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SJC Strikes MCAD's Emotional Distress Award

In *DeRoche v. Massachusetts Commission Against Discrimination*, the Massachusetts Supreme Judicial Court (SJC) rejected the \$50,000 emotional distress award that the Massachusetts Commission Against Discrimination (MCAD) granted to a prevailing complainant on a retaliation claim. The SJC determined that even though the MCAD had the authority to award damages for emotional distress, the plaintiff employee had failed to present sufficient evidence of emotional suffering or a causal connection between his alleged emotional distress and his employer's retaliation. The SJC applied its decision in *Stonehill College v. Massachusetts Commission Against Discrimination*, in which it held that in order to recover emotional distress damages on a discrimination or retaliation claim, a complainant must present substantial evidence of both the emotional suffering and a causal connection between the suffering and the unlawful act.

DeRoche claimed that his employer, a municipal electric department, had discriminated against him by failing to inform him that the mandatory retirement age was 70 (not 65 as he wrongly believed) and had retaliated against him upon his return from premature retirement by assigning him to a "line" crew, instead of the more desirable "home service" crew. During a hearing before an MCAD hearing officer on his claims, DeRoche presented evidence that linked his alleged emotional distress either to his feelings about retirement generally or his reaction after learning that his employer erred in accepting his retirement application under the mistaken belief that the mandatory retirement age was 65 rather

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What Tipped the Cases?

The Massachusetts Tip Statute, Massachusetts General Laws c. 149 §152A (Tip Statute), continues to garner significant attention from Massachusetts courts, most recently regarding the issue of retaliation. In *Smith v. Winter Place LLC*, the SJC held that an employee who makes an internal complaint to a manager about a potential violation of the Tip Statute is protected by the anti-retaliation provisions of M.G.L. c. 149 §148A, even if the employee does not file a complaint with the state Attorney General.

The plaintiffs in *Smith* were restaurant servers at Lock-Ober restaurant. When Lock-Ober reopened in November 2001 under new ownership, it instituted a tip pooling system which required servers to share their tips with bussers, bartenders, and the maitre d'. The servers complained to the maitre d' that they were not receiving all of their tips and that he should not be sharing in the tip pool. Two of the plaintiff servers also complained to the Attorney General's office. After the maitre d' advised the restaurant owners that the servers were upset about the tip pooling system, the restaurant fired the servers and the maitre d', citing performance-related reasons.

At the trial court level, the restaurant argued successfully that the anti-retaliation provision in the state wage laws only protects employees who make an official complaint to someone involved in the civil or criminal enforcement of wage and hour laws. The SJC, however, disagreed and reversed the lower court's decision. The SJC found that (1) the plain language of the anti-

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“Emotional Distress”, cont’d from page 1

than 70. DeRoche, however, failed to introduce any evidence that he experienced physical manifestations of distress, or that he was compelled to curtail his life activities in any way as a result. DeRoche also never sought medical treatment for symptoms related to emotional distress. The hearing officer ruled in favor of the employer on the discrimination claim, but found for DeRoche on his retaliation claim and awarded him \$210,000 in compensatory damages for back and front pay and \$50,000 in damages for emotional distress.

After the full MCAD Commission and a Superior Court judge affirmed the hearing officer’s decision, the SJC reversed the emotional distress award. The SJC concluded that DeRoche’s evidence fell far below the factual basis for an emotional distress award mandated by the *Stonehill* decision, and that he failed to prove any causal connection between his purported emotional distress and his employer’s retaliation. The emotional distress evidence presented by DeRoche supported only his unsuccessful discrimination claim, not his retaliation claim. Thus, the SJC concluded that the MCAD’s emotional distress award to DeRoche “appear[ed] to be a classic example of what the principles set forth in [its] *Stonehill* decision were intended to discourage.”

The SJC’s decision emphasizes that it will hold the courts and the MCAD to the stringent factual basis required to support an emotional distress award that it set forth in *Stonehill*, and that it will not hesitate to overturn awards when a court or the MCAD fails to articulate the specific evidence supporting the award of damages.

“Tipped Cases”, con’t from page 1

retaliation provision protects employees who are penalized for taking “any action” to assert their rights under wage and hour laws (including making an internal complaint); (2) its interpretation was consistent with the Attorney General’s interpretation of §148A, which is entitled to “substantial deference”; and (3) employees should be encouraged to

bring internal, informal complaints to employers, without fear of reprisal and without being compelled to file a formal agency complaint.

The *Smith* decision ties into the recent (July 24, 2006) Essex County jury verdict in *Calcagano v. High Country Investor, Inc. d/b/a Hilltop Steak House and Marketplace*. In *Calcagano*, the jury awarded four former servers of the Hilltop Steak House substantial damages for wrongful termination in retaliation for complaining about the restaurant’s tip sharing policy, which the jury also found illegal. Three of the four servers were awarded \$125,000 each for their retaliation claims; the fourth was awarded \$75,000. The jury also awarded a class of servers a much smaller amount - \$160,000 total - for the violation of the Tip Statute. The jury concluded that the defendant acted “outrageously, meaning with evil motive or reckless indifference” by firing the plaintiffs, thus allowing the court potentially to treble the damages awarded by the jury.

These decisions are not surprising in light of the facts. Employers must be certain to develop and adhere to internal procedures requiring investigation of employee questions, concerns, or complaints about wage and hour issues, and to prevent or remedy any type of retaliation against employees who complain about potential wage and hour violations.

Appeals Court Limits Bad Faith Termination Claims

In *York v. Zurich Scudder Investments, Inc.*, the Massachusetts Appeals Court declined to expand the limited circumstances in which an at-will employee may state a claim for breach of the covenant of good faith and fair dealing. In a positive decision for employers, the Court held that cost-cutting is a legitimate reason to terminate an employee, constituting “good cause” and negating any argument of bad faith termination.

In 1977, in *Fortune v. National Cash Register Co.*, the SJC first recognized a limited exception to the general “at-will” rule that an employee may be terminated for any reason, barring an

illegal reason, and found that an at-will employment contract contains an implied covenant of good faith and fair dealing. The *Fortune* case and its progeny hold that when an employer terminates an at-will employee in bad faith in order to deprive the employee of a commission due, or about to be due, so that the employer will benefit financially at the employee's expense, the employee may recover compensation for work performed. The cases interpreting *Fortune* have been clear, however, that the employer is only liable for compensation linked to the employee's past, not future, services.

The plaintiff in *York* sold group retirement plans for Scudder. Though a salaried employee, York also received incentive compensation based on the account value of each client that he recruited. The Scudder Employee Handbook made clear that all compensation, commissions, and benefits ceased as of the employee's separation date from the company, and Scudder's 1999 incentive agreement stated that employees who terminated their employment with Scudder prior to the payment of incentive awards would forfeit those awards. In the spring of 2000, Scudder managers decided to cut costs by instituting company-wide layoffs. As part of the cost-cutting efforts, Scudder restructured its sales group, eliminated York's position and terminated his employment.

In his lawsuit, York argued that Scudder had breached its implied covenant of good faith and fair dealing by terminating his employment to avoid paying him incentive compensation and therefore owed him commissions. Scudder filed a motion for summary judgment, the Massachusetts Superior Court granted Scudder's motion, and York appealed. The Appeals Court affirmed the dismissal of the good faith and fair dealing claim. The Court held that Scudder's nondiscriminatory discharge of York for cost-cutting reasons fell within the definition of good cause and was therefore in good faith. The Appeals Court decision is important because it maintains the narrow scope of the *Fortune* ruling and limits the good faith and fair dealing doctrine. The decision also recognizes that employers should be permitted to "implement cost-cutting

measures when, in the employer's judgment, these measures are necessary for the needs of the business."

State and Federal Retaliation Law Compared

As discussed in our June 23, 2006, [Management Alert](#) regarding *Burlington Northern & Santa Fe Railway Co. v. White*, the U.S. Supreme Court recently expanded the rights of employees under federal law when it concluded that an employer will be liable for retaliation if its conduct would discourage a reasonable person from exercising his or her Title VII rights, even though such conduct does not directly impact an employee's terms or conditions of employment. In reaching its conclusion, the Supreme Court noted that while Title VII's anti-discrimination provision is limited to actions that adversely impact an employee's "compensation, terms, conditions, or privileges of employment," the statute's anti-retaliation provision does not contain such limiting language.

White worked for Burlington Northern as a "truck laborer." Although the position involved several tasks, White mainly operated a forklift. After White complained that her supervisor had made insulting and inappropriate remarks to her in front of her male colleagues, she was removed from her forklift duties and reassigned to other tasks that were more arduous and less desirable than driving a forklift, but were still duties of a truck laborer. White later had a verbal disagreement with another supervisor, which resulted in a suspension without pay. An internal grievance proceeding concluded in her favor, and the company reinstated her with full back pay. The Supreme Court upheld the jury's finding that Burlington Northern retaliated against White both when it changed her job responsibilities and when it suspended her without pay, notwithstanding her reinstatement with full back pay.

Had these same facts been presented under Massachusetts law, a state court might have reached a different result. Although the language of the anti-discrimination and anti-retaliation provisions of M.G.L. c. 151B (Chapter 151B) is similar

to that of Title VII, the SJC has thus far adopted a less expansive definition of retaliation. In its 1996 decision in *MacCormack v. Boston Edison Co.*, the SJC rejected a retaliation claim where the plaintiff claimed that the company had rearranged his work duties and imposed new reporting structures in retaliation for his complaints about age discrimination. The SJC characterized the claim as “no more than subjective feelings of disappointment and disillusionment,” and ruled that an employee must show an “adverse employment action . . . in respect to salary, grade, or other objective terms and conditions of employment” that materially disadvantaged the employee. Thus, although the retaliation allegedly suffered by White in *Burlington Northern* did seem more substantial than that alleged in *MacCormack*, the state law definition of retaliation still appears more limited than its federal counterpart. On the other hand, the Appeals Court ruled in *Ritchie v. Dept. of State Police* that Chapter 151B contains an additional provision that makes it unlawful for an employer even to threaten to take an adverse employment action, while federal law does not expressly prohibit such threats.

Regardless of the apparent differences in federal and Massachusetts law, employers should exercise caution when dealing with employees who have exercised their rights by complaining about discrimination or harassment. At minimum, employers will need to undertake additional training of their managers and supervisors so they do not run afoul of the Supreme Court’s now more expansive definition of retaliation.

Stereotyping of Mothers May Constitute Actionable Gender Discrimination

In *Sivieri v. Department of Transitional Assistance*, the Superior Court held that an employer’s reliance on stereotyped views about women and their traditional roles as the primary caretakers of small children may be a form of sex discrimination prohibited by Chapter 151B, even though the statute does not expressly protect employees based on motherhood or parental status.

Sivieri was unmarried and had no children when she began working at the Department of Transitional Assistance (DTA). Sivieri married within the first year of her employment and became pregnant. During her pregnancy, Sivieri applied for a promotion, but the position was awarded to another woman who was hired after Sivieri and who had no children. Two subsequent promotions also went to female employees with less tenure than Sivieri, one of whom had no children and one of whom had an adolescent daughter. When Sivieri asked why she was not promoted, her supervisor allegedly told her that the birth of her child had led the managers of the agency to conclude that Sivieri was no longer interested in a promotion. Sivieri also alleged that her supervisor made frequent comments regarding the negative effect of maternity leaves on the department’s productivity.

Sivieri sued, claiming that the DTA’s failure to promote her constituted sex discrimination. The DTA moved for summary judgment, arguing that Chapter 151B does not prohibit discrimination based on parental status. In denying the DTA’s motion, the Court noted that the evidence Sivieri presented may have reflected a discriminatory animus not toward parents, but toward women. The Court reasoned that the promotion decisions may have been based on the preconception that wives are primarily responsible for caring for young children and that mothers of young children will prioritize their child care obligations over their work-related responsibilities, which the Court characterized as “antiquated ideas about what a woman’s role in society should be.” Relying on federal cases interpreting Title VII, the Court concluded that basing employment decisions on such stereotypes is a form of sex discrimination prohibited by Chapter 151B.

This case demonstrates that the list of protected classifications enumerated in Chapter 151B does not necessarily define the outermost reaches of the statute. Employers must ensure not only that their employment practices are neutral in their treatment of employees in protected categories, but also that employment decisions are

not based on suppositions or stereotypes regarding, for example, older employees, women or individuals with disabilities. Supervisors and human resources personnel should be wary of decisions that are based on assumptions about an employee's capabilities or interests, instead of the employee's demonstrated abilities or stated preferences.

Employee Who Quits Due to Child Care Issues May Be Eligible for Unemployment Benefits

Generally, an employee who voluntarily quits his or her job will not be eligible for unemployment benefits, unless the employee can show compelling reasons for leaving. In *Norfolk County Retirement System v. Director of the Department of Labor & Workforce Development*, the Appeals Court addressed the novel question of whether a mother's decision to leave a job because she was unable to find suitable child care qualified as an "urgent, compelling, and necessitous" reason, sufficient to support the award of unemployment benefits. While the Appeals Court left open the possibility that the employee might qualify for benefits, it sent the matter back to the Division of Employment and Training (DET) (since renamed Division of Unemployment Assistance) to address whether the employee had "acted reasonably, based on pressing circumstances in leaving her job."

For 16 years prior to the birth of her child, Pamela Masson-Smith worked full-time for the Norfolk County Retirement System. She received approval for a paid, six-month maternity leave, but returned to her position six weeks early to accommodate the County's needs. After a few weeks working full-time, Masson-Smith requested and received a temporary three-day work week to accommodate child care issues. When the County eventually informed Masson-Smith that she must return to a full-time schedule, she offered to work from home two days, in the evenings, or on weekends, explaining to the County that commercial care was too expensive and that her sister could care for her baby only three days a week. The County declined her proposal. Explaining that she "had

to leave" but "didn't want to leave," Masson-Smith resigned her job to care for her child.

During a hearing on Masson-Smith's application for unemployment benefits, a DET review examiner concluded that she was entitled to benefits under M.G.L. c. 151A, § 25 (e)(1). Although the review examiner determined that the employer acted reasonably, the examiner nonetheless concluded that Masson-Smith had met her burden of showing that she had left her job for "compelling and necessitous reasons." On appeal, the DET's Board of Review affirmed the examiner's decision.

The County again challenged the award of benefits. Characterizing the Board's decision as "deficient" and remanding the case, the Appeals Court stated that "[t]he key for benefit eligibility[] lies not in characterizing the decision [to quit] as personal or subjective rather than as economic or objective, but in ascertaining whether the claimant 'acted reasonably, based on pressing circumstances, in leaving employment.'" The Appeals Court ruled that the Board could rest on the record "in considering both the reasonableness of the claimant's conduct . . . and her availability to work," but must explain its reasoning and conclusions. Alternatively, the Court stated that the Board could remand the case back to the review examiner for additional evidence and findings.

This decision leaves open the possibility that an employee who quits due to child care concerns may be eligible for unemployment benefits. However, the burden is still on the employee to prove that compelling circumstances necessitated the resignation. Employers should consider this issue when contesting an employee's receipt of unemployment benefits.

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We hope you will join us for our upcoming breakfast briefing, "Employee Blogging in the Work Place: Risks & Rewards for Employers," to be held on September 13, 2006. Please look for announcements regarding our next Briefing in future editions of this Newsletter. Notices of upcoming events will be sent by e-mail in advance with more detailed descriptions. If you are not on our mailing list and would like to receive e-mail notification of upcoming events, please e-mail seyfarthshaw@seyfarth.com.

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Boston Office Labor & Employment and Employee Benefits Attorneys

Sally L. Adams
617-946-4916
sadams@seyfarth.com

Carla J. Eaton
617-946-4985
ceaton@seyfarth.com

Barry J. Miller
617-946-4806
bmiller@seyfarth.com

Business Immigration
Salomon Chiquiar-Rabinovich
617-946-4805
schiquiar-rabinovich@seyfarth.com

Richard L. Alfred
617-946-4802
ralfred@seyfarth.com

Andrew L. Eisenberg
617-946-4909
aeisenberg@seyfarth.com

Leah Moore
617-946-4990
lemoore@seyfarth.com

Dyann DelVecchio
617-946-4911
ddevecchio@seyfarth.com

Michael R. Brown
617-946-4907
mrbrown@seyfarth.com

Miles Henderson
617-946-4868
mhenderson@seyfarth.com

Katherine E. Perrelli
617-946-4817
kperrelli@seyfarth.com

John F. Quill
617-946-4913
jquill@seyfarth.com

Anthony Califano
617-946-4925
acalifano@seyfarth.com

Lynn Kappelman
617-946-4888
lkappelman@seyfarth.com

Krista Green Pratt
617-946-4850
kpratt@seyfarth.com

Russell B. Swapp
617-946-4905
rswapp@seyfarth.com

Ariel D. Cudkowicz
617-946-4884
acudkowicz@seyfarth.com

Daniel B. Klein
617-946-4840
dklein@seyfarth.com

Jennifer A. Serafyn
617-946-4843
jserafyn@seyfarth.com

Employee Benefits
Arthur S. Meyers
617-946-4980
asmeyers@seyfarth.com

Lisa J. Damon
617-946-4880
ldamon@seyfarth.com

Kristin G. McGurn
617-946-4858
kmcgurn@seyfarth.com

Dawn Solowey
617-946-4800
dsolowey@seyfarth.com

Laura K. Roos
617-946-4983
lroos@seyfarth.com

Brigitte M. Duffy
617-946-4808
bduffy@seyfarth.com

Catherine Meek
617-946-4873
cmeek@seyfarth.com

Diane M. Soubly
617-946-4899
dsoubly@seyfarth.com

Laura D. Sanborn
617-946-4982
lsanborn@seyfarth.com

ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E.
Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

World Trade Center East
Two Seaport Lane
Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603-5577
312-460-5000
312-460-7000 fax

HOUSTON

700 Louisiana Street
Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza, Suite 3300
2029 Century Park East
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas
Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall
Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

560 Mission Street
31st Floor
San Francisco, California 94105-2930
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2) 647 60 25
(32)(2) 640 70 71 fax

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