

2005 IN REVIEW: 10 IMPORTANT DEVELOPMENTS FOR MASSACHUSETTS EMPLOYERS

Employment law is typically dynamic and in 2005 it was no different. There were several significant developments, including the U.S. Supreme Court's recognition of "disparate impact" age discrimination claims and the Massachusetts Supreme Judicial Court's ruling that treble damages are not automatic for wage law violations. This expanded end-of-the-year issue of the ELA will recap these and other important developments, as well as provide practical advice for employers in dealing with these new changes.

1. OLDER WORKERS MAY CLAIM "DISPARATE IMPACT" AGE DISCRIMINATION

In March 2005, the United States Supreme Court ruled in *Smith v. City of Jackson* that a person can sue an employer under the federal Age Discrimination in Employment Act ("ADEA") (which protects workers age 40 or older from employment discrimination) under a "disparate impact" theory. Unlike disparate *treatment* claims, which are aimed at intentional acts of discrimination, disparate *impact* claims attack employment practices that are facially neutral in their treatment of different groups but in operation adversely impact one group more than another (*e.g.*, a pre-employment test may be neutral in content but may act as a barrier for a protected group). On a positive note, the Supreme Court ruled that the availability of such claims is limited: the employer's action will not be found to violate the ADEA if "reasonable factors other than age" account for the disparate impact. Because federal courts may now look beyond differential treatment to the impact of a particular employer policy, employers must be particularly conscious of how their policies, including layoff decisions, affect older workers.

2. NEW PERM LABOR CERTIFICATION RULES

In March 2005, the U.S. Department of Labor (DOL) introduced PERM, a new set of regulations and procedures governing U.S. employers' sponsorship of foreign nationals for full-time permanent employment. (Labor Certification). For most foreign nationals seeking U.S. permanent residence ("green card status") based on an offer of employment PERM is the only avenue and the first step in the path to achieving lawful permanent residence in the U.S.

Under PERM the Labor Certification application is completed online on a Form ETA 9089, Application for Permanent Employment Certification. Before filing an application employers must follow and complete a very structured set of procedures which includes:

- Filing of request for a prevailing wage determination;
- Mandatory advertising in at least two Sunday editions of a major newspaper (or one Sunday edition and one professional journals);
- Listing of the job opportunity with the State's online job bank;
- Internal postings within the workplace of the job opportunity;
- Satisfaction of at least three additional alternative methods of recruitment as provided by the regulations;
- Preparation and maintenance of a Recruitment Report that summarizes the recruitment efforts and explains the grounds for any rejections of U.S. applicants.

The singular advantage of the PERM system is that once the case is filed processing can be completed in as little as 30 days, although average cases appear now to be taking between 2 and 3 months. The primary disadvantage is that the PERM recruitment process is cumbersome and timeline sensitive: one missed recruitment step can render some or all of the prior recruitment useless. In addition, PERM imposes strict document retention requirements on

employers. Time and experience will tell whether in fact the new PERM system is an improvement over the simpler but much more lengthy pre-PERM Labor Certification process.

3. ENFORCEABILITY OF NON-COMPETES AFTER MATERIAL JOB CHANGES

In our September 2004 ELA, we alerted you to several Massachusetts trial court decisions that created uncertainty regarding the enforceability of non-competition agreements and other restrictive covenants in some situations. These decisions held that where an employee had signed a restrictive covenant at the time of hire and then had a change of position (such as a promotion) without executing a new restrictive covenant, the original agreement was unenforceable. In September 2005, in *Getman v. USI Holdings Corporation*, another trial court rejected the rule applied in those earlier cases.

In *Getman*, an insurance agent who years earlier had executed an employment agreement containing restrictive covenants, including a non-competition provision, argued that the agreement effectively had been rescinded by the employer because it had made unilateral changes in the terms of Getman's employment that were contrary to the terms of the earlier agreement. These changes included promotions to Senior Account Executive and to Vice-President. Without much analysis, the Court rejected Getman's argument, finding simply that the promotions "were not inconsistent with" the earlier agreement. Whether *Getman* signals a shift in thinking among Massachusetts trial judges is unclear, and the law in this area remains unsettled. Accordingly, to enhance their ability to enforce employee restrictive covenants, employers should continue to follow the steps outlined in our September 2004 ELA (which is available at http://www.mbbp.com/practices/employment/ela/ela_0904_-_non_competes.pdf).

4. FEDERAL COURT ADDRESSES RETALIATION CLAIMS

In July 2005, a federal magistrate issued a decision that potentially broadens the scope of retaliation claims in Massachusetts. In *Gore v. Trustees of Deerfield Academy* the Court ruled that the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act may cover acts by an employer that are not employment-related or even directed at the employee.

In *Gore*, the plaintiff, an employee at Deerfield Academy, alleged that the Academy retaliated against her for

complaining about harassment by denying her *daughter* admission to the school. The plaintiff claimed that she suffered emotional distress as a result of her daughter's rejection. Deerfield Academy sought to have this claim dismissed, arguing as a matter of law that denying admission to plaintiff's daughter was not an "adverse employment action" directed at the plaintiff. (Generally, to legally establish a threshold case of retaliation, a plaintiff must show that (1) she engaged in protected conduct, (2) she suffered an adverse *employment* action, and (3) a causal connection exists between the two.) The Court disagreed, ruling that the claim should not be dismissed before trial. Citing cases that broadly defined acts of retaliation, the magistrate reasoned that: "[C]ourts have had little choice but to recognize in appropriate circumstances that anti-retaliation provisions may cover actions that are not directly employment-related." In allowing the plaintiff's claim to proceed to trial, the Court seemed particularly influenced by a note made by a Deerfield admissions employee on the daughter's application. The note, dated two days after plaintiff's termination and five days after plaintiff complained, stated that plaintiff "no longer work[ed]" for Deerfield.

Retaliation claims continue to be a favorite of disgruntled current and former employees (as discussed in a MBBP article on the topic, available at http://www.mbbp.com/publications/articles/Retaliation_Claims.pdf.) Employers must carefully evaluate every act taken in relation to an employee after that employee has raised workplace complaints, especially in light of the *Gore* decision.

5. NEW CORI REGULATIONS

In June 2005, new regulations took effect for employers that are certified to request Criminal Offender Record Information ("CORI") data from the Massachusetts Criminal History Systems Board (the "CHSB") concerning prospective or current employees or volunteers. Among other things, the new regulations require organizations requesting CORI information to adopt a written policy that, at a minimum, does the following:

- notifies the applicant that an adverse decision may be made based on the CORI data;
- provides that a copy of the applicant's CORI data and the agency's CORI policy will be given to the applicant;
- provides that the applicant will be given a copy of the CHSB's "Information Concerning the Process in Correcting a Criminal Record";

- provides that the applicant will be informed which part of the criminal record appears to make him ineligible; and
- provides that the applicant will have an opportunity to dispute the accuracy and relevance of the CORI (before any adverse decision is made).

6. TREBLE DAMAGES NOT AUTOMATIC UNDER MASSACHUSETTS WAGE ACT

In July 2005, in *Wiedmann v. The Bradford Group, Inc.*, the Massachusetts Supreme Judicial Court ruled that judges are not required by the Massachusetts Payment of Wages Act, G.L. c. 149, §§ 148-159C, to award treble damages (triple the pay owed) to prevailing plaintiffs. Rather, the Court concluded that such awards are in the judge's discretion. In addressing how that discretion should be exercised, the Court stated that treble damages are punitive in nature, and appropriate only where conduct is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."

7. COURT ENFORCES EMPLOYEE'S RELEASE OF WAGE CLAIMS

In January 2005, in *Gordon v. Millivision Holdings, LLC*, a Massachusetts Superior Court held that an employee's claim for unpaid wages under the Massachusetts Payment of Wages Act was barred because the employee had knowingly and voluntarily released such claims. Plaintiff worked as a design engineer for Millivision, a technology start-up. Like many emerging companies, in its early years Millivision had difficulty obtaining funding and meeting payroll. As a result, several employees including plaintiff agreed to forego their salary from time to time but continued working. Plaintiff was then laid off, but later was offered a regular, full-time position after the company had become more successful and had secured financing. As a condition of his employment offer and in exchange for stock options, plaintiff was asked to release any claims he had to past unpaid wages. Plaintiff agreed to this condition and signed the release. However, after his employment with Millivision was terminated, he filed suit seeking to recover the past unpaid wages. The plaintiff did not allege fraud or duress in signing the release. Rather, he argued that the Payment of Wages Act forbids releases of wage claims and that the duty to pay past wages was absolute. The Court rejected plaintiff's argument, finding no proscription in the statute against releasing a wage claim.

8. NON-OFFICER INVESTORS MAY BE INDIVIDUALLY LIABLE FOR WAGE VIOLATIONS

In June 2005, a Massachusetts Superior Court ruled in *O'Leary v. Henn* that a 40% shareholder who had actively managed the affairs of a company could be held individually liable for nonpayment of wages under the Payment of Wages Act. The plaintiff, O'Leary, had worked for Cognistar Corporation for three years. He alleged that during this time much of his wages and vacation pay were not paid by Cognistar. After Cognistar filed for bankruptcy, O'Leary sued Karl Eller, who at the time of Cognistar's bankruptcy filing held 40% of Cognistar's stock. Eller moved to dismiss the case for failure to state a legal claim, arguing that he could not be found individually liable under the Wage Act because he only had served as an outside director and investor of Cognistar and that he never served as an officer of the company.

The Wage Act provides that "[t]he president and treasurer of a corporation and any officers or agents having management of such corporation shall be deemed employers," and such individuals shall be held personally liable along with the corporation for unpaid wage claims. The Court refused to dismiss the claim against Eller, finding that O'Leary might prove: that Eller had actively managed the affairs of Cognistar directly; that Eller had communicated with Cognistar management via frequent conference calls; that Eller controlled the daily operations of Cognistar after he had obtained secured creditor status; that Eller directed that wages not be paid to employees; and that Eller gave the direction to deny payment of plaintiff's unpaid wages and vacation pay. In short, the Court ruled that O'Leary might be able to prove his claim that Eller was the "de facto" president and treasurer of Cognistar.

9. ALLOWING EMPLOYEE TO WORK FROM HOME MAY BE REASONABLE ACCOMMODATION FOR HANDICAP

In June 2005, in *Smith v. Bell Atlantic*, the Massachusetts Appeals Court ruled that allowing a handicapped employee to perform substantial amounts of her work from home was a reasonable accommodation because uninterrupted attendance in the office was not an essential function of her job. This decision should remind employers that courts evaluate whether a handicapped employee's request for accommodation is reasonable by examining the essential functions of the employee's position, and whether other employees with the same

duties are allowed to work in the way requested by the handicapped employee.

The plaintiff, Smith, worked for Bell Atlantic as a “second-level manager,” and had succeeded in the workplace despite suffering from the effects of childhood Polio and, later, Post-Polio Syndrome. Following a medical leave of absence, Smith returned to work but requested to do some of her work from home. Smith’s request to work from home was supported by her physician and agreed to by Bell Atlantic. However, at trial, the jury found that Bell Atlantic had failed to reasonably accommodate Smith’s request to work from home because it did not provide her with adequate resources to do so. (There was also evidence that her supervisor hindered her efforts to work from home by his practice of leaving handwritten instructions for her at the office and not including her in meetings by teleconference.) As a result, Smith frequently needed to travel to the company’s office to print out data she needed to perform her job, and needed to work extra hours to complete assignments. Ultimately, she became too fatigued to travel to the office and, after concluding she could no longer do her work effectively, went out on permanent disability.

The Appeals Court upheld the jury’s award of emotional distress damages, finding that daily presence in the office was not “essential” to Smith’s work as a second-level manager. The Court concluded that, although the company nominally agreed to a work-from-home arrangement, the company did not adequately implement it (the company did not argue that providing the modest resources required, *e.g.*, a computer and a communications link with the company’s network, was an undue burden).

10. WIDESPREAD SEXUAL FAVORITISM MAY CONSTITUTE SEXUAL HARASSMENT

In July 2005, in *Miller v. Department of Corrections* -- a case that may influence courts in other states -- the California Supreme Court ruled that widespread sexual favoritism in a workplace may create an actionable hostile work environment for employees not involved in the

relationships. Such conduct, the Court reasoned, can convey to female employees the demeaning message that they are viewed by management as “sexual playthings” or that the way required for women to get ahead is by engaging in sexual conduct with their supervisors. In contrast to *Miller*, many courts and state fair employment enforcement agencies have ruled that *isolated* instances of favoritism on the part of a supervisor toward a female employee with whom the supervisor is involved in a consensual sexual affair may be unfair but do not ordinarily constitute sexual harassment toward other employees. This is because the other employees are disadvantaged for reasons other than their gender.

In *Miller*, the plaintiffs were two female former employees at a prison who claimed that the prison’s warden accorded unwarranted favorable treatment to numerous female employees with whom the warden was having sexual affairs. They argued that such conduct, which included job transfers, employment benefits, and promotions, constituted sexual harassment in violation of the California Fair Employment and Housing Act. The trial court and the lower appeals court rejected the plaintiffs’ claims, concluding that a supervisor who grants favorable employment opportunities to a person with whom the supervisor is having a consensual sexual affair does not commit sexual harassment toward other, non-favored employees. The California Supreme Court reversed, relying heavily on an Equal Employment Opportunity Commission policy statement that widespread sexual favoritism may create an atmosphere that is demeaning toward woman and results in hostile work environment.

Should you have questions or concerns about these new developments or other employment law or immigration matters, please contact a member of our Employment and Immigration Practice Group.

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