MASSACHUSETTS EMPLOYMENT & LABOR

# LAW REPORT

Volume IV, No. 4 December 2003

## SJC To Review Jury Trial Rights For Chapter 151B Claims

On October 16, 2003, the Massachusetts Supreme Judicial Court ("SJC") ordered a rehearing in a case argued the previous month that involves the right of employers to a jury trial on employment discrimination claims under the Massachusetts Fair Employment Practices Act, Chapter 151B. The Court consolidated that rehearing with appeals pending in three other cases involving different aspects of this important issue and expressly invited comments on whether the SJC's nearly 10-year old ruling in *Dalis v. Buyer Advertising, Inc.* was correct. In *Dalis*, the Court ruled that plaintiffs have a right under the Massachusetts Constitution to a jury trial for employment discrimination claims brought under Chapter 151B.

Together, the four cases consolidated for oral argument in February 2004 — *MBTA v. Ross; Wilfert Brothers Realty Co. v. MCAD*; *Keyland Corp. v. MCAD*; and *Stonehill College v. MCAD* — provide the SJC an opportunity to revisit and clarify many confusing procedural issues left open in *Lavelle v. Massachusetts Commission Against Discrimination*, a 1997 decision in which the Court found that defendants in employment discrimination cases — like plaintiffs — are entitled to a jury trial. Since *Lavelle*, the manner in which defendants could effectively exercise their jury trial rights, in the context of a statutory scheme that allows only plaintiff (but not defendant) to remove their cases from the MCAD to court, has raised many difficult and, as yet, unresolved issues that go to the heart of the administrative and judicial schemes that govern Massachusetts employment discrimination law. The SJC's eventual rulings in the four consolidated "*Lavelle*" cases could change the way employment discrimination cases proceed at the MCAD and in the courts, including a reexamination of whether parties have the right to a jury trial at all. The SJC could rule, for example, that Chapter 151B is unconstitutional because there is no way to provide defendants with an effective jury trial right as the statute is presently written, and could then require legislative action to change the MCAD's role and the parties' rights under the statute.

In its present form, Chapter 151B expressly grants a jury trial right only to plaintiffs asserting employment discrimination claims based on age. The statute also provides that plaintiffs, but not defendants, may remove their cases to the Superior Court prior to a final decision by the MCAD. Further, Chapter 151B permits punitive damages as a remedy in the Superior

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## Disability Update: The Major Life Activity of "Working"

Two recent Massachusetts decisions, following the trend in federal disability cases, have made it more difficult for plaintiffs to claim disability discrimination based on a physical or mental impairment allegedly affecting their ability to work. Generally, to be considered disabled under Chapter 151B and the Americans with Disabilities Act, an individual must suffer from a mental or physical condition that substantially limits one or more "major life activities." The regulations to both statutes list a variety of major life activities, such as caring for one's self, walking, seeing, hearing, speaking and performing manual tasks. Chapter 151B (unlike the ADA) also explicitly lists "working" in the statutory text as a major life activity. Several years ago, in *Sutton v. United Air Lines, Inc.*, the United States Supreme Court held that even if working were a major life activity (an issue the Court did not reach), the ADA would require a plaintiff to show that he was significantly restricted in his ability to perform either a "class of jobs" or a "broad range of jobs in various classes." The First Circuit, in *Carroll v. Xerox Corp.*, noted that a plaintiff's ability to work other jobs after the onset of the impairment contradicted his claim that he was disabled in the major life activity of working.

Recently, the Massachusetts Appeals Court, in *Dube v. Middlesex Corporation*, followed the reasoning in *Sutton* to hold that a plaintiff must demonstrate an inability to perform a broad range or class of jobs in order to demonstrate a substantial impairment in the major life activity of working. However, this decision did not address the major life activity of working in the context of cases where the plaintiff claims he was **regarded as** disabled. The Supreme Judicial Court resolved this issue in *City of New Bedford v. Massachusetts Commission Against Discrimination*, decided on December 2, 2003. Extending the analysis of *Sutton*, *Carroll* and *Dube*, the SJC held that an employee is "regarded" (or, perceived) as having a substantial limitation on the major life activity of working only if his perceived impairment precludes him from performing a class or broad range of jobs.

In *City of New Bedford*, the plaintiff, a New Bedford police officer and member of the SWAT unit, alleged that the City discriminated against him based on a "perceived psychological handicap." After shooting and killing an armed suspect in the line of duty, the plaintiff was placed on "injured on duty" status and remained out of work for one year. Upon his return to active duty in early 1997, the Chief of Police refused to allow

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Court, but not in a proceeding before the MCAD. In *Dalis*, the plaintiff removed her case to Superior Court and sought to have her gender discrimination claim heard by a jury. The defendant appealed, and in 1994, the SJC held that a plaintiff alleging gender discrimination is entitled under the Massachusetts Constitution to a jury trial on the claim. Under the Massachusetts Constitution, adopted in 1780, the right to a jury trial exists for most claims unless they are of the type traditionally heard in a court of equity (without a jury). The SJC concluded that discrimination claims are analogous to tort and contract claims that were heard by juries when the Constitution was adopted in 1780 — even though some remedies provided under Chapter 151B are traditionally equitable remedies, for which no jury trial right exists. Thus, a plaintiff has the right to remove the case from the MCAD (before the agency has issued a final decision) and seek a jury trial in the Superior Court.

In the 1997 *Lavelle* decision, the SJC ruled that its reasoning in *Dalis* also applies to defendants in discrimination cases. The Court concluded, however, that the Massachusetts Constitution does not require that plaintiffs' and defendants' jury trial rights be identical, and the Legislature did not provide defendants with the option to remove a case to the Superior Court before the MCAD has issued a final decision. Thus, the Court held, a defendant may seek a jury trial only after the MCAD has taken final action and only if the MCAD has issued some remedy that is not traditionally equitable in nature.

In the wake of *Lavelle*, parties to employment discrimination claims have disagreed about how and when a defendant must act to obtain a jury trial. The *Lavelle* decision also left open an array of other issues, such as, the admissibility of any MCAD determination in a subsequent jury trial; whether proceedings are confined to the existing record or a defendant is entitled to a trial de novo after an adverse MCAD decision; whether the plaintiff bears the burden of proof at trial; whether a defendant must choose between a jury trial or the more limited judicial review of the MCAD's final determination; and whether the MCAD may intervene as a party to the jury trial. While all of these issues present complex and intricate questions of constitutional and statutory construction, their resolution will have a fundamental impact on employment discrimination claims under Massachusetts law and on all Massachusetts employers faced with such claims. In future issues of this Newsletter and in *Management Alerts*, Seyfarth Shaw will keep you informed of future developments concerning these issues.

## Massachusetts Adopts Sunday Premium/Overtime Pay Credit

On November 26, 2003, Governor Romney signed into law a provision allowing employers to credit Sunday premium pay towards overtime pay in the same work week. The new language amends Chapter 151, §1A and states in pertinent part: "The hours so worked on Sunday or certain holidays shall be excluded from the calculation of overtime pay as required by this section unless a collectively bargained for labor agreement provides otherwise."

This new law resolves an ambiguity that had existed under Massachusetts law for retail businesses. As we reported in the September 2003 issue of this newsletter (v. IV, no. 3) a Superior Court judge had recently issued the first state court decision holding that retail establishments were obligated to pay Sunday premium pay *in addition* to overtime compensation in the same work week. *Swift v. Autozone, Inc.* (direct appellate review to SJC granted). This amendment to the Massachusetts Minimum Fair Wage Law brings Massachusetts in line with the Fair Labor Standards Act, which expressly states that "extra compensation provided by a premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular days of rest . . . may be treated as an overtime premium for purposes of the [FLSA]." 29 C.F.R. §778.203. The new law became effective immediately.

## Court Refuses to Extend "No-Contact" Rule to Former Employees

In *Clark v. Beverly Health and Rehabilitation Services, Inc.*, the SJC's third ruling addressing attorney contact with employees of an organization that is represented by counsel, the Court determined that Rule 4.2 of the Massachusetts Rules of Professional conduct does not apply to **former** employees of an organization.

As previously reported in the September 2002 edition of this Newsletter, the SJC ruled in *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*, that Rule 4.2 prohibits *ex parte* communications by an opposing attorney with the **current** employees of a represented organization only when those employees exercise managerial responsibility in the matter, are alleged to have committed the wrongful acts at issue in the litigation, or have authority on behalf of the corporation to make decisions about the course of the litigation. The SJC specifically rejected the prohibition in Comment 4.2[4] on contact with any employee "whose statement may constitute an admission." The comments to Rule 4.2 were later amended to be consistent with the SJC's opinion.

Subsequently, the Court rejected the application of the no-contact rule to **former** employees who were not represented by the organization's counsel, were not alleged to have committed the wrongful acts at issue, and were without authority to bind the organization in matters concerning the litigation. *Patriarca v. Center for Living and Working, Inc.* The SJC left open the general applicability of Rule 4.2 to unrepresented former employees, however.

In *Clark*, the SJC affirmed its earlier decisions and held that Rule 4.2 does not prohibit attorney contact with an organization's former employees unless the former employee has retained counsel or has chosen to be represented by the organization's counsel. The SJC noted that the purpose of Rule 4.2 is "to protect the attorney-client relationship and prevent clients from making ill-advised statements without counsel," and observed that this purpose would not be served by extending the Rule to unrepresented former employees. The Court also praised informal witness interviews as a tool "for the meaningful gathering of facts" and expressed concern that limiting *ex parte* interviews would enable an organization "to monitor the flow of nonprivileged information to a potential adversary at the expense of uncovering material facts." The Court was careful to point out, however, that attorneys are obligated to comply with all other ethical rules in conducting *ex parte* interviews, such as disclosing the identity of the attorney and not seeking the disclosure of information known to the former employee as a result of privileged communications while employed.

In the wake of these decisions, employers confronted with litigation should consider identifying and contacting, at the outset of a case, both current and former employees who may have significant information relating to the litigation. At a minimum, this will enable an employer to gather factual information and assess its potential exposure. In addition, employers should con-

sult with legal counsel to discuss whether to offer representation to current and former employees to bring those individuals under Rule 4.2 and appropriately shield them from *ex parte* communications with the adversary's counsel.

## Massachusetts Payment of Wages Act Construed Narrowly

The Massachusetts Appeals Court ruled last October, in *Prozinski v. Northeast Real Estate Services, LLC*, that severance pay is not a form of wages under the Massachusetts Payment of Wages Act, G.L. c. 149, § 148 ("Wage Act"). Following this decision, employers that become involved in disputes over severance pay should not face the imposition of the statute's potential sanctions for nonpayment of wages, which may include an award of up to treble damages and attorneys' fees.

Northeast hired Prozinski as its CEO and COO under a letter agreement requiring severance payments to Prozinski if his employment was terminated within two years. Less than a year later, Northeast fired Prozinski and refused to pay the severance. Northeast maintained that Prozinski breached his fiduciary duty to the Company through alleged financial mismanagement and sexual harassment of female employees. Prozinski filed suit against Northeast seeking the severance payment under the Wage Act. Prozinski appealed after the Superior Court granted summary judgment to Northeast on that claim.

The Appeals Court upheld the trial court's decision, ruling that the Wage Act should be narrowly construed. The Court refused to apply a broad definition of the term "wages" in the face of the express statutory references to "holiday pay, vacation pay and definitely determined commissions," and the lack of any such reference to "severance pay." The Court further ruled that the Wage Act is only applicable to definitely earned payments for work performed, not to payments above base salary based on contingencies. In reaching this conclusion, the Court followed a federal court ruling in *Cumpata v. Blue Cross Blue Shield of Mass., Inc.* that an incentive commission was not covered by the Wage Act because it was a payment above the employee's base salary and triggered by a contingency. The *Prozinski* decision provides employers with a strong argument that the Wage Act is inapplicable to all forms of contingent compensation, including incentive payments, discretionary bonuses and stock options.

In a decision last month involving a different issue under the Wage Act, the SJC declined to decide whether an employer has an obligation under the statute to pay a departing employee for unused vacation time. In *Electronic Data Systems Corporation v. Attorney General*, the employer had implemented a personnel policy stating that "Vacation time at EDS is not earned and does not accrue. If you leave the company, you do not receive vacation pay for unused time." An involuntarily terminated employee filed a complaint with the Attorney General's Fair Labor and Business Practices Division seeking payment for his unused vacation time. EDS argued that the Wage Act only requires vacation payments "due an employee under an oral or written agreement." The division ordered EDS to pay the employee, reasoning that the Wage Act also provides that an employer may not avoid payments "by a special contract ... or any other means ... ." The SJC determined that it did not need to reach the issue of whether vacation payments were due under the Wage Act but resolved the issue in the employee's favor by applying general rules of contract interpretation to construe an ambiguity in EDS's personnel policy against the Company.

Finally, in a third recent Wage Act decision, *Dobin v. CIOview Corp.*, a Superior Court judge ruled that a company that was late in making wage payments was liable to the employee for attorneys' fees and three times the interest lost by the delayed payment, even though the employee had volunteered to defer her salary until the company's financial condition improved. Although this decision is not binding on other courts that may consider claims under the Wage Act, employers are cautioned to heed the requirement that "wages" — as narrowly construed by the Appeals Court — must be paid within six days of the end of the pay period in which they are earned.

## Upcoming Breakfast Briefings

Seyfarth Shaw's Boston Office Labor and Employment Practice Group conducts monthly Breakfast Briefings designed to inform our clients and other interested employers about developments in this area of the law. In 2004, most of our Breakfast Briefings will be held on the third Thursday of the month from 8:00 a.m.- 10:00 a.m. Upcoming Breakfast Briefings include:

**December 17, 2003:** Impact of the Supreme Judicial Court's Gay Marriage Decision on Massachusetts Employers

**January 15, 2004:** HR Round Table — Becoming a Strategic Partner

**February 5, 2004**: Bioterrorism in the Workplace

**March 18, 2004:** Union Organizing Trends and Tactics — 2004

**April 15, 2004:** The Impact of Electronic Evidence on Employment and Commercial Litigation

Please note that these dates and topics are subject to change. Notices will be sent by email in advance with a more detailed description of the topic. If you are not on our mailing list and would like to receive email notification of these briefings, please email Denise Welding at dwelding@seyfarth.com.

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***Disability Update, cont'd from page 1***

him to return to the SWAT unit because of his behavior and attitude. However, the plaintiff continued to work as a regular police officer.

The plaintiff filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that the City removed him from the SWAT unit because they "perceived him to be handicapped" and regarded him as having "emotional problems" and being "mentally unstable" after the shooting. After an arbitrator decided that the City had perceived the officer as disabled in the major life activity of "working", the MCAD affirmed the decision in favor of the officer. On appeal, however, the SJC deemed the MCAD's decision "palpably wrong" and "repugnant to the Commission's purposes and policies." The SJC assumed, without deciding, that the officer's alleged "emotional problems" could constitute an "impairment" and that working was the major life activity at issue. However, the SJC concluded that plaintiff failed to establish that the City regarded him as unable to work a "broad class of jobs" and therefore he could not demonstrate that he was "substantially limited" in working. Indeed, the SJC observed that the City continued to employ the plaintiff and that the plaintiff continued to perform all the duties required of a full-time, active duty police officer. The SJC noted that the officer's removal from the SWAT unit indicated that the City regarded him as limited in the performance only of a "particular aspect" of "a single, particular job," insufficient to establish the "substantial limitation" requirement. Finally, the Court noted that there was no evidence that plaintiff could not find employment elsewhere, for example as a private security guard or in other law enforcement positions.

## Table of Cases

*Carroll v. Xerox Corp.*, 294 F.3d 231 (1st Cir. 2001).

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*Clark v. Beverly Health & Rehabilitation Services, Inc.*, 440 Mass. 270 (2003).

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*Dalis v. Buyer Advertising, Inc.,* 418 Mass. 220 (1994).

*Dobin v. CIOview Corp.*, No. 2001-00108 (Mass. Sup. Ct., Oct. 29, 2003).

*Dube v. Middlesex Corporation*, 59 Mass.App.Ct. 734 (2003).

*Electronic Data Systems Corporation v. Attorney General*, 440 Mass. 1020 (2003).

*Lavelle v. Massachusetts Commission Against Discrimination*, 426 Mass. 332 (1997).

*Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*, 436 Mass. 347 (2002).

*Patriarca v. Center for Living and Working, Inc.*, 438 Mass. 132 (2002).

*Prozinski v. Northeast Real Estate Services, LLC*, 59 Mass.App.Ct. 599 (2003).

*Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

*Swift v. Autozone, Inc.*, No. 02-0553 BLS (Super. Ct. Aug. 1, 2003), *direct app. rev. granted*, No. DAR-13629 (SJC Sept. 17, 2003), *appeal docketed*, No. SJC-09109 (SJC Sept. 29, 2003).

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