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Disability Claim Dismissed for Failure to Raise Claim Before the MCAD

In *Everett v. The 357 Corp.*, the Massachusetts Supreme Judicial Court (SJC) dismissed a disability discrimination claim for lack of jurisdiction, ruling that while the plaintiff had filed a wrongful termination charge before the Massachusetts Commission Against Discrimination (MCAD), he had failed to exhaust his administrative remedies before the MCAD concerning his subsequent failure to rehire claim.

Joseph Everett worked as a commercial truck driver for The 357 Corp. company. In early 1996, Everett developed schizophrenia, which led to his termination in 1997 when doctors deemed him unfit to drive a commercial motor vehicle under Department of Transportation regulations. That same year, Everett filed an unsuccessful disability discrimination charge with the MCAD, alleging that his employer unlawfully terminated him based upon a perceived disability. In 1999, Everett attempted to regain his former position, this time by presenting new evidence that he had recovered from his schizophrenia, but the company refused to rehire him.

Everett then filed suit in the Massachusetts Superior Court, claiming that his employer discriminated against him in 1997 when it terminated his employment. Throughout the case, Everett never referenced the company's failure to rehire him in 1999, but when trial began, he waived all claims related to the 1997 events and argued that the only issue was the 1999 failure to rehire. The company objected, arguing that the Superior Court had no jurisdiction over the failure to rehire claim because Everett did not raise this claim in his 1997 charge before the MCAD. The Court overruled this objection, and the jury found the employer liable.

The company appealed and the SJC decided to hear the case. Everett argued that the Superior Court had jurisdiction because the "scope of the investigation" rule allows claims not explicitly raised before the MCAD to be brought in Superior Court if they are based on facts that the MCAD reasonably would have uncovered during its investigation. The SJC rejected this argument because the MCAD closed its investigation in

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First Circuit Affirms NLRB Decision Regarding Overly Broad Confidentiality Provision

In *Northeastern Land Services, Ltd. v. National Labor Relations Board*, the First Circuit affirmed a National Labor Relations Board (NLRB) decision that a non-unionized employer violated federal labor law by including in its employment contracts a provision that prohibited workers from disclosing the terms of their employment, including their compensation.

In 2001, Northeastern Land Services (NLS) assigned temporary worker James Dupuy to a project for one of its clients, El Paso Energy. In accepting the assignment, Dupuy was required to sign NLS's temporary employment agreement, which contained a confidentiality provision that prohibited him from disclosing the terms of his employment – including his compensation – to "other parties." While Dupuy was engaged in the El Paso Energy project, a number of disputes developed between Dupuy and NLS regarding his compensation and expense reimbursements. After failing to obtain a satisfactory resolution from NLS, Dupuy contacted a supervisor at El Paso Energy regarding his complaints. When NLS learned of Dupuy's communication with El Paso Energy, the company fired him for violating the agreement's confidentiality provision.

Following his termination, Dupuy filed an unfair labor practice charge with the NLRB, alleging NLS had violated Section 7 of the National Labor Relations Act by maintaining an overly broad confidentiality provision and terminating him for breach of that unlawful provision. Section 7 guarantees all employees the right to discuss wages and other working conditions with each other, with labor unions, and with other outside resources. An Administrative Law Judge (ALJ) dismissed the complaint, but a two-member panel of the NLRB reversed the ALJ's decision. The NLRB reasoned that because employees could reasonably interpret the confidentiality provision to prohibit them from discussing their employment conditions with union representatives, it was unlawfully broad. The NLRB also held that NLS's imposition of discipline pursuant to the overbroad policy constituted an unfair labor practice.

In upholding the NLRB's determination, the First Circuit found that the NLRB's rule invalidating any provision that plausibly may be interpreted

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1997, and Everett’s complaint was not “pending” with the agency when new events unfolded in 1999. Everett also argued that he raised his failure to rehire claim before the MCAD during his appeal of the MCAD’s dismissal of his charge. The SJC, however, ruled that a complainant may not raise new allegations based on new facts in an MCAD appeal. The Court concluded that because Everett had conceded his employer did not discriminate against him in 1997, his argument that the failure to rehire was “reasonably related” to a prior discriminatory act must fail. The SJC further held that neither the Americans with Disabilities Act (ADA) nor Massachusetts General Laws ch. 151B (Chapter 151B) entitles a validly terminated employee to be rehired once his or her disability disappears.

This case is noteworthy because it demonstrates that a plaintiff may not sue based on new events that are outside the scope of an MCAD charge. The decision also affirms an employer’s right to refuse to rehire a lawfully terminated disabled employee even if he or she later becomes fit to work.

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to restrict Section 7 rights, regardless of the manner in which the provision is actually applied, is consistent with the NLRB’s prior precedent and is therefore reasonable. The Court also found that the NLRB was not required to engage in the type of balancing test advocated by NLS regarding its justification for the confidentiality provision. Finally, the Court noted that “a more narrowly drafted provision would be sufficient to accomplish NLS’s goal.”

This case serves as an important reminder to employers of the risk associated with maintaining and enforcing broad confidentiality clauses. Such provisions must be drafted as narrowly as possible to avoid impinging upon employees’ Section 7 rights, even in non-union settings.

Court Limits Plaintiffs’ Efforts to Expand Tip Statute Claim

A recent decision from the U.S. District Court for the District of Massachusetts provides an interesting analysis of the relationship between federal labor law and wage claims asserted by unionized employees. In *Hayes v. Aramark Sports, LLC*, two plaintiffs sued Aramark Sports, the concessionaire who provides food and beverage service at Fenway Park, for allegedly retaining service charges that should have been turned over to the servers under Massachusetts General Laws ch. 149, § 152A (the Tip Statute). The plaintiffs also claimed that Aramark failed to properly compute overtime payments and violated the state statute requiring prompt payment of wages due. In addition, the plaintiffs claimed Aramark’s failure to comply with these statutes gave rise to claims

for unjust enrichment, breach of contract, and interference with advantageous relations.

Aramark argued that some of the plaintiffs’ claims were preempted by federal law because they implicated the terms of its collective bargaining agreement (CBA) with its unionized employees. The federal Labor-Management Relations Act allows parties to a CBA to sue for a breach of the agreement, and preempts other legal claims that would require a court to interpret the terms of the CBA. The Court found that the CBA contained detailed provisions setting rates of pay that employees were to receive in a variety of circumstances. Because the plaintiffs’ breach of implied contract claim, unjust enrichment claim, and overtime claim each would require an interpretation of the CBA’s pay provisions, the Court found that they were preempted. Similarly, the Court held that the plaintiffs’ claims under the prompt payment of wages statute were preempted to the extent that those claims were based on an underlying allegation that Aramark had not paid them all sums they were due because the amount they were owed was dictated by the CBA.

The Court also dismissed the plaintiffs’ interference with advantageous relations claim, which asserted that Aramark had interfered with the relationship between the servers at Fenway Park and the stadium’s patrons by failing to give the servers all service fees and gratuities collected from the patrons. The Court reasoned that there was no direct business relationship between the patrons and the servers because the service fees at issue were automatically added to the patrons’ bills and were “not a discretionary payment based on [their] perception of the quality of the service.”

The District Court’s rejection of the plaintiffs’ efforts to expand their claims is a positive sign for employers. The conglomeration of multiple claims in wage cases is an increasingly common tactic that plaintiffs’ lawyers use to increase the burden of litigation on employers and increase the value of claims. The ability to dispose of extraneous claims in such cases at an early stage, particularly those that expand employers’ exposure, is vital to employers’ effective defense in these onerous wage and hour class action lawsuits.

Former Employee Cannot Bring Title VII Claim Against Individual

The First Circuit recently ruled that Title VII, which prohibits covered employers from discriminating against employees based on race, color, religion, sex, or national origin, does not provide a cause of action against individuals. Although Title VII’s definition of “employer” includes “any agent” of an employer, in *Fantini v. Salem State College*, the First Circuit declared that this language does not create a separate cause of action against an individual employee, but rather imputes a supervisor’s action to his or her employer.

Marianne Fantini worked for Salem State College as the director of general accounting. While Fantini was on a leave of absence in 2001, Salem State hired an independent accounting firm to perform an audit, which revealed numerous accounting errors made by Fantini. Consequently, Salem State terminated Fantini's employment for poor performance.

Fantini brought suit against Salem State in District Court asserting claims under Title VII and Chapter 151B for sex discrimination and retaliation. She also brought Title VII claims against the president of the college and a number of supervisors and human resources professionals there. The District Court dismissed the Title VII claims brought against the individuals and held that an individual employee is not liable under the statute. It also ruled that Fantini failed to exhaust her administrative remedies before commencing a civil action for employment discrimination, stating that although Fantini had made one brief mention of gender discrimination in her MCAD complaint, the claim was not addressed by either party or by the administrative agency.

The First Circuit affirmed the lower court's ruling that Title VII does not provide a cause of action against individuals, noting Title VII imposes liability only on employers with fifteen or more employees, in part because the Legislature intended to spare small employers the expense of defending Title VII discrimination lawsuits. The Court opined that in light of this law's original intent, it was "inconceivable" that the Legislature ever envisioned subjecting individuals to Title VII liability. Furthermore, the Court noted that when Congress amended Title VII in 1991 to expand the remedies available, it tied the size of any compensatory and punitive damage awards to the employer's size and did not provide an amount for cases in which an individual is liable. The First Circuit, however, vacated the District Court's finding that Fantini had not complied with Title VII in terms of exhausting her administrative remedies before commencing a civil action. The Court asserted that "an administrative charge is not a blueprint for the litigation to follow" and that Fantini had satisfied the exhaustion requirement when she briefly mentioned the gender discrimination claim in her MCAD complaint and described the incidents upon which the claim was based.

This case is significant for employers because it clearly limits liability under Title VII exclusively to employers, and safeguards individuals against personal liability claims. It also serves as a reminder that employers must carefully evaluate each complaint filed with the MCAD or the Equal Employment Opportunity Commission (EEOC) since they may one day need to defend against a claim which has "grown out of" the original facts and allegations of a complaint, no matter how cursory the initial assertion of the claim may have been.

Wage Act Found to Cover Executive's Salary Deferral

In *Stanton v. Lighthouse Financial Services, Inc.*, the co-founder and president of a start-up company sued the company and its CEO for nonpayment of wages, arguing that a contract for deferral of wages violated the Massachusetts payment of wages statute. The District Court held that because the plaintiff was an employee, his salary constituted wages, and the deferral provision was void as a matter of law.

John Stanton and Thomas Drunsic started Lighthouse Financial together, and on behalf of the corporation, they signed each other's compensation contracts. These one-year contracts set their salaries but allowed the company to defer payment. Neither Stanton nor Drunsic received a salary that year. After their contracts expired, Stanton resigned and sued the corporation for nonpayment of wages under Massachusetts General Laws ch. 149, § 148 (the Wage Act).

Each side moved for summary judgment, arguing that the case turned on pure questions of law: whether Stanton was eligible for protection under the Wage Act, which requires employers to pay weekly or bi-weekly wages to employees within a proscribed period of time, and if so, whether the deferred provision of the contract was valid. Drunsic also moved to amend his answer to include a set-off claim because Stanton owed him wages under his own employment contract. The Court determined that the viability of Stanton's claim turned on whether he was an employee, and whether the deferred salary constituted wages under the statute. On this issue, the Court concluded that Stanton was an employee because there is no basis to find that co-venturers in a start-up are not employed or to limit the statute's application to lower-level employees. The Court also looked to the statute's plain language, which permits an individual to be liable as an employer and protected as an employee in different contexts. The Court found that Stanton's deferred salary constituted wages because the statute uses the terms "salary" and "wages" interchangeably, and because it would be unreasonable to argue that a base salary is not a wage.

Moreover, because the Wage Act contains a specific provision that invalidates contractual waivers of statutory rights, the Court held that the parties' agreement to defer compensation was void as a matter of law. The District Court denied Drunsic's motion to amend his answer to add a claim for set-off against Stanton because the statute of limitations had run on Drunsic's claim.

This case demonstrates that even high-level executives may bring claims under the Wage Act, and businesses may not rely on salary deferral clauses to avoid liability. Interestingly, Stanton would also have been liable if the statute of limitations had not run on Drunsic's claim because the two had signed each other's contracts as officers of the corporation. It is possible, then, for corporate officers to be simultaneously protected by the Wage Act as employees and liable under it as employers.

Employer Found Liable for Revoking an Accepted Offer of At-Will Employment

In *Hooker v. Trusted Life Care, Inc.*, a Superior Court judge held that an employer can be contractually liable for rescinding an accepted offer of at-will employment. This decision is particularly noteworthy because courts rarely find employers liable for discharging an at-will employee because at-will employment does not cover a specified term, and thus there can be no damages. Since it makes little sense for an individual to have greater contractual protection prior to starting work than once employed, courts typically have found no grounds for breach of contract claims when employers renege on accepted offers of at-will employment. The plaintiff in *Hooker* took a different tack, and the Court concurred.

Leslie Hooker accepted a written offer of at-will employment from Trusted Life Care, Inc. (TLC) on March 4, 2005, to start work on June 6, 2005. In the interim, Hooker hurt her back and delayed her start date until June 13, 2005. On June 10, 2005, however, TLC informed her that it had decided not to hire her after all. Hooker sued TLC, alleging that TLC breached the accepted employment offer by terminating her before she started working. TLC responded that because Hooker had accepted an offer of at-will employment, it was free to discharge her at any time, which no doubt would include before she began her employment.

The Court agreed with Hooker and ruled that an employer who retracts an offer for at-will employment before the employee starts work may be liable to the employee for breach of contract. It reasoned that the accepted offer constituted not a “promise” for employment, as TLC contended, but rather a contractual obligation to let Hooker begin employment in exchange for her agreement to report to work. The accepted offer thus created a distinct obligation on TLC to let Hooker begin working. According to the Court, “[t]he fact that her employment, once commenced, would be governed by the rules of at-will employment has no effect on the binding nature of the [other] obligations contained within the offer agreement.”

This case serves as a cautionary tale that is particularly salient in the current economic climate in which employers might be tempted to rescind employment offers or delay start dates. In light of the *Hooker* decision, employers should review their offer letters and consider inserting language reserving the right to revoke an offer at any time before employment begins.

Statements Concerning Sexual Harassment Ruled Protected by Absolute Privilege

In *Visnick v. Caulfield*, the Massachusetts Appeals Court held that the absolute privilege defense to a defamation claim protected statements made by a former employee in a sexual harassment complaint, as well as statements made in a letter to her employer about the alleged harassment.

Jeanette Caulfield began working for a hotel in 2003, and was supervised by assistant restaurant manager Gary Visnick until she resigned in 2004. At the suggestion of a different manager, Caulfield reapplied for employment with the hotel several months later. Visnick conducted a one-on-one interview with Caulfield for the position, and immediately following the interview, Caulfield complained to the hotel management that Visnick had sexually harassed her during the interview and during her previous employment. Caulfield withdrew her application and subsequently sent a letter about the sexual harassment to the hotel’s general manager, with copies to its legal and human resources departments. The letter alleged that Visnick’s conduct was the reason for her resignation in 2004 and that she was constructively terminated. Caulfield then filed a charge of discrimination with the EEOC. The parties settled the matter through mediation, and Caulfield took no further action against the hotel or Visnick.

On March 9, 2006, Visnick filed a complaint in the Superior Court against the hotel and Caulfield, alleging, among other claims, wrongful termination and defamation. Caulfield responded with a counterclaim for retaliation in violation of Chapter 151B and sought summary judgment, claiming that the absolute privilege defense barred all counts against her. The lower court denied Caulfield’s motion, but on appeal, the Court held that statements made by a party, counsel, or witness during the course of a judicial proceeding are absolutely privileged and cannot be the basis of a defamation claim if they relate to that proceeding, even if they are uttered “with malice or in bad faith.” The Appeals Court added that “[w]here a communication to a prospective defendant relates to a proceeding which is contemplated in good faith and which is under serious consideration, . . . the privilege should attach,” noting that EEOC proceedings “are sufficiently judicial in nature for the application of the privilege.” The Court therefore declared the statements in Caulfield’s complaint and her letter to the hotel privileged and, accordingly, dismissed all of Visnick’s claims against Caulfield.

This case reaffirms that the absolute privilege protects not only statements made by former or current employees in contemplation of a lawsuit, but also statements made by employees to employers or former employers in EEOC or MCAD charges.

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Next *Massachusetts Employment & Labor Law Report*: **September 15, 2009.**

Upcoming Briefings:

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