

# Massachusetts Employment & Labor Law Report

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## Incentive Programs Included in Employee Manuals May Be Binding Even After They Are Discontinued

In *LeMaitre v. Massachusetts Turnpike Authority*, the Massachusetts Appeals Court considered whether a frequently updated attendance incentive program set forth in a personnel manual constituted an employment contract between an employer and its at-will employee. The Court held that each updated version of the incentive program was a legally binding offer to reward employees with certain cash and medical benefits for good attendance despite the fact that the employer reserved its right to alter the personnel manual.

Robert LeMaitre worked for the Massachusetts Turnpike Authority (the Authority) from 1975 until he retired in 2002. During his employment, the Authority offered an incentive program to encourage employees to use their sick time only when absolutely necessary. The incentive program described in the personnel manual contained two relevant components: (1) a medical benefit provision that allowed a percentage of the value of an employee's accrued, unused sick leave to be placed in escrow upon the employee's retirement and applied toward future health insurance premiums; and (2) a cash benefit that entitled an employee to a lump-sum cash payment at retirement equal to a percentage of accrued, unused sick leave. The Authority informed employees of the terms of the program and notified them occasionally of modifications to it. In 1996, the Authority eliminated the medical benefit and reduced the cash benefit percentage from 50 percent to 20 percent. Consistent with its 1996 changes, upon LeMaitre's retirement in 2002, the Authority paid him the cash value of 20 percent of his accrued, unused sick leave, but provided no payment toward his medical insurance premiums.

Despite his at-will status, LeMaitre sued and claimed the Authority breached the employment contract formed by the promises contained in the personnel manual. The Authority argued that any offer contained in

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See "*Incentive Programs*," page 2

## District Court Lacks Jurisdiction Over Labor Dispute Because of Parties' "Side Agreement"

In *Local 791, United Food & Commercial Workers Union, AFL-CIO v. Shaw's Supermarkets, Inc.*, the U.S. Court of Appeals for the First Circuit held that the U.S. District Court for the District of Massachusetts lacked jurisdiction to review a union's claim for breach of the parties' collective bargaining agreement because the parties had previously entered into a separate agreement to resolve all disputes internally.

Effective August 1, 2004, Local 791 and Shaw's entered into a collective bargaining agreement (CBA) that consisted of 25 articles, along with a series of side letters and agreements dating back to past contracts. The CBA contained a three-step grievance procedure, followed by arbitration, for resolution of disputes. The parties also agreed that "the following 1985 and 1991 understandings [provisions of side letters] are hereby continued but shall not be subject to arbitration." When Shaw's took steps the union believed violated an article in the parties' 1985 Side Agreement, the union brought an action in District Court asserting a claim for breach of the CBA. In response, Shaw's moved to dismiss, arguing that the parties had agreed that such disputes would be resolved pursuant to the CBA's grievance procedures. The union argued that because the side agreement had eliminated arbitration as a remedy for such disputes, it was entitled to seek a resolution pursuant to Section 301 of the Labor Management Relations Act (LMRA) which permits judicial review in the absence of an agreement on a form of final dispute resolution. Alternatively, the union argued that the provision purporting to eliminate arbitration as a means of resolving disputes arising under the side agreement was ambiguous and a fact-finder should determine the parties' intent in drafting the provision.

The District Court agreed with Shaw's and dismissed the case, ruling that it lacked jurisdiction over the dispute under the LMRA. On appeal, the First Circuit agreed, finding that the provision at issue was unambiguous

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See "*Labor Dispute*," page 2

*"Incentive Programs," cont'd from page 1*

the personnel manual was unenforceable because it had retained the unilateral right to modify the program's terms. As a result, LeMaitre had no vested right to any benefits prior to those benefits in effect at the time he retired. Further, even if LeMaitre had obtained a contractual right to the benefits, he agreed to forfeit them by continuing his employment after the Authority implemented each superseding policy. The Court disagreed, finding that a promise to make payment at a future date was not a mere gratuity, but a contract related to LeMaitre's total compensation. "[H]ad the authority intended to make no legally binding promises, it should have included in the personnel manuals 'in a very prominent position . . . an appropriate statement that there is no promise of any kind by the employer contained in the manual.'" The Court ruled that each promise contained in the various versions of the incentive program were enforceable and constituted a legally binding offer to reward LeMaitre with certain benefits once he signified acceptance by continuing to work in reliance on the terms of each provision.

This decision reminds Massachusetts employers that their personnel manuals must always include a prominent statement disclaiming any perceived promises made, both at the beginning of the manual and within specific policies, as appropriate. Employers should contact counsel before adopting incentive programs that include future compensation.

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*"Labor Dispute," cont'd from page 1*

and ruling that the plain meaning of the CBA required resolution of the dispute under the internal grievance process, not in court. The Court reasoned that the parties' intent was to utilize internal procedures, rather than court procedures, as the exclusive means for resolving grievances. It adopted the District Court's analysis that the simplest interpretation of the language was that disputes could be resolved through the internal, three-step grievance procedure, but the decision was final and not subject to arbitration. Because the parties "made an effective agreement for an alternative method to handle disagreements arising under the 1985 Side Agreement," the Court lacked jurisdiction over the matter.

The Court's ruling confirms that parties can contract to limit the methodology for dispute resolution of certain collective bargaining agreement provisions while leaving the remaining provisions subject to the full grievance procedure outlined in the contract. As long as the

parties make an effective agreement for the handling of disputes under a CBA, courts will not have jurisdiction to intervene.

## Mandatory Arbitration Programs and Class Action Waivers – Getting It Right

Increasingly, companies are instituting arbitration programs as a dispute resolution process for employment disputes. A recent First Circuit decision highlights some of the challenges employers face in ensuring they have implemented such a program in a manner that binds their employees.

In *Skirchak v. Dynamics Research Corporation*, two managers filed a class action in the District Court alleging violations of the Fair Labor Standards Act (FLSA) and the Massachusetts Minimum Fair Wage Law. Dynamics Research Corporation (DRC) moved to dismiss the complaint and compel arbitration under its 2003 dispute resolution process (the Program) which required arbitration of such disputes and contained a waiver of employee participation in class actions. The District Court agreed that DRC could force its employees to arbitrate their FLSA claims, but found that the Program's elimination of employee class action claims was unconscionable and invalid as contrary to the policies animating the FLSA.

DRC appealed the decision striking the class action waiver. The First Circuit upheld the District Court's decision finding the provision unconscionable based on three factors: (1) the timing of the announcement of the Program; (2) conflicting language found in the Program's various provisions; and (3) the Program's design and introduction to employees. In particular, the Court found conflicting language in Program documents, including statements that the Program would "provide the same resolution as can be obtained through the court system" and did "not limit or change any substantive legal rights of [DRC] employees." Though e-mail delivery of notification of the Program and its terms did not trouble the Court, DRC's failure to obtain a response to the e-mail and its failure to articulate prominently and clearly the new limitations on employee rights were problematic. Moreover, the Court found the timing of the Program's release questionable. DRC had waited until two days before Thanksgiving to notify employees of the Program and selected the Monday following the Thanksgiving holiday as the date the Program would take effect. Moreover, the Program defined assent to participation as continued employment after the effective

date. The combination of these factors caused the Court to find the class action participation waiver invalid under Massachusetts law. The Court, however, was clear in stating that its holding was based upon the particular facts of the case.

The First Circuit's decision offers guidance to employers considering implementation of dispute resolution programs that require mandatory arbitration and class action waivers. To ensure enforceability, employers should give clear and concise written notice to employees. Program language should be consistent and easy to understand, and any waiver of substantive rights must be disclosed clearly. Finally, employers should include a methodology for employee acknowledgment to establish that participation in the program is knowing and voluntary.

### Holidays Count Against An Employee's Intermittent FMLA Leave

The Family and Medical Leave Act's (FMLA) intermittent leave provision has traditionally been difficult for employers to administer. In *Mellen v. Trustees of Boston University*, the First Circuit, for the first time, gave employers guidance on how to calculate days used during intermittent leaves that include work holidays. The Court found that when work holidays fall during an employee's intermittent leave of one week or more, the holiday counts as a day of leave against the employee's 12-week entitlement.

Plaintiff Linda Mellen, a long-time Boston University employee, applied in writing for leave to care for her sick mother. She requested to be away from work from August 4 through October 3 and, if necessary, from October 28 through November 18. The 15-day gap between the two leave periods encompassed vacation time previously granted to Mellen. The University approved Mellen's request and informed her that should she fail to return to work on November 19, the University would consider it a voluntarily resignation.

During her leave, Mellen informed her supervisor that she expected to be out of work through November 20, extending her leave by one day due to the University's internal November 17 holiday. Mellen's supervisor advised her that holidays did not serve to extend employee FMLA leave and informed Mellen that she was expected back at work on November 19. Mellen did not return to work on November 19, nor did she request extended leave. The University interpreted Mellen's failure to return as her voluntary resignation. Mellen filed suit against Boston University and her

former supervisor, claiming that they had interfered with her substantive rights under the FMLA and the Massachusetts Small Necessities Leave Act (SNLA) by miscalculating her leave period and firing her in retaliation for taking family medical leave.

Affirming the lower court's summary judgment award, the First Circuit rejected Mellen's claims and held that if an employee's intermittent leave includes at least a full week with a holiday, the amount of leave used includes the holiday. Moreover, even if Boston University had incorrectly calculated Mellen's leave, intermittent leave required prior approval by the employer, which Mellen neither sought nor received. The Court also rejected Mellen's argument that the University failed to take the SNLA into account in calculating her leave. The Court found that though Mellen's situation was foreseeable, she did not provide the University with notice of her need for leave as required by the SNLA. Accordingly, she was not entitled to the 24 hours of additional leave the SNLA provides.

The *Mellen* decision provides clarification of the scope of both the FMLA and SNLA. More importantly, it highlights how important it is for managers who administer these leaves to acquaint themselves with the technical regulations governing them.

### Court Finds That Sexual Harassment Complaint May Be Defamatory

A recent decision by the Massachusetts Superior Court addresses several complex and interesting issues that may arise when a supervisor accused of sexual harassment takes legal action against the employee who reported him or her. In *Visnick v. Caulfield*, the Superior Court allowed a supervisor, who was terminated following an investigation of sexual harassment, to proceed with a defamation claim against the subordinate who complained. The Court also dismissed the subordinate's claim that the supervisor had sued in retaliation for her reporting his harassment.

Gary Visnick was an assistant manager at a restaurant operated by a Cambridge hotel. Jeannette Caulfield was a bartender at the restaurant until she resigned in May 2004. In December 2004, she applied for re-employment with the restaurant, and Visnick interviewed her for an open server position. Immediately after the interview, Caulfield told two employees working in the restaurant that Visnick had made sexual remarks to her during the interview. Those individuals encouraged Caulfield to report the matter to the hotel's human resources manager, but she declined to do so.

After the interview, Caulfield sent a letter to the hotel's general manager claiming that Visnick had made sexual remarks during the interview and that he had also sexually harassed her during her former employment as a bartender. Caulfield's letter stated that she intended to sue the hotel unless it paid her \$100,000 to settle her claims. After investigating Caulfield's allegations, the hotel terminated Visnick's employment for violating its sexual harassment policies. Caulfield subsequently filed a charge with the U.S. Equal Employment Opportunity Commission and settled her sexual harassment claim against the hotel.

Visnick later sued Caulfield claiming that she had defamed him and wrongfully interfered with his employment by falsely accusing him of sexual harassment. In response, Caulfield argued that her statements regarding Visnick's harassment were legally protected because they were made in the context of litigation. Caulfield also asserted a counterclaim against Visnick, claiming that his lawsuit constituted an act of retaliation in violation of Massachusetts General Laws Ch. 151B (Chapter 151B).

The Court denied Caulfield's motion for summary judgment on Visnick's claims. It found that while statements made in the context of litigation are absolutely protected, Caulfield had not proved that her statements were made at a time when she was seriously considering suing. The Court noted that Caulfield did not mention a lawsuit when she told the other restaurant employees that Visnick had harassed her, did not immediately report the alleged harassment to human resources, and did not file suit against the hotel until months after sending her letter to the hotel's general manager.

The Court also dismissed Caulfield's counterclaim against Visnick. The Court assumed that Caulfield's report of Visnick's alleged harassment was protected activity under Chapter 151B. The Court, however, found that the statute only prohibits retaliatory conduct that harms an individual in his or her employment. Caulfield could not demonstrate that Visnick had harmed her in her employment because she had resigned her bartender position and withdrawn her application for re-employment before accusing Visnick of harassment.

This case is interesting because it shows that even complaints of sexual harassment, which are generally regarded as categorically protected, may subject the complaining employee to liability in some circumstances. Notwithstanding the outcome of this case, employers are cautioned to consult legal counsel before taking any adverse action against an employee who has filed a discrimination or harassment complaint.

## Appeals Court Finds That Reporting Criminal Violations Is Protected Conduct

In *Cappucci v. Boston University*, the Appeals Court recently reversed a summary judgment decision in favor of an employer, holding that the reporting of an alleged criminal violation to either internal or external public authorities is protected conduct sufficient to form the basis of a claim for wrongful termination in violation of public policy. In so doing, the Court established additional employee conduct that is subject to protection under the public policy exception to at-will employment.

Plaintiff Enrico Cappucci worked as deputy chief of Boston University's police department under Department Chief Robert Shea. During his tenure, Cappucci observed Shea engaging in inappropriate conduct, including Shea's alleged gender discrimination in the promotion of a sergeant, use of ethnic slurs and racial profiling, and attempted removal of a department computer for his personal use away from the University. Cappucci alleged that Boston University terminated him in retaliation for reporting, and thereby opposing, Shea's departmental practices. The University claimed that it terminated Cappucci's employment in a university-wide reduction-in-force necessitated by a budget crisis.

Cappucci filed a complaint in Superior Court against both Boston University and Shea, alleging retaliatory termination for reporting Shea's discriminatory conduct, wrongful termination in violation of public policy, and, against Shea, intentional interference with advantageous relations. The trial judge allowed the defendants' motion for summary judgment on all counts, finding that Cappucci failed to produce sufficient admissible evidence that the University's economic reason for his termination was untrue or that Shea played an instrumental role in his selection for termination. The judge also determined that Cappucci's internal report that Shea took the computer was not protected activity and could not support a claim for wrongful termination in violation of public policy.

On review, the Appeals Court affirmed the judge's decision in part and reversed it in part. The Court concluded that there were genuine facts in dispute regarding whether the University's budgetary problems compelled Cappucci's termination and Shea's role in his selection. The Court also held that reporting an alleged criminal violation is protected conduct regardless of whether the employee notifies external public authorities or makes an internal complaint in the workplace, provided the employee believes, in good faith, that the conduct is illegal. Accordingly, the Court reasoned, Cappucci's internal report of Shea's attempted computer theft was protected conduct. Moreover, although there was

little evidence establishing a causal relationship between the report and his termination, Cappucci supported his allegation with evidence of Shea's hostile comments and harassing conduct subsequent to the internal report. That evidence was sufficient for the claim to survive summary judgment.

With its finding, the Court has expanded the types of complaints protected by the public policy exception to at-will employment in Massachusetts. Employers should take note that reports of criminal activity brought to internal authorities enjoy the same protection against retaliation as complaints reported to formal governmental policing bodies.

### Employer Victory in Tip Statute Appeal

The hospitality industry has experienced a significant rise in the number of lawsuits brought by servers and wait staff asserting violations of Massachusetts General Laws ch. 149, § 152A (the Tip Statute). Many of these cases have resulted in significant settlements or sizable damage awards against employers. The Appeals Court's recent decision in *Killeen v. Westban Hotel Venture LP*, however, provides some good news for hospitality employers and indicates the Court's willingness to reduce attorneys' fees awards where only nominal damages are awarded.

The plaintiff, a banquet and function server at The Westin Copley Place, alleged that the hotel's practice of equally distributing the 14 percent banquet service fee to all staff working the event was improper. According to the plaintiff, sharing the service charge with captains violated the Tip Statute because captains did not provide "service" within the meaning of the statute. The plaintiff argued that although the captains assisted in the service of food and beverage, service was only a "minor component" of their job. Further, captains were often assigned to work at multiple functions during the same period, leaving them eligible to receive a larger portion of the gratuities than the servers.

The trial judge ruled that the captains were entitled to gratuities for providing service, but found that the hotel's practice of allowing captains to receive multiple tip shares for working multiple events violated the Tip Statute's "proportionality" provision because the amount of the gratuity was out of proportion to the service performed. Nevertheless, the judge found that the plaintiff failed to prove substantial damages and awarded her nominal damages of only \$1.26, which the judge trebled to \$3.78.

Pursuant to the fee-shifting provision in the statute, the trial court also granted \$153,717.00 in attorneys' fees despite the small award.

On appeal, the Court vacated the multiple damages award because the trial judge failed to find that the employer's conduct was "outrageous" or "reckless"—a prerequisite for the trebling of damages. The Court then considered whether the attorneys' fees award was excessive in light of the plaintiff's token recovery. Although the plaintiff was entitled to receive attorneys' fees as a "prevailing party," the Court found that "when a fee request appears on its face dramatically disproportionate to the result the litigation produced, as it does here, the judge must focus with precision on the relationship between the time invested and the results achieved." The Court remanded the case to the trial court to reconsider the attorneys' fees award.

Although statutory wage claims carry the threat of attorneys' fees awards, the *Killeen* decision makes clear that the awards must not be disproportionate to the results obtained.

### Employer's Decision To Terminate Employee After Discrimination Complaint Upheld

In a recent decision, the First Circuit emphasized that plaintiffs must prove discriminatory animus through evidence, and not mere conjecture, to successfully oppose summary judgment. In *Bennett v. Saint-Gobain Corporation*, the Court held that the plaintiff's failure to link his internal age discrimination complaint to his eventual termination warranted dismissal of his claims.

Plaintiff David Bennett worked for several years as a patent attorney for a company acquired by Saint-Gobain. Following the acquisition, Saint-Gobain decided to retain Bennett. Though competent, over time Bennett demonstrated difficulty interacting with management. Eventually, he joined a group of Saint-Gobain intellectual property attorneys and filed an internal age discrimination complaint against Saint-Gobain's deputy general counsel, Timothy Feagans. The group accused Feagans of making statements suggesting that he wished to rid the intellectual property group of older attorneys. An internal investigation resulted in a finding that the allegations were unfounded.

At the investigation's close, Saint-Gobain employee Diana Henchey complained to human resources that she had received anonymous,

harassing poems. Saint-Gobain undertook an immediate investigation and, based upon the evidence uncovered by internal and external investigators, concluded that Bennett was responsible. Although Bennett denied involvement, Saint-Gobain's general counsel, John Mesher, terminated his employment. Bennett sued, claiming Saint-Gobain, Mesher, and Feagans discriminated against him on the basis of his age and retaliated against him for his internal complaint. Bennett also alleged that Mesher and Feagans tortiously interfered with his employment contract, and aided and abetted Saint-Gobain's discriminatory conduct.

Saint-Gobain sought and obtained summary judgment. Affirming the lower court's decision, the Court found that Bennett was terminated for a legitimate, nondiscriminatory reason – the belief that he sexually harassed a co-worker. The Court ruled that Bennett failed to offer evidence of discriminatory motive or proof that Saint-Gobain had not, in fact, reached the conclusion that he had engaged in inappropriate conduct. Because the company acted properly, the Court ruled that the aiding and abetting claims against Feagans and Mesher failed as a matter of law.

The Court's decision confirms that an employer's good faith belief or reliance upon legitimate grounds for termination is sufficient evidence to rebut a claim of discriminatory treatment.

### Court Holds Union Liable for Discrimination Against Member and for Retaliation That Occurred in Workplace

A recent decision of the First Circuit clarified the type of conduct by a union that may constitute retaliation under state and federal discrimination law. In *Dixon v. International Brotherhood of Police Officers*, the Court found that actionable retaliatory conduct by a union is not limited to conduct related solely to union membership, but may include general conduct that occurs within the workplace. The Court also found that unions can be held liable for discrimination that occurs within the union.

Vanessa Dixon was a member of the Lowell, Massachusetts, police department and an active member of the police officers' union. In 1998, Dixon participated in a union-sponsored bus trip to a gubernatorial

campaign rally in Boston. During the return trip to Lowell, Dixon, the only female officer on the bus, was subjected to an onslaught of sexual comments by her fellow union members. The president of the local was on the bus but made no effort to intervene.

While Dixon did not report the incident to her supervisors, when the department learned of the incident from other sources, she cooperated with an internal investigation. The chief of police ordered the officers suspected of harassing Dixon to have no contact with her. Thereafter, one of the officers obtained a temporary restraining order against Dixon resulting in a mandatory leave of absence for her under department policy. In addition, the president of the local gave extensive newspaper and television interviews in which he belittled Dixon, and the national union president used a television program, funded by the union, to disparage Dixon and the police department for undertaking the investigation.

Dixon brought claims for discrimination, retaliation, and defamation against the national union, its local chapter, their presidents, and two of the officers involved in the bus incident, seeking to hold them liable for the conduct on the bus and their actions in response to the investigations of her complaints in the years that followed. After trial, a jury awarded Dixon \$2.2 million on her retaliation and discrimination claims.

The union appealed, arguing that Dixon's evidence of retaliation was insufficient because it related to her employment, not her union membership. Pointing to Title VII's broad anti-discrimination provisions, the First Circuit flatly rejected the union's argument and confirmed that unions can be held liable for retaliation that occurs in the workplace under both state and federal anti-discrimination laws. The Court similarly reasoned that a union could be liable for discrimination where the evidence established that the discriminatory act occurred within the union, by union members, against a union member, and under supervision of the local's president. Accordingly, the crude behavior by union members on the union-sponsored bus trip was sufficient evidence of sex discrimination.

While the Court's decision in *Dixon* did not directly affect the employer, this case serves as a reminder that employers should be careful not to engage in conduct that could potentially cause harm outside the workplace to any employee, even if that harm appears unrelated to the employee's work environment.

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