

# Massachusetts Employment & Labor Law Report

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## Mandatory Treble Damages Provision Does Not Apply Retroactively

The U.S. District Court for the District of Massachusetts and the Massachusetts Superior Court recently held that Chapter 80 of the Acts of 2008 (Chapter 80)—which amended Massachusetts General Laws ch. 149, § 150 to provide for mandatory treble damages for state wage and hour law violations—does not apply retroactively.

In *DiFiore v. American Airlines, Inc.*, the plaintiff skycaps sued American under Massachusetts General Laws ch. 149, § 152A (the Tip Statute), claiming the fee that the airline charged to passengers for curbside baggage check-in services constituted a tip which should properly have been paid to them. Following a jury verdict in the plaintiffs' favor, American moved for reconsideration of an earlier order in which the Court had held that the plaintiffs' claims were not preempted by the Airline Deregulation Act. The Court denied the motion, holding that American had failed to show that the Tip Statute had a "significant effect" on airline prices or services, as would be necessary to establish preemption. The Court stated its disagreement with other recent District Court decisions finding preemption under similar facts.

The Court then addressed the plaintiffs' motion to amend the judgment to include treble damages pursuant to Chapter 80, which they requested even though the trial and conduct at issue had occurred prior to the effective date of the amendment. The Court denied the skycaps' motion, noting that as a general rule all Massachusetts statutes are prospective in their operation unless made retroactive by unequivocal terms.

The District Court further held that since the amendment constitutes a change to the substantive rights of employers and employees, it cannot be applied retroactively. The Court examined whether the amendment was enacted as a clarification of the existing law, but held that since the amendment was not an immediate reaction to any application of the law and because the legislature had given no clear indication that the amendment was meant to explain the statute, the

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## FMLA Does Not Protect Trip To Attend Faith-Based Healing Event

In *Tayag v. Lahey Clinic Hospital, Inc.*, the District Court held that a seven-week trip abroad to help an ill spouse participate in a faith healing event was not protected under the Family and Medical Leave Act (FMLA). The Court found that "[t]he FMLA does not permit employees to take time off to take a vacation with a seriously ill spouse, even if caring for the spouse is an 'incidental consequence' of taking him on vacation."

Lucy Marie Tayag, a woman of Filipino descent, commenced employment at Lahey Clinic Hospital in 2002. During her employment, she routinely took leave of one or two days at a time pursuant to the company's FMLA policy to care for her husband, who suffered from several chronic health problems. In June 2006, Tayag requested seven weeks of vacation, and when that request was denied, she asked for the same amount of FMLA leave. Tayag provided a number of reasons why she needed the leave: (1) to aid her husband's recovery from eye and hip surgery; (2) to take care of her husband during his recovery from a recent angioplasty procedure; and (3) to assist her husband in managing his chronic liver and kidney problems. Tayag failed to provide an adequate medical certification to support any of these reasons notwithstanding the company's requests for further documentation.

Despite the fact that her leave had not been approved, Tayag left for the Philippines and stayed there for seven weeks. While there, Tayag and her husband, both practicing Catholics, spent three and a half weeks attending a "Pilgrimage of Healing Ministry" at St. Bartholomew Parish because its priest was known for his "miraculous healing" abilities. Of the remaining time, nineteen days were spent with family and friends. At no point during their trip did Mr. Tayag receive medical treatment or visit a health care professional.

While the Tayags were in the Philippines, Mr. Tayag's cardiologist submitted a medical certification indicating that Mrs. Tayag did not need to take FMLA leave to care for her husband. After several unsuccessful attempts to contact Tayag to obtain appropriate FMLA documentation,

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*“Treble Damages Provision,” cont’d from page 1*

amendment could not be deemed a clarification. In addition, the Court ruled against the skycaps’ argument that the decision of the Massachusetts Supreme Court (SJC) in *Somers v. Converged Access, Inc.* mandated that the recent amendment be given retroactive effect. The Court stated that in *Somers* the SJC merely listed damages that might be available to the plaintiff, but did not express an opinion as to the retroactive effect of the amendment.

Following *DiFiore*, the presiding judge of the Business Litigation Session of the Superior Court likewise held that Chapter 80 does not apply retroactively. In *Hernandez v. Hyatt Corp.*, hotel employees argued that the company had violated the Tip Statute by including banquet captains in its hotels’ service charge pools. The plaintiffs asserted that the mandatory treble damages provision applied retroactively to the conduct at issue, which occurred between 2002 and 2004. Judge Hinkle relied heavily on the District Court’s analysis in *DiFiore* in finding the provision does not apply to alleged conduct that predates the amendment.

Together, *DiFiore* and *Hernandez* provide increased support for the proposition that mandatory treble damages cannot be imposed on conduct that occurred prior to the effective date of Chapter 80. Of the four trial court decisions that address this issue, three have decisively held that the amendment has no retroactive effect.

*“FMLA,” cont’d from page 1*

Lahey terminated her employment. After her termination, Tayag brought claims against Lahey for violation of the FMLA, as well as discrimination claims under the Americans with Disability Act (ADA), Title VII of the Civil Rights Act of 1964, and Massachusetts General Laws ch. 151B.

The Court held that even if “caring for a seriously ill spouse on a trip for non-medical religious purposes is a protected activity under the FMLA”—a prospect that the Court noted is “far from clear”—Tayag’s claim failed because almost half of her trip was spent visiting friends and family. The Court also granted Lahey’s motion for summary judgment as to each of her remaining disability, race, religion, and national origin discrimination claims because they were either dependent on the outcome of her FMLA claim or because she had failed to exhaust her administrative remedies by filing a charge of discrimination at an appropriate agency.

This case reaffirms that FMLA leave must be used for covered purposes, and may not be invoked as a substitute for vacation time.

## First Circuit Finds Evidence of Pretext in “Shifting Explanations”

In *Vélez v. Thermo King de Puerto Rico, Inc.*, the U.S. Court of Appeals for the First Circuit found evidence of pretext in an age discrimination case where an employer terminated a fifty-six year old employee without explanation, later disclosed the reason to the Puerto Rico Anti-Discrimination Unit (PRADU), and then added a second explanation to the first when the case was filed in federal court. The First Circuit’s ruling highlights the risks employers take when refusing to explain termination decisions or offering partial explanations.

Jose Vélez had worked for Thermo King for twenty-four years when the company fired him without explanation. At the time of his termination, Vélez was a tool crib attendant with access to expensive tools and supplies. After he filed an age discrimination complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and with PRADU, Thermo King revealed for the first time that it fired Vélez for accepting gifts from suppliers. When Vélez withdrew his claim from PRADU and filed suit in federal court, Thermo King further elucidated its reasons for terminating him—not only had he accepted gifts from suppliers, but he had also sold Thermo King’s tools and supplies to other employees without authorization.

The U.S. District Court for the District of Puerto Rico granted Thermo King’s motion for summary judgment. The First Circuit reversed the decision on appeal, finding that three aspects of the evidence would permit a jury to conclude that Thermo King was motivated by age-based discrimination. First, the Court found evidence of pretext because Thermo King gave different reasons at different times for Vélez’s termination. Second, the Court found the employer’s policies regarding the acceptance of gifts from suppliers was sufficiently ambiguous to make it unclear whether Vélez had violated that policy. While the Court noted that Thermo King was in the best position to interpret its own policies, it held that in conjunction with the shifting explanations, the ambiguous policy added to the suspicion that the company’s explanation for Vélez’s termination had been fabricated.

Finally, Thermo King failed to terminate other younger employees for their complicity in Vélez’s alleged thefts. This evidence was, in the Court’s view, “unusually strong.” While Thermo King argued that Vélez was the ring leader and that none of the younger employees had profited from or made a business out of the sale of company tools and materials, the Court found this distinction “meaningless” because the younger employees had admitted their wrongdoing and were therefore equally worthy of discipline.

While Thermo King never contradicted itself in explaining its reasons for terminating Vélez, the evolving nature of the company’s explanation contributed to the Court finding strong evidence of pretext. In light of the First Circuit’s ruling, employers are well advised to provide employees with complete and accurate explanations for termination decisions, and to be consistent in articulating those reasons to employees, administrative agencies, and courts.

## Court Finds Massachusetts Wiretap Act Governs Out of State Telephone Recording

The Massachusetts Wiretap Act prohibits a party from recording a telephone conversation without first informing the other party or parties participating in the conversation. In *Heffernan v. Hashampour*, the Superior Court held that the statute applies when a party outside of Massachusetts secretly records a telephone call to a party in Massachusetts.

Reza Hashampour was the Chief Executive Officer of Vianix Delaware, LLC, a Virginia-based software corporation. Vianix licensed software to Nuance Communications, Inc., a Massachusetts-based corporation. In 2007, Vianix filed a lawsuit against Nuance related to the software licensing agreement between the parties. Shortly thereafter, while he was in Virginia, Hashampour allegedly secretly taped multiple telephone conversations with Donna Heffernan, a Nuance employee, and several other Nuance employees, while they were in Massachusetts. During discovery in the dispute between Vianix and Nuance, Heffernan and the other employees learned that the calls had been recorded without their knowledge. They brought suit against Hashampour and Vianix for violation of the Massachusetts Wiretap Act. Hashampour and Vianix moved to dismiss on the grounds that Virginia law—which does not prohibit covert telephone recording—governed Hashampour's actions.

The Court found that Hashampour's motion to dismiss turned on whether Massachusetts or Virginia law controls in this situation. In reaching its decision that Massachusetts law applies, the Court relied on the Second Restatement of Conflict of Laws, § 152, which specifies that in invasion of privacy cases, "the local law of the state where the invasion occurred determines the rights and liabilities of the parties" and that "the place of invasion is the place where the plaintiff was at the time." The Court therefore denied Hashampour's motion to dismiss because the Massachusetts Wiretap Act governed the telephone recordings he made in Virginia unbeknownst to the Massachusetts participants.

Prior to the *Heffernan* decision, the District Court had reached the opposite conclusion, holding that such secret recordings were covered by the law of the state where the recording occurred. The *Heffernan* Court, however, found the District Court's decision outdated because the SJC had since held that courts should look to the Restatement in conflict of law cases, which the District Court had not done.

Thus, the *Heffernan* decision provides individuals in Massachusetts with a basis for asserting claims under the Massachusetts Wiretap Act for any undisclosed recording of their telephone conversations, regardless of the location where the taping party places the call.

## No Violation of Release by Bringing Suit for Breach of Severance Agreement

In *Bukuras v. Mueller Group, LLC*, the First Circuit held that an employee did not breach the general release provision of his severance agreement by initiating a good faith challenge to the employer's interpretation of its obligations under that severance agreement.

In 2003, George Bukuras entered into an employment contract with Mueller Group, LLC. Pursuant to the terms of that agreement, Bukuras was entitled to an annual bonus based on the company's performance. In addition, in the event the employer terminated his employment, Bukuras would receive a severance payment that would include 150 percent of the "bonus paid or payable" for the fiscal year immediately preceding the fiscal year in which his termination occurred.

In 2005, Mueller entered into a merger agreement with another entity. The merger became final at the beginning of the 2006 fiscal year. Bukuras received a significant transaction bonus for his efforts in completing the deal. Shortly thereafter, the company terminated Bukuras's employment without cause. As a condition of receiving his severance payment, Bukuras signed a broad, general release of all claims against the company.

In May 2006, Bukuras received his severance payment, which was calculated using the amount of his 2005 annual bonus, but not the transaction bonus he received as a result of the merger. Bukuras filed suit for breach of contract in District Court, and Mueller counterclaimed, asserting that Bukuras breached the release he signed by suing the company. The District Court granted the parties' cross-motions for summary judgment and dismissed both claims.

The First Circuit affirmed, holding that the transaction bonus was not payable in the fiscal year preceding the year of Bukuras's termination, as defined in the severance provision of the employment agreement. Moreover, based on the context in which the term was used, the Court found that the parties had intended the provision to refer only to Bukuras's regular annual bonus.

With regard to Mueller's counterclaim, the First Circuit held that Bukuras's breach of contract claim relating to his severance payment fell outside of the provisions of the release he had executed because the "precise amount of the severance payment had not been liquidated at the time the release was executed." Mueller's interpretation of the provision thus would have deprived Bukuras of any recourse had the company failed to pay him as specified in the agreement. The Court also found that while a release may serve as an affirmative defense, it does not supply a defendant with an independent claim for breach of contract. The Court further reasoned that the damages Mueller sought—attorneys' fees and costs—could not be obtained in the absence of an agreement or statute specifically permitting such fee shifting.

This case demonstrates that release provisions in severance agreements may not be used offensively, but rather provide a defense to claims covered by the release. In addition, such provisions may not be used to prevent an employee from challenging a breach of the severance agreement itself.

## Employer Does Not Violate ADA by Terminating Employee Unable To Perform Essential Job Functions

In *Richardson v. Friendly Ice Cream Corporation*, the First Circuit affirmed a District Court ruling that an employee was not discharged in violation of the ADA because the employee was incapable of performing the essential functions of her position with or without a reasonable accommodation.

Katharine Richardson, an assistant manager at one of the Friendly Ice Cream Corporation's (Friendly's) restaurants in Maine, injured her shoulder at work and took a leave of absence under the FMLA to undergo shoulder surgery. After the surgery, she informed Friendly's that her condition prohibited her from performing repetitive activity with her right arm and from lifting objects weighing more than five pounds. Friendly's terminated Richardson's employment, stating that she had remained on leave beyond the time permitted under the company's FMLA policy.

Following her termination, Richardson first filed a charge of discrimination with the Maine Human Rights Commission and the EEOC, and then filed suit in District Court, alleging that Friendly's discharged her because of her disability.

In view of the trial court's decision to dismiss Richardson's claim, the First Circuit held that she was not qualified for her position at the time of her discharge. Since it was undisputed that Richardson was disabled, the First Circuit's analysis focused on whether she would be able to perform the essential functions of her position with or without accommodation. The Court rejected Richardson's argument that her only essential function involved overseeing the operation of the restaurant. Instead, after reviewing a job description for the assistant manager position and testimony about the tasks Richardson had performed in that position, the Court concluded that Richardson's essential functions also included assisting in kitchen, dining, and take-out operations, all of which required performing a number of predominantly manual tasks.

The Court next examined whether Richardson could complete these essential functions without a reasonable accommodation. The Court concluded that even though Richardson could do some manual tasks using her left arm only, without a reasonable accommodation the number of fundamental tasks Richardson could not execute would prevent her from fulfilling her necessary operational duties effectively.

Finally, the Court considered whether Richardson could sufficiently carry out her job with a reasonable accommodation. Richardson argued that as a reasonable accommodation, she could delegate her manual tasks to other restaurant employees. The Court rejected this proposed accommodation, stating that if Richardson were to delegate her numerous tasks of this sort, she would "no longer be performing her essential function of physically assisting with the restaurant's operations."

This decision elucidates the analytical process courts use to determine whether an employee can perform the essential functions of his or her job with or without an accommodation. When evaluating employee requests for accommodation, employers may find it helpful to refer to the factors leading to the Court's ruling in this case.

## Massachusetts Security Standards Go into Effect

On March 1, 2010, Standards for the Protection of Personal Information of Residents of Massachusetts went into effect. These Standards require businesses that collect personal information from Massachusetts residents to create a comprehensive written information security program. Since "personal information" is defined to include the first name or initial combined with the last name of the individual, together with a social security number, credit card number, or bank account number, every Massachusetts employer will likely need to comply. The Standards apply to electronic and paper records.

The Standards require a business to implement a wide variety of data security "best practices." Employers will need, among other things, to assess how information is handled and secured, train employees (including temporary and contract employees) on privacy and security matters, ensure the physical security of electronic and paper records containing personal information, control whether and how employees may access personal information outside the business, encrypt personal information that is uploaded on laptops or mobile devices or transmitted outside of the company's network, and ensure that service providers protect the security of the personal information.

Seyfarth Shaw's privacy team assists clients in developing and implementing their data privacy and security programs, and Seyfarth Shaw at Work© provides privacy and security training. For further information, contact Bart Lazar at [blazar@seyfarth.com](mailto:blazar@seyfarth.com) or click on the following link to review Seyfarth Shaw's Management Alert on this topic: <http://www.seyfarth.com/MA082509>

## Table of Cases

*Bukuras v. Mueller Group, LLC*, No. 08-2160 (1st Cir. Jan. 20, 2010).

*DiFiore v. Am. Airlines, Inc.*, No. 07-10070-WGY (D. Mass. Dec. 23, 2009) (Young, J.).

*Heffernan v. Hashampour*, No. MICV2009-2060-F (Dec. 19, 2009) (Curran, J.).

*Hernandez v. Hyatt Corp.*, No. SUCV2005-0569-BLS1 (Feb. 8, 2010) (Hinkle, J.).

*Richardson v. Friendly Ice Cream Corp.*, No. 08-2423 (1st Cir. Feb. 5, 2010).

*Somers v. Converged Access, Inc.*, 454 Mass. 582 (2009).

*Tayag v. Lahey Clinic Hosp., Inc.*, No. 08-10727-PBS (D. Mass. Jan. 6, 2010) (Saris, J.).

*Vélez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441 (1st Cir. 2009).

Next *Massachusetts Employment & Labor Law Report*: **June 15, 2010.**

## Upcoming Breakfast Briefing

**April 1, 2010:** "An Altered Landscape for Non-Compete Agreements in Massachusetts? Learn the Latest on the Proposed Non-Compete Agreement Legislation"

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