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SJC Clarifies Employer's Duty To Prevent Third Party Harassment

The Massachusetts Supreme Judicial Court ("SJC") recently defined the scope of an employer's duty to prevent and address harassment by someone who is not the employer's agent or employee. In so doing, the SJC overturned a Massachusetts Commission Against Discrimination ("MCAD") decision awarding \$50,000 in damages to a female "Big Dig" worker for alleged on-the-job harassment.

Modern Continental/Obayashi ("Modern") is a contractor on a portion of the Central Artery/Tunnel project in Boston. Modern employed a crew of carpenters, including Whatleigh Edmands, and it subcontracted the iron work on the project to Mohawk Construction ("Mohawk"), which employed the ironworkers. Shortly after starting her job, Edmands reported to her foreman that she saw someone peeping through an open vent into a port-a-john she was using. The peeper wore an ironworker's hard hat. In addition, someone had tied the port-a-john door shut, forcing Edmands to scream in order to have someone open the door. The foreman assured her that he would address the incident.

Within two days, an ironworker admitted that he had tied the door shut as a "prank" but he denied the peeping. The ironworker apologized to Edmands. Mohawk refused Modern's request to remove the ironworker from the site. Shortly thereafter, Edmands reported crude graffiti on the port-a-john, which she believed was directed at her. Modern removed the graffiti and contacted Mohawk, but Mohawk refused to identify the perpetrator.

Within a few weeks, Modern warned employees at a meeting that it would not tolerate sexual harassment. Modern also designated toilets for the female workers' exclusive use and placed fences around the port-a-johns, securing them with padlocks. Ultimately, the fences fell and the padlocks disappeared, so Modern hired a security monitor. Modern revised the work schedule to ensure that the ironworkers worked at a different location and on a different shift from Edmands. Four months later, there

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First Circuit Provides Guidance Regarding Reasonable Accommodation and "The Interactive Process"

In *Tobin v. Liberty Mut. Ins. Co.*, the U.S. Court of Appeals for the First Circuit ("First Circuit") provided guidance to employers on how to satisfy their obligation to engage in the interactive process with an employee who seeks an accommodation for a disability. The *Tobin* decision also highlights the importance for employers to take great care to define the essential functions of all jobs since that may be a key issue in determining whether a particular accommodation is reasonable.

Liberty Mutual hired Kevin Tobin in 1964 and promoted him to sales representative in 1968. He was diagnosed with bipolar disorder in 1976, but did not tell anyone at the Company about his condition until December 1997. According to Tobin, his condition limits his ability to focus and concentrate and to prioritize and complete tasks. During his career, Tobin sold numerous insurance policies that continued to generate annual premiums for the Company, but starting in 1992, he failed to meet his quota for selling new policies and started receiving negative performance evaluations.

In November 1997, Liberty Mutual placed him on a nine-week warning period due to his poor performance. Tobin used short-term disability leave from December 1997 to June 1998 and again from September 1998 to January 1999 to address his bipolar disorder. When he returned from the leave, Liberty Mutual provided him with a nurse to assist him with his work. Liberty Mutual placed Tobin on probation in April 1999 and in November 2000, and ultimately fired him on January 10, 2001, for failing to meet minimum sales quotas.

Tobin sued Liberty Mutual for disability discrimination under the Americans with Disabilities Act ("ADA") and Massachusetts General Laws c. 151B ("Chapter 151B") alleging that it denied him a reasonable accommodation when it refused his request that the Company assign

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were two other graffiti incidents, and Modern removed the graffiti before Edmands saw it. Modern issued a notice that it would deal with anyone responsible for the graffiti "in the most severe terms." Although Edmands did not complain about further harassment, Modern granted her request to transfer to another job site. Not long after transferring, Edmands quit her job and filed a complaint with the MCAD, which awarded her damages and ordered Modern to conduct training. Modern appealed.

The SJC rejected Modern's argument that it should not be liable for the conduct of a third party over whom it lacked control. The Court, however, did find that an employer will not be liable for the conduct of third parties unless it knew or should have known of harassing conduct and failed to take prompt remedial action. The SJC described the promptness and effectiveness of the employer's response and its ability to control the third party perpetrator as "key" factors in determining liability. The SJC stressed, however, that the analysis should focus on whether the employer acted *reasonably under the circumstances*. For example, it would consider whether the employer took prompt action which was (i) reasonably calculated to end the harassment; and (ii) reasonably likely to prevent it from recurring. The Court stated the standard is *not* whether the complaining employee wished a different response or whether, in hindsight, there may have been better or more effective measures.

The SJC concluded that Modern had met this standard. While Modern was not completely successful in eradicating all remaining vestiges of sexual harassment, and while there may have been additional steps that Modern could have taken, those factors were insufficient to impose liability on Modern.

This case offers a strong reminder that an employer must take prompt, effective, and reasonable remedial action in response to harassment, whether the acts are perpetrated by an employee or by a third party. In doing so, an employer may be able to insulate itself from possible liability for the conduct.

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him the most desirable mass marketing accounts and terminated his employment. The District Court granted Liberty Mutual summary judgment on Tobin's disability discrimination claims and Tobin appealed. The First Circuit affirmed that decision in part and reversed it in part. Addressing Tobin's termination claim, the Court held that Tobin did not rebut Liberty Mutual's legitimate business reason for terminating him — specifically its "full and well-documented account" of his performance problems. It found that Tobin failed to meet minimum quotas and standards, did not show up for meetings with supervisors, and received many poor performance reviews.

Notably, the First Circuit also found that the Company had satisfied its obligation to engage in an interactive process with Tobin because Liberty Mutual engaged in "a great deal of discussion about Tobin's difficulties" and took "significant action," including providing a nurse,

computer training, and "numerous meetings to help Tobin create the skills and plans to increase his sales effectiveness." Nonetheless, the Court reversed the lower court's judgment on Tobin's reasonable accommodation claim. Liberty Mutual had argued that it need not assign Tobin the mass marketing accounts as an accommodation because an employer has no duty to modify an essential function of the employee's job to accommodate a disability because an employee who cannot perform an essential function of his job is not a qualified individual under the ADA. The First Circuit found an issue of material fact as to how Liberty Mutual assigned the mass marketing accounts to other employees, and thus a factual dispute about whether assigning those accounts to Tobin would have altered the essential functions of his job.

This case emphasizes that the question of what constitutes a "reasonable accommodation" is a fact intensive one, and employers must be prepared to defend their business reasoning when they refuse to provide an employee with his or her requested accommodation. In addition, it highlights how important it is for employers to define the essential job functions of each job because they need not provide accommodations that eliminate those functions.

Employer's Demand for Release Violates Wage Act

In *Wilkie v. NETS, Inc.*, the Massachusetts Superior Court found that an employer's conditional payment of commissions to a former employee violated Massachusetts General Laws c. 149, §§ 148 and 150 (the "Wage Act"). After his former employer conditioned its payment of commissions on the execution of a release, the plaintiff filed a claim in Superior Court for violation of the Wage Act and breach of contract. The Court held that a promise of payment that is conditioned on execution of a release or other consideration is not a tender of payment that complies with the statute.

In 1995, NETS hired Wilkie as a sales representative. His employment agreement provided that in addition to an annual salary, NETS would pay Wilkie quarterly commissions on his sales over \$100,000. The agreement also provided that NETS would pay Wilkie a commission on any sales he booked before the termination of his employment. In 1999, Wilkie and NETS orally modified his employment agreement so that Wilkie received monthly commissions. Approximately two years later, NETS again attempted to modify Wilkie's compensation agreement. After he refused several proposals, NETS terminated Wilkie's employment. Four days later, NETS paid Wilkie his earned commissions for 2001 but withheld payments for 2002 on the grounds that the parties' inability to agree on a renegotiated contract in 2001 rendered the 1999 modification of Wilkie's employment agreement ineffective.

In response to a demand letter from Wilkie's counsel, NETS admitted that it owed Wilkie unpaid commissions totaling \$37,459.67. NETS further stated that it would

pay this amount, provided Wilkie executed a release of any claims he might have against NETS. Rather than sign a release, Wilkie filed a wage claim with the Attorney General for violation of the Wage Act, which requires employers to pay wages timely. Wilkie subsequently filed his action in Superior Court and moved for summary judgment.

The Court granted Wilkie partial judgment. The Court found that Wilkie's compensation constituted commissions, which must be timely paid under the Wage Act because (1) his bi-weekly salary was supplemented by a monthly surplus, which was derived from generated sales; (2) his commissions were not dependent on any contingencies other than the booking of sales, which was accomplished before his termination; and (3) NETS had definitely determined the commissions that it owed Wilkie as evidenced in its post-termination letter to him.

Further, because the Wage Act provides that tender of earned commissions must be "without stipulations or conditions," the Court found that NETS had violated the statute when it conditioned the payment of his commissions upon his execution of a release. The Court deferred the computation of damages, and consideration of whether to award treble damages, until trial. The Court noted, however, that an award of attorneys' fees would be automatic under the Wage Act.

Employers should review the Wage Act to determine whether any of the compensation they pay to employees constitutes earned commissions. Employers are reminded that once they can definitely determine commissions, and those commissions become due pursuant to an employment or other agreement, they must promptly tender payment. If they fail to do so, they violate the Wage Act and will be susceptible to treble damages and attorneys' fees.

Senate Proposal for Relief from H-1B Visa and Green Card Quotas

On October 20, 2005, the U.S. Senate added a proposal to provide temporary relief for both the H-1B visa quota and the employment-based immigrant visa (green card) quota as part of Congress's budget reconciliation process (S. 1932).

The H-1B employment visa is the most common form of employment authorization enabling foreign nationals to work for U.S. employers. The H-1B category is limited to temporary employees who have a Bachelor's or higher degree, and who seek to work in the U.S. in professional occupations. There is an annual limit of 65,000 H-1B visas that the U.S. Citizenship and Immigration Service ("USCIS") may issue during each fiscal year. For fiscal year 2006, which began on October 1, 2005, the USCIS reached its H-1B quota on August 10, 2005, seven weeks before the USCIS fiscal year commenced. Similarly, there is an annual limit on the number of employment-based green cards that the USCIS may issue in each fiscal year. In September 2005, the Department of State

announced backlogs in most employment-based green card categories, and as a result, many green card applicants will experience delays of several years.

The Senate proposal would provide some measure of relief for both the H-1B quota and the employment-based green card quota. As a trade-off, the proposal would also result in increased USCIS filing fees for some petitions. The highlights of this proposal include:

- ♦ A new \$500 fee for many green card petitions.
- ♦ Recapture of unused employment-based green cards from prior fiscal years, to be allocated in FY 2006 and future years.
- ♦ Revision of the method of counting employment-based green cards, to exempt dependent spouses and minor children from counting against the annual quota, thereby effectively increasing the number of available green cards each fiscal year.
- ♦ Recapture of approximately 300,000 unused H-1B numbers from prior fiscal years, at the rate of 30,000 H-1B visas for each of the next ten fiscal years, including FY 2006.
- ♦ A new \$500 fee for recaptured H-1B visas.
- ♦ A new \$750 fee for L-1 visas.

During floor debate on the Senate's budget reconciliation package in early November, Senator Robert Byrd (D-WV) offered an amendment to remove these provisions from the final package. Senator Byrd's amendment was defeated by a wide margin.

There is still a large hurdle to be cleared before this proposal becomes law. The Senate budget reconciliation package must be reconciled with the House version. The Senate-House conference is tentatively scheduled for early 2006, but the House's budget reconciliation bill does not contain provisions to temporarily increase the H-1B and green card quotas.

Seyfarth Shaw will continue to update clients as developments unfold in this legislative process.

Plaintiff's Failure To Allege Causation Sufficiently Is Fatal to Retaliation Claim

The First Circuit recently confirmed that employees claiming retaliation under state anti-discrimination statutes must establish that the report or complaint forming the basis for their protected activity includes a statement that they believe they are being discriminated against based on a protected category. In *Stinson v. SimplexGrinnell L.P.*, the plaintiff alleged that her former employer, SimplexGrinnell, retaliated against her by terminating her employment, in violation of the Maine Human Rights Act ("MHRA"), after she complained to the employee "Concern Line" about her supervisor's

conduct. The plaintiff alleged that she told the individual who answered her call that her supervisor “had created a hostile work environment” and the Company subsequently fired her.

The defendant moved to dismiss the complaint on the grounds that the plaintiff did *not* allege that she had reported to the Company that her supervisor’s conduct was based on sex or any other protected category under the MHRA. In opposing the motion to dismiss, the plaintiff requested permission to amend her complaint. In granting permission to amend, the District Court admonished the plaintiff that she needed to show that she had engaged in protected activity before the Company terminated her because the MHRA “does not protect employees from (or forbid retaliation based on opposition to) all hostile work environments, only those where the hostility proceeds from one of the prohibited characteristics (such as sex).”

The plaintiff amended her complaint to contain references to sexual harassment, but still failed to allege that she complained to her employer about a sexually hostile work environment. Rather, she asserted that her complaint to the Concern Line was made in a “good faith belief” that the conduct was sex-based. Finding that the plaintiff had ample opportunity to cure the deficiency in her pleading yet still failed to allege that she had engaged in protected activity before her termination, the District Court dismissed her claim.

On appeal, the First Circuit upheld the dismissal relying on the plaintiff’s failure to allege a causal link between any protected activity and her termination. The First Circuit stated that in order to establish such a link, the plaintiff had to make some showing that her employer was aware of her protected activity and noted that the plaintiff “carefully avoids alleging that she complained to her employer of a hostile work environment based on gender.” In the absence of clear allegations, the First Circuit refused to infer that the plaintiff was complaining about sex-based treatment, stating that “it would hardly be reasonable to draw an inference to supply an essential element of Stinson’s case [which she] omitted from her complaint after the District Court had warned her that the omission would be fatal.”

This case demonstrates that in order to sustain a claim for retaliation, it is not enough for an employee to claim that she told her employer that she was experiencing a hostile environment. The employee must inform her employer that the complained of treatment was based on a protected category. The employee’s mere belief that this is the case is insufficient, and even artful pleading by counsel will not obviate this requirement.

Despite Weak Evidence, Age Discrimination Case Survives

In *Dragonas v. School Committee of Melrose*, the Massachusetts Appeals Court reversed the trial court’s entry of summary judgment in favor of a public school employer and several individual defendants. The Court

determined that the record contained sufficient evidence to warrant a trial on the plaintiff’s age discrimination and defamation claims. This case may signal a more difficult road for employers seeking early dismissal of employment claims.

A long-time employee of the Melrose School District, Phyllis Dragonas served as lead foreign language teacher and had chaperoned high school students on an annual trip to Germany for many years. In 1999, the principal of the high school began questioning the plaintiff’s overall performance and ability to lead the trip, citing problems on a previous trip and her lack of fluency in German. In March 2000, the principal called a meeting with parents to discuss the plaintiff. He criticized her lack of fluency in German, stated that she had allowed a seriously ill student to go sightseeing during the prior Germany trip, and described her as the kind of person who would “rip your face off.” Later, the school district posted the lead foreign language teacher position in the newspaper and interviewed three applicants, including the plaintiff. According to the School Committee, the teacher selected for the position had more computer experience (which was necessary for a new computer-driven foreign language laboratory) and performed better than the plaintiff during the interview.

Dragonas sued in Superior Court, asserting claims for age discrimination based on her demotion from the lead teacher role, and defamation based on the principal’s disparaging comments about her to parents. Following discovery, the defendants sought, and the Superior Court granted, summary judgment on all claims. On appeal, the Appeals Court reversed the lower court’s decision, finding sufficient evidence to support both the defamation and discrimination claims. While the Court recognized the principal’s conditional privilege to communicate to the parents his concerns about the plaintiff’s qualifications to lead the Germany trip, it noted that the principal could lose that privilege by abusing it. The privilege would be abused, for example, if the principal knew his statements were false or if he was motivated by malice. To show “malice,” a plaintiff must provide more than just evidence of personal dislike or animosity. Ultimately, the Court found that because there were both privileged and unprivileged explanations for the principal’s conduct in the meeting with the parents, a jury must decide this issue.

Addressing the discrimination claim, the Court found that although the defendants had provided evidence of the plaintiff’s poor work performance and lack of computer skills which supported their decision to demote Dragonas, there was also sufficient evidence to support the inference that the school’s explanation for her demotion was “false” and “not a good faith judgment.” Accordingly, the Court found a jury must decide the discrimination claim as well.

Although the defendants may ultimately prevail in this case, this decision highlights the difficulty for employers in convincing courts to dismiss employment claims before trial because such cases are frequently fact-intensive and involve complex issues of motive.

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