MASSACHUSETTS EMPLOYMENT & LABOR

LAW REPORT

Volume VI, No. 3 September 2005 *Online Edition*

Treble Damages Not Mandatory for Violation of Payment of Wages Statute

The Massachusetts Supreme Judicial Court ("SJC") recently held that the state statute governing the payment of wages, M.G.L. c. 149, §§ 148 and 150, does not require courts to award treble damages (*i.e.*, the tripling of back pay due an employee) for violations. In *Wiedmann v. The Bradford Group, Inc*., the SJC also upheld the trial court's imposition of a sanction preventing the employer from contesting the amount of commissions owed because the employer failed to maintain the employee's commission records.

Corrie Wiedmann worked in a commissioned position under an oral contract with The Bradford Group. When Wiedmann resigned in September 2000, the Company issued her a check for her September commissions. Wiedmann disputed the amount of the commission payment. In November 2000, she sent a letter demanding payment of the commissions owed and requesting a copy of her employment records.

Wiedmann filed suit, alleging violations of the state wage payment statute. When, during discovery, the Company failed to produce her employment records, Wiedmann sought sanctions for evidence spoliation and for judgment in her favor. According to the Company, the electronic version of the documents was irretrievable due to a software problem, and it had not maintained the paper documents because the Company had no reason to believe Wiedmann would pursue a claim. The trial court granted Wiedmann's motions, noting that the employer had intentionally destroyed the paper records *after* the plaintiff had sent the November demand letter. In the absence of documentary evidence to contest Wiedmann's calculations, the trial court concluded that the Company would be unable to dispute Weidmann's claim, and issued judgment in her favor. The trial court awarded Wiedmann treble damages.

On appeal, the SJC affirmed the trial court's decision with respect to the sanction and entry of judgment, citing the employer's obligation to maintain records regarding hours and wages for two years, the Company's intentional destruction of records, and the prejudice to Wiedmann. The SJC, however, vacated the award of treble damages, holding that the statute does not require an automatic award of treble damages. The SJC reasoned, based on the statute's non-

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Working from Home May Be a Reasonable Accommodation

In *Smith v. Bell Atlantic*, the Massachusetts Appeals Court concluded that allowing a handicapped part-time employee to work from home was a reasonable accommodation because attendance in the office was not an essential function of her job.

Doreen Smith, who had been significantly disabled since contracting polio as a child, worked for Bell Atlantic as a second-level manager. Smith walked using wrist-braced crutches until 1992, when she began using a scooter due to increased fatigue, weakness, and pain. Smith eventually was diagnosed with post-polio syndrome, a degenerative condition accelerated by overexertion, which ultimately compromises the ability to perform daily functions.

In 1993, Bell Atlantic transferred Smith to its Marlborough office, which had limited handicapped parking. Smith's fatigue increased due to a longer commute. Following a medical leave, the Company permitted Smith to work part-time and from home at least two days per week. This arrangement proved ineffective because Smith lacked a home office and frequently needed to travel to Marlborough to collect and print out data. Smith eventually purchased her own computer and office equipment, but it took approximately three years for Bell Atlantic to provide her dedicated access to the Company's network. Smith's frequent need to travel to the office and vendors' sites exacerbated her condition. Smith ultimately became too weak to travel to the Marlborough office and could no longer do her work effectively. As a result, she resigned in 1999 due to her permanent disability.

Smith sued Bell Atlantic for failure to accommodate her disability, and a jury found that Bell Atlantic failed to reasonably accommodate Smith by failing to provide her with an adequate home office. The jury, however, did not hold the Company accountable for failing to provide Smith with a shorter commute and parking. The jury also found that the Company's failure was a substantial contributing factor in rendering Smith unable to work, and awarded her damages for loss of future pay and for emotional distress that occurred prior to her resignation.

On appeal, the Court found that with an adequate computer and access to the Company's network, Smith could have performed most, if not all, of her essential duties.

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mandatory wording, that such punitive damages are appropriate only where conduct is egregious, stems from an "evil motive," or shows reckless indifference to the rights of others. The SJC remanded this issue to the trial court to reconsider whether treble damages are warranted.

The SJC also reversed the trial court's ruling holding the general manager of the office personally liable. While the statute imposes personal liability on the president and treasurer and "any officers or agents having the management of such corporation," the SJC held that a manager may only be liable for violations if he or she "controls, directs and participates to a substantial degree in formulating and determining policy of a corporation." (Compare to article on *O'Leary v. Henn* in this edition.)

Wiedmann underscores the importance of employers maintaining employee wage records and resolves the issue of whether treble damages are required for violation of this and several other wage-related statutes, such as the tipping statute. Employers can now make more informed decisions concerning whether to litigate or settle claims, recognizing that they may face treble damages only if a court finds their conduct to be egregious or "outrageous" or to have resulted from "evil motives." The case also provides useful guidance to employers concerning which individuals within a company may be held personally liable under the statute. Lawmakers, however, are pushing legislation that would require the award of treble damages in civil suits against employers that fail to pay wages. We will report on this proposed legislation.

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Accordingly, the Court concluded that neither daily presence in the office nor travel was an essential function of Smith's job, as demonstrated by the fact that Bell Atlantic permitted other second-level managers to work substantially from home. The Court held that Smith's request to work substantially, but not exclusively, from home was a reasonable request and that Bell Atlantic failed to supply her with adequate resources to so do. The Court, however, rejected the jury's award of future damages, finding insufficient evidence that the failure to accommodate caused Smith's permanent inability to work.

While the Court concluded that Smith's request to work from home was reasonable under the circumstances, it did not hold that all such accommodation requests are necessarily reasonable. (Compare article below on *Mulloy v. Acushnet Co.*) Employers, therefore, should carefully assess such requests, taking into consideration the employee's specific job duties and whether other employees with similar duties are permitted to work from home.

Employer Not Required To Allow Engineer To Work Remotely

In *Mulloy v. Acushnet Co.*, the U.S. District Court for Massachusetts held that an employer was not required to grant an employee's request to work at a remote location to accommodate his sensitivity to chemicals used in the employer's manufacturing process. Acushnet hired Michael Mulloy, an electrical engineer, to program machines in its golf ball manufacturing plant. Mulloy began to experience breathing difficulties and dizziness when exposed to certain chemicals in the manufacturing process. Initially, he was able to work in the plant as long as he avoided "red zones," where the concentration of respiratory irritants was particularly high. Eventually, he began to experience symptoms while working in any part of the plant, and his doctor recommended that he stay out of all buildings in which chemicals were used.

Mulloy requested permission to work at Acushnet's corporate headquarters, located fifteen miles from the plant. He suggested that he could work on the plant's machinery by using web cameras or similar technology. Acushnet denied Mulloy's request and subsequently terminated his employment.

Mulloy sued, claiming that Acushnet discriminated against him on the basis of a disability in violation of the Americans with Disabilities Act and M.G.L. c. 151B ("Chapter 151B"). The District Court granted summary judgment to Acushnet after finding that Mulloy could not establish that he was disabled because he was not substantially limited in any major life activity. The Court pointed out that Mulloy only experienced symptoms while exposed to certain substances and that "intermittent responses to particular irritants" were not severe enough to constitute a substantial limitation in the major life activity of breathing.

Pursuing its analysis of Mulloy's claim further, the Court also held that the claim failed because Mulloy was unable to perform the essential functions of his job with or without reasonable accommodation. The Court noted that physical attendance at the worksite is an essential function of most jobs. As to Mulloy's job in particular, the Court found that an electrical engineer needed to be at the plant because the job involved collaborative problem-solving that could not be accomplished effectively from a remote location. Accordingly, no reasonable accommodation would have permitted Mulloy to be physically present at the plant to perform this essential job function.

This case demonstrates that employers need not accede to every employee request to work remotely as an accommodation for a claimed medical condition. The Court distinguished its holding from the Massachusetts Appeals Court's recent decision in *Smith v. Bell Atlantic* (reported herein), noting that the plaintiff in *Smith*, unlike Mulloy, did not seek to work remotely full-time. The Court also noted that, unlike Mulloy, the plaintiff in *Smith* was able to show that her employer had allowed other people in her job classification to work remotely. This decision demonstrates that courts will examine closely whether a proposed remote work arrangement is truly practicable in light of the employee's particular job duties. Therefore, in responding to such requests, employers should consider the requesting employee's specific job duties and how it has responded to similar requests in the past.

Employer's Failure To Post EEO Notice of Rights May Toll Limitations Period

In *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, the U.S. Court of Appeals for the First Circuit held that an employer's failure to post notice of employee workplace rights may excuse an employee's late filing of a charge with the U.S. Equal Employment Opportunity Commission ("EEOC"). Despite failing to file administrative charges within 300 days of allegedly experiencing discrimination, two employees sued the Ritz-Carlton San Juan Hotel, Spa & Casino, asserting claims for sexual harassment and national origin discrimination under Title VII and Puerto Rico's discrimination laws.

The plaintiffs claimed that the discrimination and harassment forced them to resign from their jobs in January 1999. The employees met with an attorney on November 11, 1999 and filed charges with the EEOC on December 14, 1999, after the 300-day statutory time period for filing a charge of discrimination had lapsed. The EEOC issued letters notifying the plaintiffs of their right to file their claims in court, which the plaintiffs did. The Ritz-Carlton moved to dismiss their complaint on the grounds that they failed to file charges within the 300-day period. In response, the employees argued that the Ritz-Carlton could not assert timeliness as a defense because the hotel had failed to comply with EEOC regulations requiring employers to post notices advising employees of their legal rights relating to employment discrimination. The employees invoked the doctrine of equitable tolling, and argued that the filing period did not begin to run until they received notice of their rights when they met with their attorney in November 1999. The lower court dismissed the claims, reasoning that the equitable tolling doctrine only applies in "exceptional cases" when the employer "actively misleads" employees, and that Ritz-Carlton's failure to post mandatory notices did not amount to "active misleading."

On appeal, the First Circuit reversed the lower court's decision, holding that under Title VII, an employee's constructive knowledge of his or her rights will be presumed (i) if the employer has complied with its statutory obligation to post EEOC notices in conspicuous locations; or (ii) once the employee has retained an attorney, whether or not the employee, in fact, is aware of his or her rights.

Because the Ritz-Carlton had not posted the appropriate EEOC notices in conspicuous locations, the First Circuit declined to presume that the employees had constructive knowledge. The Court remanded the case to the trial court for further factual development of the employees' tolling claim, including whether the hotel failed to comply with the posting requirement and whether the employees had actual or constructive knowledge of their Title VII rights and were diligent in pursuing those rights.

With this ruling, the First Circuit joined five other circuits in holding that an employer's failure to provide an employee notice of his Title VII rights may justify equitable tolling of the limitations period. This case underscores the importance of posting all mandatory notices of employee workplace rights and the potential ramifications of failing to do so.

Employer Not Required To Anticipate Need for Accommodation

In *Leach v. Comm'r of the Mass. Rehab. Comm'n*, the Appeals Court held that an employer was not obligated to anticipate the likelihood that an employee would develop a disability that would require accommodation. Maura McKeag Leach suffered from a hearing impairment and developed repetitive stress injury ("RSI") while working as a full-time vocational rehabilitation consultant for the Massachusetts Rehabilitation Commission (the "Agency"). After voluntarily resigning her position, Leach sued the Agency under Chapter 151B, alleging, in part, failure to accommodate her handicaps (the hearing disability, followed by RSI). Leach claimed that the Agency was obligated to provide her with a reasonable accommodation for her RSI *before* she put the Agency on notice of this condition because the Agency knew that hearing impaired individuals were at greater risk of developing RSI.

Affirming the trial court's dismissal of the claim, the Court rejected Leach's argument that the Agency should have anticipated her condition and taken steps to accommodate it. The Court deemed Leach's proposed standard "unrealistically demanding" and not required by law. The Court acknowledged that there may be "infrequent" situations where an accommodation request by an employee is unnecessary to trigger an employer's obligation to reasonably accommodate, such as where a need for an accommodation is obvious or an employee suffers from a condition that renders her incapable of making a request. Leach's situation, however, did not fall into either of these categories.

The Court also concluded that once Leach informed the Agency of the onset of her RSI, the Agency reasonably accommodated her. The Agency consulted with a rehabilitation engineer; reduced Leach's caseload and hours; acquired and properly adjusted a new ergonomic chair; provided her with a new desk, computer keyboard, and wrist pad; furnished part-time assistance for her computer work; assigned a vocational counselor to assist with her reduced caseload; and provided additional assistance by the head office clerk. These accommodations fulfilled the Agency's legal obligation to reasonably accommodate Leach's handicap. With respect to Leach's claim that there was a delay in receipt of some of the new equipment, the Court noted that while "delay can be tantamount to denial," there is "no requirement that accommodation be instantaneous."

The Court further held that Leach did not demonstrate that she was capable of performing the essential functions of the position even with reasonable accommodation. The record established that Leach voluntarily left her job, stating that she was unable to work an eight-hour day, type on the modified computer keyboard, use the teletypewriter, and write reports or communicate with others by means of sign language. The Agency invited her to return, but she declined. The Court also noted that Leach's own physician stated that Leach had not found permanent relief for her RSI symptoms.

This case clarifies that employers need not anticipate the likelihood that a particular employee will develop a disability and need an accommodation. Employers, however, should keep in mind their obligation to engage in the interactive process to explore a reasonable accommodation when on reasonable notice of an employee's disability and need for accommodation, even in the absence of an express request for accommodation.

Retail Employers Exempt from Paying Sunday Premium Pay Must Pay Holiday Pay

The Appeals Court recently determined that the Massachusetts Holiday Pay Law, M.G.L. c. 136, § 13, requires a retail employer to pay holiday pay to nonexempt employees who work on New Year's Day, Columbus Day, and Veteran's Day even if the employer is excused from paying premium pay for Sunday work under the separate Massachusetts law addressing work on Sundays ("Sunday Closing Law"). In *Drive-O-Rama v. Attorney General*, the Court also declared that an employer's failure to pay holiday pay under the Holiday Pay Law violates the law governing payment of wages, M.G.L. c. 149, §§ 148 and 150, thereby exposing the employer to possible treble damages.

Under the Massachusetts wage and hour laws, retail employers may open for business on Sundays and on most legal holidays with some restrictions. These restrictions include the requirement that, in certain circumstances, retailers pay their nonexempt employees premium pay, or time and one-half, for Sunday or holiday work. The only holidays on which a retailer must pay such premium pay, or holiday pay, are New Year's Day, Columbus Day, and Veteran's Day.

In this case, Drive-O-Rama (d/b/a Mill Stores) was engaged in the retail sale of gifts, furniture, and other general merchandise. Under the "gift shop" exception to the Sunday Closing Law, Mill Stores did not have to provide premium pay to its employees for Sunday work. In 1999, an employee complained to the Attorney General that Mill Stores did not pay her holiday pay for work she performed on Veteran's Day.

After the Attorney General requested payroll records from Mill Stores, the Company filed a lawsuit in which it requested that the Court declare it exempt from the Holiday Pay Law. Mill Stores contended that it should be exempt because it fell under the "gift shop exemption" to the Sunday Closing Law. The trial court and the Appeals Court disagreed, concluding that the retailer was required to pay holiday pay because the Holiday Pay Law unambiguously requires time and one-half for work on New Year's Day, Columbus Day, and Veteran's Day. Both courts found that the Sunday Closing Law exemption was unrelated to the Holiday Pay Law.

The Court also declared that an employer's failure to pay employees as required under the Holiday Pay Law constituted a violation of the law governing payment of wages. Accordingly, an employee may recover up to three times his or her actual damages, and an employer is subject to civil and criminal penalties.

This decision serves as a reminder that with treble damages available, employers should ensure that they are complying with the Sunday Closing and Holiday Pay Laws. To this end, employers may want to consider conducting annual audits and should seek appropriate guidance from legal counsel if a compliance question arises. Employers should also note that the Sunday Closing and Holiday Pay Laws require that work performed on those days be voluntary, and employers cannot retaliate against employees who refuse to work on Sundays or legal holidays.

Active Outside Investor May Be Liable for Unpaid Wages

In *O'Leary v. Henn*, the Massachusetts Superior Court held that an outside investor and director who never served as an officer of a corporation, but who actively managed the company's affairs, could be held personally liable as an "employer" along with the corporation for unpaid wages under the Massachusetts statute governing the payment of wages, M.G.L. c. 149, §§ 148 and 150.

The investor, Karl Eller, provided Cognistar Corporation with $5 million of funding in April 2002 and an additional $750,000 in March 2003. However, by June 2004, Eller was no longer willing to provide Cognistar with funding, and on June 9, 2004, Cognistar filed for bankruptcy protection. At the time Cognistar filed its bankruptcy petition, Eller owned 39.9 percent of the corporation's stock and was owed in excess of $2.2 million.

Dennis O'Leary worked for Cognistar from July 2000 through June 2003. According to O'Leary, Cognistar failed to pay him much of his wages and vacation pay during his employment. The Company provided O'Leary two $25,000 payments on the condition that he execute loan agreements purporting to characterize the payments as loans to him. O'Leary filed suit against Eller and Stephen Henn, a founder of the Company, claiming that the loan agreements violated the payment of wages statute because the Attorney General had not approved the loans, as required by the statute. Eller moved to dismiss O'Leary's claims, contending that he was never an officer or agent of the Company.

The Court found that Eller was the *de facto* president and treasurer of Cognistar because he actively managed the Company's affairs, including, among other things (i) directing that Cognistar not pay overdue wages owed to its employees; (ii) directing the Company not to pay O'Leary's unpaid wages and vacation pay; and (iii) controlling Cognistar's daily operations through frequent teleconferences with its officers, either directly or through an agent.

The Court held that the intent of the Legislature in drafting the statute was to render liable for unpaid wages persons with responsibilities functionally equivalent to those of a president or treasurer. In rejecting Eller's motion to dismiss, the Court reasoned that, as a policy matter, individuals who perform the duties and responsibilities of a company's president or treasurer should not be permitted to evade the requirements of the statute because of their lack of title or official position.

Although the facts of this case were extreme and clearly tipped the scales of liability against the outside investor, it is prudent to view the case as a harbinger of potential liability. This case suggests that investors exercise control at the peril of becoming "deep pocket" targets for unpaid wage claims, and it serves as an important reminder of the far-reaching potential of individual liability under the payment of wages statute.

Employee Cannot Enforce Severance Agreement He Secretly Altered

In *NaviSite, Inc. v. Cloonan*, the Superior Court invalidated a severance agreement secretly altered by an executive employee. Joseph Cloonan, a licensed attorney and CPA, and his employer, NaviSite, negotiated a severance agreement. NaviSite's Director of Human Resources sent Cloonan a severance agreement that provided for eight weeks of severance pay in exchange for a comprehensive release. After he received the agreement, Cloonan retyped an entire page of the document and altered a paragraph containing a lengthy enumeration of the claims he was to release. He inserted language into the paragraph that read, "[y]ou will be paid eight hundred and fifty thousand dollars for wages earned, if not paid in full within seven days you will be paid three times this amount along with all your expenses and legal fees, all the officers and directors will be personally liable as well." He used the same font and spacing as in the original agreement and took other steps which, the Court found, served to "camouflage the substitution from the casual reader."

After Cloonan altered the severance agreement, he had another conversation with the Director of Human Resources about the severance agreement, but did not tell her that he had altered it. After signing the altered document, he mailed it to NaviSite but never mentioned that he had modified it. NaviSite then signed the altered document without noticing Cloonan's changes and subsequently paid Cloonan the severance it believed it owed.

Cloonan subsequently made a written demand on NaviSite for $850,000. NaviSite commenced a legal action in which it sought, among other things, a declaration that the altered agreement was unenforceable. NaviSite ultimately moved for summary judgment on claims Cloonan asserted against the Company. The Court found that the altered agreement was not binding, relying on the rarely used doctrine of procedural unconscionability. The Court noted that it was "inarguable" that Cloonan altered the agreement "in a manner designed to give it maximum concealment," and that NaviSite had not knowingly accepted the terms Cloonan inserted, but had simply placed "too much trust in the integrity of a fellow NaviSite employee, and in his adherence to the ethical norms of the business world."

This case serves as a vivid reminder to employers of the importance of carefully reading all agreements before signing them. The Court relied on a doctrine to invalidate the altered agreement in this case that may not be available in cases with less extreme or overt misconduct. Even when employers are able to avoid the obligations in surreptitiously altered documents, they are likely to incur substantial costs in doing so. It is important to verify that a signed document returned by an employee is the same document the employer presented for signature. In some cases, it may be advisable to require a departing employee to sign documents in the presence of a company representative to minimize the risk of alterations.

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