2004).
An Act Further Regulating Public Construction in the Commonwealth, Chapter 193 of the Acts of 2004.

Upcoming Breakfast Briefings

April 14, 2005: This Is Not Your Father's AFL-CIO! Preparing For a New Era of Organizing

May 19, 2005: Legal Issues of Outsourcing and Offshoring

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Next *Massachusetts Employment & Labor Law Report*: **June 15, 2005**

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