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Massachusetts Appeals Court Limits Survival of Employment Discrimination Claim

In *Robinson v. City of Boston*, the Massachusetts Appeals Court recently upheld a trial court's dismissal of an employment discrimination claim for failure to promote, finding that the claim did not survive the plaintiff's death. In doing so, the Appeals Court interpreted very narrowly a 2006 Massachusetts Supreme Judicial Court (SJC) decision in which the SJC held that a claim for discriminatory wrongful termination survived the death of the employee.

In 2003, Hubert Robinson filed a charge with the Massachusetts Commission Against Discrimination (MCAD) against the City of Boston, alleging age, race, and color discrimination, after he unsuccessfully applied for a promotion to a supervisory position. While his charge was pending, Robinson died, and his wife moved to substitute herself as her husband's representative. Thereafter, the MCAD issued a lack of probable cause finding, and the wife filed a complaint in the Massachusetts Superior Court, alleging discrimination as well as common law breach of contract based on the discriminatory acts. The Superior Court dismissed the claims—based in part on the Court's determination that Robinson's claims did not survive his death—and Robinson's wife appealed.

On appeal, the wife relied solely on the SJC's holding in *Gasior v. Massachusetts General Hospital* to support her argument that her husband's employment discrimination claim survived his death. In *Gasior*, the SJC analogized the plaintiff's employment discrimination claim to one for breach of contract, and found that because contract claims survive the death of a party, Gasior's claim for wrongful termination survived his death.

In this case, Robinson's wife argued that the SJC's holding in *Gasior* applied to all discrimination claims, including a claim for failure to promote. The Appeals Court disagreed, finding that *Gasior* addressed only the survivability of claims for discriminatory termination and that a claim for discriminatory failure to promote fell outside the narrow

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Federal Court Finds That Non-Employer May Be Held Liable for Retaining Service Charges Under Tip Statute

The U.S. District Court for the District of Massachusetts recently provided the first interpretation by a court of the term "service charge" as defined in Massachusetts General Laws ch. 149, § 152A (the Tip Statute). In *DiFiore v. American Airlines, Inc.,* the District Court determined that a person other than an employer may be liable for failing to distribute a service charge and ordered a new trial for the limited purpose of determining whether a consumer would reasonably expect a $2 per bag charge for curbside check-in to be given to a skycap "in lieu of, or in addition to, a tip."

In December 2006, ten skycaps, nine of whom were employed by independent contractor G2 Secure Staff, filed a lawsuit against American challenging American's retention of the curbside fee, asserting both common law and Tip Statute claims. After an eleven-day trial, a jury returned a verdict of more than $325,000 in favor of most of the skycaps. American moved for a new trial, arguing that the statutory definition of "service charge" only includes charges levied by an employer and that the airline therefore could not be liable for the claims of the skycaps employed by G2. Plaintiffs countered that employers "or other persons" can be liable under the three other sections of the Tip Statute and that the absence of "or other persons" in this provision was a legislative oversight.

The Court agreed with American that "or other person" cannot be read into the definition of service charge, but found that a person other than an employer can still be liable under the statute. The Court reached this conclusion based on its determination that the definition encompasses two different kinds of fees: (1) "a fee charged by an employer to a patron in lieu of a tip" or (2) "a fee that a patron or other consumer would reasonably expect to be given to" the protected employee classes "in lieu of, or in addition to, a tip."

According to the Court, because American was not the employer of the G2 skycaps, the airline could be liable to them only if the baggage fee falls within the second prong of the definition. Because the jury

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scope of that case. According to the Appeals Court, the decedent's wife failed to explain sufficiently why the court should extend the SJC's reasoning in *Gasior* to other types of discriminatory conduct. The Appeals Court specifically stated, however, that its holding does not preclude survival of failure to promote claims where a plaintiff sets forth an argument sufficient to support such a finding.

This case demonstrates the willingness of the courts to limit *Gasior* to the specific circumstances of a case. In recent years, many plaintiffs' attorneys have relied on *Gasior* in arguing that a variety of employment statutes are implied terms of agreements between employers and their employees. This has been problematic for employers, in part because breach of contract claims have a much longer statute of limitations than, for example, claims for discrimination or non-payment of wages. While the *Robinson* decision provides a strong defense against such claims, the *Gasior* decision remains problematic to employers' efforts to defeat contract claims which are based on statutory obligations.

"Retaining Service Charges," cont'd from page 1

instructions did not distinguish between the two types of fees, and the jury rendered a general verdict that did not specify the basis for liability, a new trial is necessary to determine whether a jury would find that the fee at issue satisfies this portion of the definition.

As the first published decision that addresses whether a non-employer can be liable for retaining "service charges" under the Tip Statute, this decision could have far-reaching implications for the service industry. The District Court, however, has stated that it will certify questions regarding its interpretation to the SJC for a definitive ruling. Thus, interpretation of this aspect of the statute remains an unsettled area of law.

Confidentiality Provision Violates National Labor Relations Act

A recent decision from the National Labor Relations Board reminds non-unionized employers of the potential risks associated with broad confidentiality provisions that prohibit employees from discussing the terms and conditions of their employment. In *Northeastern Land Services, Ltd.,* the Board found that a non-unionized temporary employment agency violated federal labor law by including in employment contracts a confidentiality provision that prohibited temporary workers from disclosing the terms of their employment, including compensation, to other parties.

In 2001, Northeastern Land Services (NLS) assigned Jamison Dupuy to a project undertaken by one of its clients, El Paso Energy. NLS required Dupuy to sign its temporary employment agreement, which included the following confidentiality provision: "Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal." During the El Paso Energy project, Dupuy experienced several issues with his compensation and expense reimbursements. He complained first to NLS, but when the problems were not resolved, he took his complaint directly to El Paso Energy's project manager. NLS terminated him for failing to comply with the confidentiality provision by disclosing his terms of employment to another party.

Dupuy filed an unfair labor practice charge with the Board, asserting that his termination violated Section 7 of the National Labor Relations Act (the Act) because it arose from the enforcement of an overly broad confidentiality provision. Section 7 protects the rights of both union and non-union employees to discuss their wages and other working conditions with each other, labor unions, and other outside sources, including customers. An employer must have a legitimate business reason to restrict these rights. Even if a policy does not explicitly restrict Section 7 activity, it is nonetheless unlawful if employees would reasonably construe the language of the rule to prohibit Section 7 activity. The Administrative Law Judge dismissed the complaint, finding that the confidentiality agreement did not prohibit employees from discussing their terms and conditions of employment with one another, and that although it did restrict disclosure of such terms to third-party clients, NLS had a legitimate business reason for the restriction.

On appeal, the Board reversed the decision, finding that the confidentiality provision was overly broad and violated the Act because the provision, by its clear terms, precluded employees from discussing compensation and other terms of employment with "other parties." According to the Board, an employee reasonably could construe the language as restricting Section 7 activity by prohibiting discussions with union representatives regarding such matters. Because an employer's imposition of discipline pursuant to an unlawfully overbroad policy constitutes a violation of the Act, the Board ordered NLS to offer Dupuy reinstatement and to make him whole for his loss of earnings and benefits over the previous seven years.

This decision serves as a reminder that the Act applies to both unionized and non-unionized workplaces. To avoid liability under the Act, all employers should carefully review employment agreements, employee handbooks, and other personnel policies that include confidentiality provisions restricting employees' rights to discuss their terms and conditions of employment to ensure that such restrictions are well-defined and narrowly-tailored.

Federal Court Rejects Sex Discrimination Claim Based on Working Mother Stereotypes

A recent decision from the U.S. District Court for the District of Maine reaffirms that federal law does not prohibit discrimination against employees based on family status and rejects an employee's attempts to prove sex discrimination based only on the prevalence of certain stereotypes in the modern American workplace.

In *Chadwick v. WellPoint, Inc.,* the plaintiff alleged that her employer engaged in sex discrimination when it denied her a promotion, notwithstanding the fact that the company awarded the position to another woman. The plaintiff claimed that the promotion decision was biased by her supervisors' assumptions about her obligations as a caregiver of four young children, including 6-year-old triplets. The woman the company promoted had only two children, who were slightly older. As evidence that the decision not to promote her was based on stereotypical views of working mothers, the plaintiff alleged that the decision-maker commented to her, "Oh my—I did not know you had triplets . . . Bless you!" She also claimed that the decision-maker explained the decision not to promote her by saying, "It was just that you're going to school, you have the kids, and you just have a lot on your plate right now."

The plaintiff sued under Title VII, which prohibits employment discrimination on the basis of sex, but does not address discrimination relating to an employee's family status. She claimed that the company's decision was based on the stereotypical notion that as a mother of four, she would have primary responsibility for the care of her children, which would threaten to interfere with her job performance. She also offered expert testimony that gender stereotyping in American society is widespread, that the words used in the decision-maker's comments to the plaintiff reflected a stereotypical attitude toward working mothers, and that it was unlikely that the decision-maker would have reacted in the same way to a man with children.

The Court entered summary judgment for the employer because the plaintiff had failed to provide sufficient evidence to support the conclusion that gender discrimination motivated the promotion decision. The plaintiff's mere assertion that her employer's decision was driven by "working mother stereotypes" was not adequate to overcome the company's explanation that it had promoted the candidate it believed had superior qualifications. The Court also rejected the plaintiff's proposed expert testimony, noting that the expert had never met the decision-maker and had no basis to draw conclusions about that person's usage of certain terminology. The Court also observed that the existence of stereotyping in society at large cannot be used to establish that a particular individual harbored a bias.

This case serves as a reminder that plaintiffs cannot prevail in discrimination cases based on mere suspicion and innuendo. Plaintiffs must come forward with probative evidence that their employers acted based on impermissible motives or see their claims dismissed.

First Circuit Holds That Yawning Is Not Evidence of Discrimination

The U.S. Court of Appeals for the First Circuit recently affirmed the District of Puerto Rico's ruling that a plaintiff's subjective beliefs are insufficient to show pretext for discrimination. In *Arroyo-Audifred v. Verizon Wireless, Inc.,* the First Circuit found that Verizon had legitimate, non-discriminatory reasons for its decision not to promote the plaintiff and that a manager's yawn during an interview was insufficient evidence of age animus.

Dennis Arroyo-Audifred alleged that Verizon wrongfully failed to promote him in violation of the Age Discrimination in Employment Act (ADEA). Verizon countered that it promoted younger employees over Arroyo because he lacked professional maturity and confidence, and the employees who were promoted were better suited for the positions. Arroyo asserted several allegations to support his claim that Verizon's stated legitimate reasons constituted a mere pretext to mask age discrimination.

First, Arroyo argued that the manager who interviewed him yawned during his interview and that he believed the yawn indicated that his answers did not matter because the decision had already been made to promote a younger person. While the First Circuit agreed that yawning "could make an interview awkward," the Court could not "see how an involuntary yawn evinces a hidden discriminatory animus any more than a sneeze or a cough." Next, Arroyo argued that his interviewer stated that "[t]his position is like stepping in a train station, sometimes the doors open, and sometimes they don't." Arroyo interpreted this statement to mean that the position he sought was already closed to him. The Court, however, refused to infer a discriminatory animus from such a vague statement. The First Circuit found that courts are required to draw only reasonable inferences in a plaintiff's favor, and imputing an ulterior motive to yawns and ambiguous comments based on Arroyo's subjective beliefs is not reasonable.

Finally, Arroyo argued that the fact that his human resources "certification score" was the highest of all candidates constituted evidence of discrimination. The First Circuit disagreed. Verizon testified that the human resources department used "certification scores" merely as an internal tool to establish that candidates met the minimum job requirements and that the department had no

See "Yawning Not Discriminatory," page 4

"Yawning Not Discriminatory," cont'd from page 3

further role in the hiring process. Arroyo failed to counter this testimony, contending instead that the credibility of Verizon's witness was for the jury to determine. The First Circuit found this contention inadequate to show pretext because there was no evidence to suggest that Verizon's explanation was false.

This decision demonstrates the First Circuit's refusal to impute a discriminatory animus into conduct based on the subjective beliefs of a disgruntled employee. It illustrates that courts will draw only reasonable inferences in a plaintiff's favor, and an employee's subjective and unsubstantiated interpretation of an employer's conduct will not suffice to defeat an employer's motion for summary judgment.

Employee May Bring Claim Not Specifically Pleaded in MCAD Complaint

The Massachusetts Appeals Court recently held that an employee's failure to plead a specific claim in his MCAD charge did not constitute a failure to exhaust administrative remedies. In *Windross v. Village Automotive Group,* the Appeals Court upheld a Superior Court jury verdict in favor of the plaintiff on a hostile work environment claim—even though the plaintiff did not explicitly plead it—because he alleged sufficient facts for the MCAD to uncover the claim.

Markdale Windross, a black male of Jamaican descent, worked as a salesperson for the defendant for two months before he was terminated for poor performance. Following his termination, Windross filed a charge with the MCAD alleging discrimination based on race, color, and national origin. In his charge, he alleged that during his employment with the defendant, his managers and coworkers subjected him to racially-abusive conduct and comments, which were so pervasive that they interfered with his work performance. However, he did not specifically plead a hostile work environment claim. Windross subsequently removed the MCAD complaint to Superior Court.

The case proceeded to a jury trial on both claims for hostile work environment and wrongful termination. The jury returned a verdict in favor of Windross with respect to his hostile work environment claim, but found for the defendant on the wrongful termination claim. Village Automotive appealed the jury's verdict on the hostile work environment claim, arguing that the claim should have been barred for failure to exhaust administrative remedies because Windross did not specifically plead the claim in his MCAD charge.

The Appeals Court disagreed, holding that a claim that is not explicitly stated in an administrative complaint may be asserted in a subsequent Superior Court action as long as it is based on acts of discrimination that the agency investigation could reasonably be expected to uncover. The Appeals Court concluded that although Windross did not use the words "hostile work environment" in his MCAD charge, he described being persistently subjected to racially discriminatory conduct with sufficient specificity for the MCAD to uncover the existence of additional facts that would support a claim for racial harassment. Accordingly, the Appeals Court affirmed the judgment of the trial court.

This decision demonstrates that employers should be prepared to defend against a broader range of claims than those specifically pleaded in an employee's MCAD charge. If an employee alleges sufficient facts to put the MCAD (and the employer) on notice of a potential claim, the employer must be prepared to defend against that claim.

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