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Employees Must Arbitrate Discrimination Claims Only If Arbitration Agreement States Clear Intention

In *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, the Massachusetts Supreme Judicial Court (SJC) held that an employment contract purporting to waive or limit an employee's rights under the Massachusetts anti-discrimination statute is enforceable only if the intent to do so is stated in "clear and unmistakable terms."

Carol Warfield, the former chief of anesthesiology at Beth Israel Deaconess Medical Center (BIDMC), filed an action in Massachusetts Superior Court, alleging gender discrimination and retaliation in violation of Massachusetts General Laws ch. 151B (Chapter 151B). BIDMC moved to dismiss the action and compel arbitration of Warfield's claims based on an arbitration provision in her employment agreement, which stated: "Any claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration." The Superior Court denied BIDMC's motion finding that the arbitration clause in Warfield's employment agreement did not cover her discrimination and retaliation claims "because the agreement did not govern her employment relationship . . . generally, but only the narrow topic of her duties as chief of anesthesiology, and the claims of discrimination fell outside this narrow topic."

On appeal by BIDMC, the SJC agreed with the lower court. Specifically, the Court held that while "parties to an employment contract are free to agree on arbitration of statutory discrimination claims . . . parties seeking to provide for arbitration of statutory discrimination claims must, at a minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause."

This decision provides clarity to Massachusetts employers regarding the use of arbitration agreements. Unless the agreement clearly articulates that statutory discrimination claims are subject to arbitration, courts in this Commonwealth will not compel arbitration of those claims. Due to the potential ramification of this decision, employers are well advised to review the arbitration provisions of all their employment agreements.

SJC Outlines Damages for Independent Contractor Misclassification

In *Somers v. Converged Access, Inc.*, the SJC held that an employee misclassified as an independent contractor may sue for nonpayment of wages even if the employee earned more as an independent contractor than he or she would have earned as an employee. The Court ruled that any such misclassified individual is entitled to overtime and other benefits at the rate he or she was paid as an independent contractor rather than the rate the individual would have been paid as an employee.

Robert Somers twice applied for employment with Converged Access, Inc. (CAI), but neither application resulted in a job offer. He later agreed to work for CAI as an independent contractor. CAI paid Somers at a higher rate as an independent contractor than he would have earned as an employee, but did not pay him overtime or provide him with any of the other benefits CAI's employees receive.

After CAI terminated his contract and failed to respond to a third application for employment, Somers filed suit against the company in Superior Court, asserting a claim for nonpayment of wages based on his misclassification as an independent contractor. CAI moved for summary judgment, arguing that even if it misclassified Somers, he was not harmed by the misclassification because he earned more as an independent contractor than he would have earned as an employee. The Superior Court agreed and dismissed the claim.

Somers appealed, and the SJC reversed. The Court found that Somers had in fact suffered damages because he was entitled to overtime, vacation and holiday pay, and other benefits received by CAI's employees based upon the hourly rate he received as an independent contractor rather than the hourly rate he would have received had he been hired as an employee. The Court also noted *in dicta* that if Somers prevailed at trial, he could be entitled to treble damages under Massachusetts General Laws ch. 149, § 150 (Payment of Wages Act).

This decision highlights the importance of properly classifying workers as "employees" or "independent contractors." It is no defense to a

nonpayment of wages claim that a worker earned more as an independent contractor than the worker would have earned as an employee.

The Court's liberal view of what damages are available for violations of state wage and hour laws is disquieting. In Massachusetts, entitlement to vacation depends upon whether a contract provides for vacation. But notwithstanding the fact that Somers's contract did not provide for vacation, the SJC held that he would be entitled to vacation pay if he prevailed. The Court's decision also holds that Somers would be entitled to benefits, even though federal benefits law, not state wage and hour law, governs most entitlement to employee benefits. Litigation over these issues is likely in the wake of the SJC's decision.

Employers Must Pay Unused Vacation Time to Discharged Employees

In *Electronic Data Systems v. Attorney General*, the SJC recently held that the failure to pay unused vacation time to involuntarily terminated employees violates Massachusetts General Laws ch. 149, § 148 (Wage Act). The Wage Act requires employers to pay all wages that are due to an employee on the day of his or her discharge. The Wage Act further provides that "wages" include "vacation payments due an employee under an oral or written agreement" but prohibits employers from contracting around the Wage Act's requirements by entering into "special contracts" with employees.

In this case, EDS terminated an employee and, invoking language in its vacation policy, which stated that it would not pay any employee leaving the company on a voluntary or involuntary basis for unused vacation time, declined to pay the employee for his unused vacation time. The employee filed a complaint with the Massachusetts Attorney General's fair labor division, and the Attorney General cited EDS for failure to make timely payment of wages. EDS appealed the citation.

On appeal, EDS argued that because "vacation payments" under the Wage Act's definition of "wages" are only those due under the terms of an employment agreement and its policy explicitly provided that employees leaving EDS would not be paid for unused vacation time, no payment was due the employee "under a written agreement." The Attorney General, in turn, argued that once the employee had accumulated vacation time under the vacation pay policy, it became due under the definition of "wages," and therefore constituted "wages earned," which the Wage Act required EDS to pay on the day of the employee's discharge. The Attorney General considered the portion of EDS's vacation policy denying payment for unused vacation time to constitute an unenforceable "special contract."

The SJC agreed with the Attorney General. The SJC first held that vacation pay was in fact "earned" under the policy, despite the policy's language to the contrary, because employees were eligible for vacation based upon the number of hours they worked per week and their years of service. The SJC then stated that where an employer provides for vacation in an employment agreement or policy, that vacation becomes due to the employee for Wage Act purposes day by day as the employee works. The Court noted that vacation may be "lost by disuse," but vacation earned pursuant to an employer's policy may not be forfeited at termination.

With this case, the SJC left open many questions regarding the application of the Wage Act to vacation pay policies. For instance, the case does not address payment of unused vacation upon voluntary termination. Nor does it discuss the circumstances under which vacation may be forfeited pursuant to a "use-it-or-lose-it" policy. The case makes clear, however, that the Wage Act requires employers to pay discharged employees for any accrued, unused vacation.

SJC Finds Non-Employer May Be Held Liable for Retaining Service Charges Under Massachusetts Tip Statute

In *DiFiore v. American Airlines, Inc.*, the SJC held that American Airlines violated Massachusetts General Laws ch. 149, § 152A (Tip Statute) when it failed to remit a fee charged for curbside check-in to skycaps who were employed by a contractor of the airline. The Tip Statute requires an "employer or other person" to remit a "service charge" to employees in occupations that customarily receive tips or gratuities and defines a "service charge" as a fee charged by an "employer" in lieu of or in addition to a tip or fee that a customer would reasonably expect to be given to the employee.

In *DiFiore*, ten skycaps, eight of whom were employed by independent contractor G2 Secure Staff, filed a lawsuit against American, alleging that the airline violated the Tip Statute when it implemented a $2 per bag fee for curbside check-in and failed to distribute the proceeds of the charge to the skycaps. Instead, after collecting the fee, the skycaps employed by G2 were required to remit it to G2 (who split the fee with American), and the skycaps employed by American remitted the fee directly to American. After a jury verdict in favor of most of the skycaps, American requested a new trial, arguing that the statutory definition of a "service charge" only includes charges levied by an "employer," and therefore it could not be liable for the claims of the G2 skycaps. The G2 skycaps, on the other hand, argued that because liability can attach to employers or "other persons"

under the Tip Statute, American could be liable even though it was not their direct employer. Because this was a novel issue, the court asked the SJC to clarify whether an entity other than an employee's direct employer may be held liable for failing to distribute a service charge.

The SJC held that American was liable to the G2 employees notwithstanding that it was not their employer. The Court reasoned that the Legislature enacted the Tip Statute to ensure that service employees receive all proceeds from service charges that customers intended for them to receive. This purpose would be undercut if a business in the service industry, such as an airline or restaurant, could escape liability by entering into a contract with a third party, such as G2, under which the third party employs workers and shares a service charge collected from customers with the service entity.

This decision could have far-reaching implications for businesses in the service industry that contract with third parties for the provision of labor, particularly in light of the fact that Tip Statute claims are now subject to mandatory treble damages. Under *DiFiore*, a business may not avoid liability under the Tip Statute by outsourcing services to a third party and contractually requiring the outsource employer to remit to that business all or part of a service charge. Rather, the Tip Statute requires that service employees receive all the proceeds from service charges.

SJC Holds Anti-Discrimination Policy Trumps Deference to Labor Arbitrators' Decisions

In *Massachusetts Bay Transportation Authority (MBTA) v. Boston Carmen's Union, Local 589*, the SJC reviewed two separate arbitration awards and held that a public employer may act contrary to the terms of a collective bargaining agreement (CBA) in order to remedy illegal discrimination.

The first case involved a hearing-impaired job applicant whom the MBTA did not hire because he could not pass a physical exam. The applicant was not permitted to wear his hearing aid during the examination. He filed a disability discrimination claim with the Massachusetts Commission Against Discrimination (MCAD). The MCAD found probable cause to believe that discrimination had occurred, and the MBTA chose to settle the matter by hiring the applicant, granting him retroactive seniority under the CBA, and setting his rate of pay at the top of the CBA's pay scale. The MBTA never sought the Union's approval of the settlement.

The Union filed a grievance, seeking an order prohibiting the MBTA from negotiating with individual employees to establish terms or conditions of employment without its consent. An arbitrator concluded that a private settlement cannot deviate from the terms of a CBA without the Union's consent absent an adjudication of discrimination. The Superior Court affirmed the arbitrator's decision.

The SJC vacated the arbitrator's award on public policy grounds, holding that there was a "substantial basis" to believe that the MBTA had discriminated against the applicant because the MCAD had found probable cause and the remedy provided in the settlement was the remedy "awarded presumptively" after a finding of discrimination in hiring.

In the second case, the MBTA discovered that women and minorities were being excluded from its "spare inspector" list and issued a new list, resulting in some employees losing seniority to more junior employees. An arbitrator concluded that the MBTA had a right to place employees' names on the list but could not remove names from the list without Union authorization. The Superior Court affirmed the arbitrator's decision.

This time the SJC confirmed the award. The SJC found that the employees on the list had acquired seniority rights under the CBA, and the MBTA could not strip those rights in the circumstances because no one had come forward with a claim of discrimination and the MBTA had failed to prove at arbitration that it had discriminated against anyone when it initially populated the list. Thus, the SJC concluded that public policy concerns were not implicated, and therefore the MBTA should have negotiated with the Union to remedy any improper appointments.

The SJC's holding suggests that public employers with unionized workforces may only act unilaterally to correct discriminatory practices if they can point to evidence of discrimination, such as a probable cause finding. Otherwise, public employers should negotiate with Union representatives to remedy any alleged discriminatory practices. It is unclear whether the Court would have reached the same result with a private employer because federal labor law generally displaces inconsistent state laws.

Court Applies Mandatory Treble Damages Retroactively Creating Split Among Superior Court Judges

In July 2008, the Massachusetts Legislature amended Massachusetts General Laws ch. 149, § 150 (Payment of Wages Act) to make treble damages mandatory for all state wage and hour law violations. The legislation was in reaction to a 2005 SJC ruling, which found that, as drafted, the statute permitted treble damages awards only in those situations involving "willful misconduct" by the employer. Under the amendment, treble damages are required even if the employer made an inadvertent error or acted in the good faith but mistaken belief that its conduct complied with the statute.

Since the amendment, however, there has been substantial disagreement as to whether the amendment should be applied retroactively to mandate treble damages in actions arising from conduct that occurred before the effective date of the amendment.

In a 2008 decision issued by a Superior Court judge in *Pantano v. Artificial Life, Inc.*, the Court held that the amendment should not be applied retroactively. The *Pantano* Court looked to the well established legal principle that an amendment that substantially changes parties' rights and expectations should only be applied retroactively where the statute specifically provides for it or where the context indicates that the Legislature intended for the amendment to be applied retroactively. The Court determined that the amendment to the Payment of Wages Act met neither criteria and therefore should not be applied retroactively.

In a more recent Superior Court decision, *Rosnov v. Malloy*, a Superior Court judge found differently by applying the amendment retroactively. The Court in this case, however, did not consider the two alternate requirements under Massachusetts law discussed in *Pantano* for applying a statute retroactively. Instead, the Court relied solely on the incorrect assumption that "violators of the Wage Act have always been subject to treble damages" in reaching its decision that the amendment did not "substantially change[] parties [sic] rights and expectations." In fact, treble damages were added in 1993. In reaching its conclusion, the *Rosnov* Court ignored the substantial change in employers' rights caused by the mandatory treble damages law.

These conflicting decisions would appear to create some uncertainty as to the application of mandatory treble damages to wage claims arising from pre-amendment violations. Until a Massachusetts appellate court addresses this specific issue, employers defending state wage and hour claims will have to face the possibility of treble damages for conduct that occurred prior to the enactment of the statute's amendment.

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