SEYFARTH SHAW LLP
ATTORNEYS

Massachusetts Employment & Labor Law Report

Vol. XII, No. 4 **December 2011**

Governor Signs Transgender Rights Law

On November 23, 2011, Massachusetts Governor Deval Patrick signed a law to protect transgender people in Massachusetts from discrimination in employment, housing, mortgage loans, and credit. The legislation also affords transgender people protection under the state's existing hate crime laws. The law becomes effective on July 1, 2012.

The law amends the Commonwealth's non-discrimination laws, Mass. Gen. Laws c. 151B, to include "gender identity" as a new protected category. The law contains a broad definition of gender identity: "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth."

According to the language of the new law, evidence of a person's gender identity may include "medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the person's gender-related identity is sincerely held, as part of the person's core identity." The law also provides that while transgender people may not be discriminated against on the basis of their gender identity, transgender people may not assert their gender identity "for any improper purpose." Notably, the law does not include language to protect transgender people in public accommodation settings, such as hotels, restaurants, clubs, and restrooms.

With the passage of this law, Massachusetts joins more than a dozen other states in protecting transgender people from discrimination in the workplace. Massachusetts employers should review their personnel policies and procedures, including policies related to equal employment opportunity, dress codes, bathrooms, and any other gender-specific facilities, to ensure compliance with the new law.

Massachusetts Court Applies Wage Act to Out-of-State Employee

In *Dow v. Casale,* the Massachusetts Superior Court held that the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, § 148 (Wage Act), protects out-of-state employees so long as they have sufficient contacts with the Commonwealth. In the wake of this decision, Massachusetts employers cannot assume that their out-of-state employees are not covered by the Wage Act.

In 2006, Starbak Communications, Inc., located in Massachusetts, hired Russell Dow as its sole salesperson. Dow, a commissioned employee, reported to Gregory Casale, Starbak's CEO in Massachusetts, with whom he communicated daily by email and several times a week by phone. Throughout his employment with Starbak, Dow was a resident of Florida, worked out of his home, and contacted his customers via telephone or email. However, Dow worked with between eleven and nineteen customers located in Massachusetts and traveled to Massachusetts twelve times in 2008 and at least eight times in 2009. When visiting

Massachusetts, Dow always worked out of the same cubicle at the Starbak office. His business card identified his work address as the Starbak office and listed a Massachusetts telephone and fax number. All paperwork related to Dow's sales activities, such as purchase orders and invoices, was generated in Massachusetts and customers returned such documents to Starback's facility in Massachusetts.

Beginning in the third quarter of 2008, Starbak failed to pay Dow his full commissions and eventually ceased paying any commissions when the company filed for bankruptcy in February 2010. In April 2010, Dow filed suit against Casale and two other Starbak executives to recover $138,957 in commissions, expenses, and accrued vacation, alleging a violation of the Wage Act. Both parties then filed motions for summary judgment.

The Superior Court granted Dow's motion for summary judgment, holding that the purpose of the Wage Act is to prevent the unreasonable retention of wages and that there is no language in the Wage Act that restricts its coverage to employees who work or reside in Massachusetts; nor is there any language that identifies whether it is the situs of the employer, the employee or the work that determines coverage under the Wage Act. The Court applied a personal jurisdiction analysis and found that Dow had sufficient and regular contacts with Massachusetts to fall within the scope of the Wage Act's protections. These contacts included the location of Dow's customers in Massachusetts; Dow's business travel to Massachusetts; Dow's use of a Massachusetts business address, telephone number and fax number; Dow's daily communication with Casale (located in Massachusetts); and the fact that paperwork related to Dow's sales activities was generated in and returned to Massachusetts.

Although this decision may be limited by the facts of the case, specifically Dow's repeated contacts with Massachusetts, it continues to expand the scope of the Wage Act. Given that the costs of non-compliance can be high due to automatic trebling of damages resulting from any violation, Massachusetts employers should review their pay policies and practices with regard to out-of-state employees to ensure compliance with the Wage Act.

U.S. District Court Rejects Longstanding Wage Rule, Conditionally Certifies Collective Action of Hospital Workers

In *Norceide v. Cambridge Health Alliance*, Judge Nancy Gertner of the U.S. District Court for the District of Massachusetts rejected a longstanding wage rule, known as the *Klinghoffer* Rule, and allowed plaintiffs, a group of hospital workers, to pursue their minimum wage claims on a collective action basis.

The plaintiffs alleged that they were not paid for all hours worked, in violation of the minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (FLSA). Their employer, Cambridge Health Alliance, moved to dismiss the claims based on the *Klinghoffer* Rule. The *Klinghoffer* Rule was first recognized by the U.S. Court of Appeals for the Second Circuit in *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487 (2d Cir. 1960). In that case, the Second Circuit concluded that the FLSA requires only that (1) employees receive overtime for all hours worked in excess of 40 hours per week; and (2) *in toto*, employees receive at least the minimum wage for all hours worked. Under the *Klinghoffer* Rule, courts have declined to find a minimum wage violation so long as the employee's total weekly pay, divided by their actual hours worked, does not dip below the minimum wage threshold for each hour of work. Thus, where an employee alleges that he worked 38 hours in a week, but received pay for only 34 hours, courts will find no violation of the FLSA so long as the average hourly rate for all 38 hours worked is above the federal minimum wage.

At least five other circuit courts and the U.S. Department of Labor (DOL) have adopted the *Klinghoffer* Rule and declared that the weekly-average method is the proper way to determine if an employer has violated the FLSA's minimum wage requirement. But Judge Gertner observed that courts following *Klinghoffer* have "mostly done so by citing to *Klinghoffer* without any further analysis of whether, in fact, the weekly average rule effectuates the legislative intent of the FLSA's minimum wage law." Offering her own analysis of the statute's legislative intent, Judge Gertner concluded that Congress intended for the hour-by-hour method (not the weekly-average method) to be used to determine whether a minimum wage violation has occurred; that is, where an employee is not paid an hourly wage for a certain number of hours worked in a week, there is a violation of the FLSA's minimum wage requirements even where the average pay received for each hour actually worked is above the federal minimum wage. The Court concluded that the plaintiffs could proceed with their minimum wage claims on a collective action basis.

Although clearly an outlier case, *Norceide* is an adverse decision for all employers, particularly those in Massachusetts, because it potentially makes it easier for plaintiffs to prevail on their FLSA minimum wage claims. Keeping track of employees' actual working hours and paying them for all hours worked remains employers' best defense against this type of claim.

Despite Supreme Court Ruling, Massachusetts Court Invalidates Class Action Waiver in Arbitration Agreement

A Superior Court judge recently invalidated a class action waiver in an arbitration agreement under state law, even though in April 2011 the U.S. Supreme Court held that federal law preempts state laws that interfere with a company's ability to enforce class action waivers in arbitration agreements. This ruling shows that Massachusetts courts may still find class action waivers in arbitration agreements unenforceable, particularly where the waivers are not carefully drafted or where small claims are at stake.

In *Feeney v. Dell, Inc.*, two plaintiffs sought to bring a consumer class action against Dell arising out of Dell's collection of sales tax on their computer service contracts. Their claims were both worth less than $250. Their contracts with Dell required arbitration, prohibited class actions, and did not allow consumers to be awarded anything more than the value of their claims.

In 2009, the Massachusetts Supreme Judicial Court (SJC) invalidated Dell's class action waivers. The SJC ruled that, given the small claims at stake, a class action was the only realistic option for consumers to pursue their claims against Dell. Accordingly, the SJC held, the waivers were contrary to public policy and unenforceable.

After the SJC's ruling, the Supreme Court ruled in *AT&T Mobility LLC v. Concepcion* that the Federal Arbitration Act (FAA) preempted a California rule that banned class action waivers in certain consumer arbitration agreements. The Supreme Court found that the California rule required companies with certain arbitration agreements to allow class-wide arbitration, even though class actions are less efficient than individual arbitrations. The Supreme Court decided that the California rule thus frustrated the ability to resolve disputes efficiently, thereby interfering with one of the FAA's purposes. However, the Supreme Court also added that the claim before it was likely to be prosecuted on an individual basis because the company agreed to pay claimants at least $7,500 and twice their attorneys' fees if they obtained an arbitration award greater than the company's last settlement offer.

After *Concepcion*, Dell argued in the Superior Court that the SJC's earlier ruling was no longer valid because, similar to the California rule invalidated in *Concepcion*, the SJC required Dell to allow consumers to pursue their claims through class actions notwithstanding the language of the arbitration agreements, thereby frustrating the purpose of the FAA. The Superior Court rejected Dell's argument and found that, unlike the arbitration provision in *Concepcion*, Dell's provision did not include features that would make individual-based arbitration of small claims feasible. The Superior Court concluded that the SJC's ruling did not frustrate the FAA because individual-based arbitration was not a realistic option for Dell's consumers. The Superior Court added that it would have upheld Dell's class action waiver if Dell had made individual-based claims feasible, such as through incorporating a minimum recovery provision.

Employers who have or are considering arbitration class action waivers should be aware of *Feeney* because it shows that, regardless of *Concepcion*, courts may still invalidate such waivers, particularly where small-dollar claims are involved as may be the case in wage and hour disputes. To avoid invalidation, employers may want to consider including provisions in their waivers that make individual-based arbitrations feasible for small-dollar claims.

First Circuit Rules that Interviewing an Applicant Is Not an Admission that the Applicant Is Qualified for the Position

In *Goncalves v. Plymouth County Sheriff's Dep't*, the U.S. Court of Appeals for the First Circuit held that allowing an applicant to proceed through the stages of a hiring process is not an admission that the applicant was qualified for the position or similarly situated to other applicants for purposes of state and federal anti-discrimination laws.

Plaintiff Joy Goncalves was a 49 year old Cape Verdean woman who worked for the Plymouth County Sheriff's Department and had applied for a promotion to two different information technology (IT) positions. Both positions called for an associate's degree in a computer-related field, at least three years of relevant work experience, and three or more years of experience using certain

web development and interface software. The Sheriff's Department considered a number of applicants for each position, including two white applicants who were younger than the plaintiff. The application process involved several stages, including a panel interview and an examination that tested the applicants' IT knowledge. Although the plaintiff was allowed to complete all stages of the application process, she scored considerably lower than the two white applicants at both the interview and the examination stages. As a result, the Sheriff's Department hired the two white applicants rather than the plaintiff.

The plaintiff filed a lawsuit alleging unlawful discrimination based on her gender, race, age, and national origin in violation of Massachusetts General Laws ch. 151B, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. § 623. The District Court granted the Sheriff's Department's motion for summary judgment, holding that the plaintiff had failed to sustain her prima facie burden because she had not shown that she was qualified for either of the positions or similarly situated to the applicants hired. The District Court also noted that the Sheriff's Department had demonstrated a nondiscriminatory justification for its decision and that the plaintiff had not shown this reason to be pretextual.

On appeal, the plaintiff argued that by allowing her to advance through the interview process, the Sheriff's Department had effectively admitted that she was both qualified for the positions and similarly situated to the applicants hired. The First Circuit reviewed the evidence concerning plaintiff's IT background and experience and interview/examination scores, as well as the other applicants' work experience, IT background, and interview/examination scores. The First Circuit dismissed the notion that the Sheriff's Department had conceded plaintiff's qualifications simply by allowing her to advance through the hiring process: "That the [Sheriff's Department] in an abundance of caution let her application advance does not make Goncalves qualified." It similarly found that the decision to allow the plaintiff to advance in the hiring process was insufficient to create a genuine dispute of material fact regarding the similarly situated element of her prima facie case, noting that it could not "rely on 'overly attenuated inferences, unsupported conclusions, and rank speculation' to quiet the tolling of the summary judgment bell."

While *Goncalves* serves to protect employers who may provide opportunities to under-qualified applicants to proceed through the interview process, employers should do so with caution, keeping in mind the First Circuit's statement that it was "confusing" as to why the Sheriff's Department had permitted the plaintiff to proceed if she clearly lacked the requisite skills and experience. In another set of circumstances, a plaintiff may successfully argue that resolution of this "confusion" should be left to a jury.

First Circuit Finds Banquet Sales Managers Exempt from Overtime

The First Circuit recently held that sales managers for a Boston banquet facility are exempt from the overtime requirements of the FLSA and Massachusetts wage laws because they qualify as administrative employees.

In *Hines v. State Room, Inc.*, the plaintiffs sought unpaid overtime wages that they claimed they were due. The banquet facility countered that the plaintiffs were exempt from the FLSA's overtime requirements because they were administrative employees. The plaintiffs responded by claiming that their job duties – which included securing wedding and other event business for the company and working with clients to design those events – did not meet the criteria for the administrative exemption. The plaintiffs argued, first, that the sales aspects of their job made them "production" workers not eligible for the exemption, and, second, that they did not exercise the level of independent judgment and discretion required for the exemption. The District Court rejected both of these arguments, and the First Circuit affirmed.

The First Circuit determined that the plaintiffs' job duties could not be considered "production" because they were ancillary to the employer's principal business function of actually providing banquet services. The Court also found that the job involved the exercise of independent judgment and discretion because acting as the face of the company and "engaging potential clients and assisting them in selecting from various options from the employers' offerings" required "invention, imagination and talent."

The Court rejected the plaintiffs' assertion that, based on language in a recent and controversial decision by the Second Circuit involving pharmaceutical sales representatives, *In re Novartis Wage & Hour Litigation*, they could not be exempt under the administrative exemption because they lacked authority to make financial decisions and did not perform any of the job duties listed in the DOL administrative exemption regulations. The First Circuit rejected the notion that "simple evaluation of the regulation's *exemplary* list of factors to be considered among 'all the facts involved in the particular employment situation in which the question arises'

provides a determinative answer to the ultimate question whether an employee exercises discretion."

The case is certain to become a key precedent for employers in two ways. First, it aids employers in arguing that employees in sales-related job positions meet the "duties test" for the administrative exemption. *Hines* is the most recent in a line of First Circuit administrative exemption cases, starting with the 1997 decision *Reich v. John Alden Life Insurance Co.*, that have held that employees charged with representing the company to outsiders meet the criteria for the administrative exemption, even where sales is also a large portion of the job. This line of cases implicitly rejects a position recently taken by the DOL and some district courts in other contexts that sales jobs are necessarily "production" jobs and thus ineligible for the administrative exemption. Second, the case clarifies that the discretion and independent judgment analysis necessary for application of the administrative exemption should not be unnecessarily rigid.

Table of Cases

Dow v. Casale, et. al, No. 10-1343-BLS1 (Mass. Super. July 15, 2011).

Feeney v. Dell, Inc., No. MICV 2003-01158 (Mass Super. Sept. 30, 2011).

Goncalves v. Plymouth County Sheriff's Dep't, 659 F.3d 101 (1st Cir. 2011).

Hines v. State Room Inc., No. 10-2298 (1st Cir. Nov. 28, 2011).

Norceide v. Cambridge Health Alliance, Civ. Action No. 10-cv-11729 (Aug. 28, 2011).