

2006 in Review: New Developments For Massachusetts Employers

2006 was no stranger to new developments in the dynamic area of employment law. This issue of the *Employment Law Advisor* summarizes the most significant of these new legal developments and offers practical advice for employers on how to respond.

Separation Agreements Subject to Increased Scrutiny

As reported in our October 2006 *ELA*, several cases highlight the increased scrutiny of employee separation agreements, especially those agreements which purport to release federal age discrimination claims under the Age Discrimination in Employment Act. These cases have questioned provisions in agreements that are used routinely by many employers. To summarize, several cases have held that separation agreements are not enforceable if they purport to waive an employee's right to file claims of discrimination with the Equal Employment Opportunity Commission. Other cases have held that common provisions in which the employee "covenants" (promises) not to sue and promises to "tenderback" (give back) severance payments if he or she does so are *per se* retaliatory and thus not enforceable. Given that there is real risk that separation agreements currently used by employers contain provisions that arguably are no longer enforceable, employers are well advised to have their separation agreements reviewed by counsel.

Employee Handbooks Can Create Liability

A Massachusetts court issued a decision that should remind employers that handbooks can still create employer liability. In *Wakefield v. Ortega Thermal Solutions, Inc.* the employer issued an employee handbook that contained the usual disclaimers that the handbook was not a contract and employees were employed "at-will" and could be fired at any time. The employer fired an employee "on-the-spot" for perceived dishonesty. The former

employee sued, alleging that the employer should have followed the progressive disciplinary policy in the handbook (*i.e.*, verbal warning, written warning, suspension, termination). The court held that, despite the disclaimers, whether the handbook constituted an enforceable agreement was a question for the jury. The court even suggested that the employer's use of such disclaimers could be found to be misleading or fraudulent.

The lesson from the *Wakefield* case is that employers should understand that handbooks can create contractual arrangements and thus employers should make sure they can live up to handbook policies—or not include or adopt such policies. Moreover, employers should consider removing any statement suggesting a promise of "fairness" or that progressive discipline would be applied. Finally, handbooks should use more explicit disclaimers to reduce the risk of litigation.

MCAD Procedures Change

Recently, the Massachusetts Commission Against Discrimination changed significantly how the agency handles complaint processing. Specifically, rather than requiring an "investigative conference" in nearly every case where each side and their counsel can present their positions, the MCAD has eliminated this hearing in most cases. Further, the MCAD now is issuing "investigatory discovery" in most cases. This discovery is similar to discovery used in court litigation.

These two changes require employers in most cases to "front-load" their preparation of the defense. Employers will need to carefully prepare their position statement to the MCAD and explain in detail the employer's legitimate business reasons for taking action against the complainant. Moreover, the use of discovery will require much more precise preparation of the case to ensure the employer takes consistent, well thought out positions.

The Supreme Court Substantially Expands Retaliation Claims

In *Burlington Northern & Santa Fe Railway Co. v. White*, the United States Supreme Court substantially increased the scope of retaliation claims under Title VII—the federal law prohibiting workplace discrimination on the basis of sex, race, national origin and religion. The Court held that the anti-retaliation provision in Title VII is not limited to conduct related to compensation, terms, conditions or privileges of employment but rather applies to any retaliatory conduct. Moreover, the Court broadened the ability of employees to bring claims by lowering the level of harm an employee must suffer to establish such a claim. The Court held that the plaintiff must show that "a reasonable employee would have found the challenged [retaliatory] action materially adverse, which, in this context, means that it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Plaintiffs now will have a significantly easier time establishing claims of retaliation under Title VII. Employers should also anticipate that this lower standard will be applied to the anti-retaliation provisions of other federal laws (such as the ADA, ADEA and FMLA) and possibly state law as well. As such, employers need be even more careful in their handling of employees who have engaged in "protected activity" (such as filing a claim of discrimination or supporting such a claim).

Internal Complaints Regarding Wage Violations Protected Against Retaliation

The Massachusetts Supreme Judicial Court held that internal complaints

regarding wage violations are protected by statutory prohibitions against retaliation. In *Smith v. Winter Place LLC* the employer argued that the Payment of Wages statute's anti-retaliation provisions only protected employees with regard to complaints made to enforcement agencies, such as the Attorney General's office. The Court rejected this position, holding that an employee who reasonably believes the employer is violating wage statutes and makes an internal complaint to his or her employer has engaged in protected conduct.

Prior to this ruling, many employers believed that only formal complaints to enforcement agencies were protected. Now, employees have gained another measure of legal protection. Thus, employers must be even more vigilant in making sure that employment decisions cannot be argued to be retaliatory.

Disability-Related Misconduct is Not Protected

In *Mammone v. President and Fellows of Harvard College*, the Massachusetts Supreme Judicial Court held that an employee who engaged in egregious misconduct caused by his bipolar disorder was not entitled to statutory protection on the basis of disability. In *Mammone*, the plaintiff, who suffered from bipolar disorder, worked as a receptionist at a Harvard museum. Due to his condition, the plaintiff engaged in a variety of bizarre workplace behavior which culminated in an arrest by campus police. This conduct resulted in the plaintiff's termination. The court held that the plaintiff's egregious misconduct, although caused by his disability, rendered him "unqualified" for his position. Although this decision makes clear that misconduct on the job is a legitimate basis for termination, employers should continue to be careful in terminating any employee with a disability.

Employers (and Their Supervisors) May Be Held Liable for Derogatory Comments

In *Martin-Kirkland v. UPS*, a Massachusetts trial court held that an employer and its supervisor could potentially be liable for the supervisor's alleged invasion of a subordinate's privacy. The supervisor allegedly made derogatory comments about a subordinate's management skills during

conference calls, screamed obscenities at her and disclosed to co-workers her failure to meet "her numbers." The court held that these allegations were sufficient to require a jury trial because the supervisor's behavior was related to the interests of the employer and disclosure of private facts in intracorporate communications was sufficient to impair the plaintiff's right to privacy. This case suggests broadened potential liability for employment-related privacy claims. It also reinforces the notion that performance-related criticisms should be disclosed to only those management personnel with a "need to know."

Massachusetts Enacts Health Care Law

Massachusetts has enacted a health care reform that creates sweeping changes to health care insurance regulations. The new law mandates that, as of January 1, 2007, all employers of 10 or more employees adopt a premium-only cafeteria plan, provide and subsidize health insurance, and provide coverage for dependent children for two years longer than the IRS definition of a "dependent child." If an employer does not make a "fair and reasonable" contribution to a health plan it sponsors, it must make a \$295 annual "Fair Share" contribution on behalf of each employee. Moreover, if the employer (i) does not offer a cafeteria plan and arrange for health insurance and (ii) its employees (or their dependents) receive a certain level of health care that is paid for by the state, then the employer will be assessed a "Free Rider Surcharge".

Massachusetts Increases Minimum Wage

Overriding the Governor's veto, in August the Massachusetts legislature adopted a two-step increase in the state minimum wage. On January 1, 2007, the minimum wage will increase to \$7.50 per hour and on January 1, 2008, will increase again to \$8.00 per hour.

A Frivolous Non-Compete Lawsuit Can Be an Unfair and Deceptive Business Practice

In *Brooks Automation v. Blueshift Technologies, Inc.*, a Massachusetts trial court found that a company willfully violated the Massachusetts Unfair Trade Practices Act (M.G.L. c. 93A) by filing a frivolous non-competes claim against a former employee and the start-up company he founded so it could interfere with the former employee's/start-up's efforts to develop a relationship with a key customer. In sum, the court found that the plaintiff filed its lawsuit only

on a vague belief that the defendants stole trade secrets without reasonably investigating whether theft actually occurred. Moreover, the court found that the former employee did not violate the non-competes when he engaged in preparations to compete. In the end, the court awarded triple damages to the former employee and his company as well as nearly \$1,000,000 in attorneys' fees. This case sends the strong message to employers to carefully investigate any suspected violations of non-competes agreements before filing lawsuits, as well as redrafting non-competes agreements to bar former employees from preparing to compete during a non-competition period.

Significant 2006 Jury Awards and Settlements

2006 saw a number of significant jury awards and settlements. For example, a large insurance company was hit with a \$1.3 million judgment after a jury found that the company had terminated an insurance agent because of his disability. In addition, the MCAD affirmed three six-figure emotional distress awards (of \$100,000, \$125,000, and \$195,000). Finally, a well known technology employer paid \$1.14 million to its Vice President of Marketing to settle allegations of sexual harassment by the Company's former President and CEO.

As these awards and settlements indicate, employers continue to run significant risks in employment-related practices. They emphasize the need for adopting best practices in employee relations, and for investing in preventive practices such as training and employment law audits.

The Morse, Barnes-Brown & Pendleton, PC, **Employment & Immigration Practice Group** provides sophisticated legal services and practical advice to employers of all sizes, ranging from technology start-ups to Fortune 1000 companies.

Robert M. Shea – rshea@mbbp.com
Mark H. Burak – mburak@mbbp.com
Donald W. Parker – dparker@mbbp.com
John J. Gallini – jgallini@mbbp.com
Sandra E. Kahn – skahn@mbbp.com
Scott J. Connolly – sconnolly@mbbp.com

Employment Law Advisor is intended as an information source for clients and friends of MBBP. It should not be construed as legal advice, and readers should not act upon information in this article without professional counsel.

© 2006 Morse, Barnes-Brown & Pendleton, P.C.

 **MORSE
BARNES-BROWN
PENDLETON PC**
The law firm built for business.SM