



# Labor & Employment Law Section

March 2008 **Newsletter**

# Section Co-Chairs' Corner

The Labor and Employment Section year is flying by, filled with educational programs, public service initiatives, and most recently, a purely social after-work event at the Elephant & Castle Pub. This event was co-sponsored by the New Lawyers Section and was great fun. Employment lawyers – new and not so new alike – met lawyers in the early stages of their careers and enjoyed hors d'oeuvres, spirits and good conversation. Few of us take the time in our increasingly busy lives to relax and connect with colleagues and it's easy to forget how restorative such mini-escapes can be. We hope the event marks the beginning of a new tradition for our Section, promoting not only stronger professional networks for all of us but also encouraging the development of genuinely collegial relationships.

Our popular lunchtime educational “Brown-Bag” series has been in high gear all year. . In December, State Representative **Marty Walz** from Littler Mendelson P.C. and **Becca Rausch** from Krokidas & Bluestein LLP presented on the new Massachusetts Data Security Breach Law about the new obligations imposed on Massachusetts employers. The first brown-bag program of the new year in January covered the EEOC's new guidelines on “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities”. **R. Liliana Palacios-Baldwin** of the EEOC provided a useful overview of this emerging area of discrimination that particularly affects the current “sandwich generation”. In February, employment and tax lawyers gathered to learn about tax issues in employment law cases from **Rob Webb** of Nutter McClennen & Fish LLP and **Patricia Metzger** of Vacovec of Mayotte & Singer. The program provided welcome clarity on the vexing tax questions that arise with settlement awards and other tax aspects of employment cases. Most recently, **Nina Joan Kimball**, of Kimball Brousseau LLP, presented on new significant recent amendments to the Family and Medical Leave Act (FMLA), including new amendments to the statute that provide protection for members of the military and their families; the DOL's proposed new FMLA regulations; and pending U.S. Supreme Court cases on the enforceability of FMLA waivers. We have several informative Brown Bag programs planned for this spring as well, and hope to see you there – first Tuesday of each month, at the BBA, from 12:30-2:00.

Our Section will offer three CLE seminars this spring. On March 12, experienced practitioners presented “Litigating and Winning Employment Discrimination Cases” and offered practical guidance on the early stages, discovery and trial phases of an employment case. On April 9, an expert panel, including the **Hon. Allan Van Gestel**, will speak about non-competition agreements and other restrictive covenants. On Saturday morning May 3rd, the **35th Annual Workshop for Public Sector Labor Relations Specialists** will take place. Our last CLE of the year will be held on June 12th and will focus on the use of economic, mental health, and vocational experts in employment cases.

We have also been active on the legislative front. This winter, members of the Steering Committee drafted comments on the Attorney General's Proposed Advisory on the Massachusetts Independent Contractor Law, M.G.L. c. 149, § 148B. BBA President Tony Doniger signed the letter, which outlined concerns about the 2004 amendments and asked for more guidance on enforcement policies. A productive follow-up meeting was held with representatives of the Steering Committee and the Business and Fair Labor Bureau and a dialogue continues.

Our public service projects are also progressing well. A group of Steering Committee and Section members are working to rewrite Massachusetts General Laws Chapter 151B, concentrating first on making the statute more accessible, coherent and internally consistent. Phase I, focusing on punctuation and plain English, is moving forward under the capable guidance of Jay Shepherd and James Weliky. We are also proud to announce that the BBA is in the final stages of publishing the *Employment Law Guide* to serve as a resource for Massachusetts employers and employees without ready access to counsel. This publication, written by several members of our Steering Committee, was previously distributed to the Section via email and will soon be available on the BBA website.

As always, we welcome your comments and ideas for programs or events and hope to see you at as many of the upcoming programs as possible! We will soon begin to think about next year for the L&E Steering Committee and welcome your input on how we can make it a rewarding and productive year for all members.

- **Jennifer Catlin Tucker** and **Jody Newman**

# Calendar of Section Events

## CLE Programs

### Surviving the Noncompete Surge

**Wednesday, April 9, 2008**

4:00 p.m. - 7:00 p.m.

*Sponsored by: The Labor & Employment Law and Litigation Sections*

Over the past three years, the number of noncompete lawsuits has increased by 43%; over the past decade, the number has nearly doubled. To stay competitive, employers in today's knowledge economy have to find the best talent to succeed, and then keep their rivals from luring that talent away. As a result, more companies are finding themselves embroiled in noncompete litigation. And today's courts are scrutinizing noncompete agreements more closely than ever.

The lawyers advising these companies have to know how the litigation will play out in Massachusetts courts. Our panel of noncompete experts will help you steer your clients around the many landmines in this fast-moving, fast-changing area of law. Hear from two practitioners who have handled hundreds of these cases between them; a general counsel with the in-house, real-world view of noncompetes; and the judge who presided over more noncompete litigation than any other Massachusetts jurist.

#### Program Chair

**Jay Shepherd**, Esq., Shepherd Law Group

### Workshop for Public Sector Labor Relations Specialists

**Saturday, May 3, 2008,**

9:00 a.m. - 12:00 p.m.

For more information on this or any other CLE program, please visit our website at:

<http://www.bostonbar.org/cle/index.htm>

## Special Events

### BBA Law Day Dinner 2008 - Tables on Sale Now!

**Thursday, May 22, 2008**

5:30 p.m. - Reception and 7:00 p.m. - Dinner

Boston Marriott Copley Place  
110 Huntington Avenue, Boston

To register, please visit our website at <http://www.bostonbar.org/ps/lawday08/homepage020508.htm>.

The Boston Bar Association invites you to be a part of the celebration for the 50th Anniversary of Law Day Dinner. Join your colleagues on May 22 for an evening of camaraderie and reflection at the biggest bench/bar event in Massachusetts.

This year, the BBA presents renowned scholar and author **Professor Cass Sunstein** as our keynote speaker. Described by The New York Times as "one of America's most able, innovative and prolific constitutional experts," Cass Sunstein is the Karl N. Llewellyn Distinguished Service Professor of Jurisprudence at the University of Chicago.

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## Past Events

The January 2008 brown bag kicked off the new year with a review of “The EEOC’s New Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.” R. Liliana Palacios-Baldwin, Senior Trial Attorney for the U.S. Equal Employment Opportunity Commission provided an overview of the EEOC’s new guidance, which is intended to assist employers, employees, and Commission staff in determining whether discrimination against persons with caregiving responsibilities constitutes unlawful disparate treatment under federal EEO. After presenting her overview, in true “brown bag” spirit, Lili was able to engage all 25 attendees to participate and share their experiences in the emerging area of family responsibility discrimination with the group.

In February, our brown bag program focused on “The Tax Aspects of Employment Cases,” which covered strategic issues such as drafting complaints to yield beneficial tax treatment, Section 409A of the Internal Revenue Code (nonqualified deferred compensation plans), and important tax considerations for employment litigators on both sides. The tax luncheon was led by Rob Webb, a tax attorney at Nutter, McClennen & Fish, and Patricia Metzer, a tax attorney at Vacovec, Mayotte & Singer, who were able to present the often complex and highly-structured subject of taxes in a user-friendly and enlightening manner to the 35 attendees. Rob and Pat also spoke about the tax treatment of settlement awards and fielded many questions from the attendees.

In March, we continued our successful and well-attended brown bags with “What’s New with the FMLA: New Service Member Leave Amendments, DOL’s Proposed Regulations & Family Responsibility Discrimination Claims.” Attorney Nina Kimball of Kimball Brousseau LLP presented to the 40 attendees a summary of the high points of the Department of Labor’s 125 pages of proposed significant changes to the 15-year old FMLA regulations. Topics included how the U.S. Supreme Court is considering whether FMLA waivers are enforceable, the two new types of Service member leave, what employers need to do to update leave policies, and following up on January’s brown bag topic, how the FMLA can be used to combat family responsibility discrimination, which is the subject of the EEOC’s 2007 Caregiver Guidance described above.

So far this year the Brown Bag programs have been substantive and timely, providing practical and important information to our section members. Brown Bag Co-Chairs Suzanne Suppa and Justine Brousseau would like to thank the presenters for taking time to share their knowledge and experience to make the luncheons so successful.

Stay tuned for further announcements on upcoming programs.

## Judicial Update

**Nguyen v. William Joiner Center, 450 Mass. 291 (2007).**

The Supreme Judicial Court upheld the dismissal of a complaint alleging discrimination on the basis of age in employment in violation of Chapter 151B and in education under Chapter 151C brought against the University of Massachusetts at Boston (“University”) and the William Joiner Center for the Study of War and Social Consequences.

In 2000, the defendants sought applicants for new research fellowships to study the Vietnamese diaspora. Fellows would become temporary employees of the University and would have all the privileges of university faculty. On January 4, 2000, the fellowships were announced to the public via a press release, letter, and advertisements in Vietnamese publications. The application deadline was January 31, 2000, after which time, four individuals were chosen as fellows. The plaintiffs did not learn about the fellowship opportunity until April 11, 2000. When the defendants sought applicants for the fellowships again in 2001 and 2002, the plaintiffs did not apply because they had filed a charge with the Massachusetts Commission Against Discrimination (MCAD) and believed that applying for the fellowships would be futile.

After the MCAD dismissed the charge for lack of probable cause, plaintiffs filed a complaint in Superior Court alleging individual and class claims. The Superior Court dismissed the complaint finding that the announcements in 2000 did not permit an inference of discriminatory animus and because the plaintiffs never applied for the 2001 and 2002 positions. The Appeals Court affirmed with different reasoning, concluding that the plaintiffs sought class protection

based on their political beliefs, which is not a protected class under either Chapter 151B or Chapter 151C.

The SJC affirmed the judgment of the courts below. As to the plaintiffs' Chapter 151B claims, the SJC affirmed dismissal for failure to state a *prima facie* case. The plaintiffs put forward no evidence that the defendants' chosen method of notice for the fellowship positions in 2000 was motivated by discriminatory animus. With respect to the 2001 and 2002 positions, the SJC concluded that the plaintiff did not establish "a consistently enforced pattern and practice of discrimination" which would preclude the need to apply for the position in order to establish their *prima facie* cases. See *International Bhd. Of Teamsters v. United States*, 431 U.S. 324 (1977) (holding that a plaintiff is not required to subject himself or herself to rejection where an employer has a consistent policy of discrimination). The SJC affirmed dismissal of the Chapter 151C claim because the plaintiffs were not covered under the statute. Chapter 151C applies only to students and prospective students, and here, the plaintiffs were applying for positions which would afford them the privileges of faculty.

**Franceschi v. Dep't of Veterans Affairs, 2008 WL 240274 (1st Cir. 2008).**

The First Circuit affirmed summary judgment for the defendants where the plaintiff had failed to exhaust his administrative remedies with the Equal Employment Opportunity Commission ("EEOC"). The Court of Appeals' decision clarified the circumstances under which a plaintiff can bootstrap a claim as to which administrative remedies have not been exhausted to a claim as to which they have.

In 2001, the plaintiff, a medical doctor, was passed over for promotion in favor of his colleague Gracia-Lopez, who became the plaintiff's superior. Gracia-Lopez soon informed the plaintiff that there were numerous performance deficiencies in his area of responsibility. Over the next two years, she also warned the plaintiff about unexcused absences and other violations of hospital protocol. In 2003, the hospital's Equal Employment Officer ("EEO") met with the plaintiff concerning allegations that he was giving favorable treatment to a female employee with whom he was romantically involved. The plaintiff claimed that he complained about Gracia's "harassing" and "micro-managing" behavior to the EEO officer at this time. A few months later, the plaintiff received a poor

job evaluation. His prior evaluations had all been positive. After receiving this poor evaluation, the plaintiff filed a charge with the EEOC, alleging a pattern of gender harassment and unfavorable gender treatment arising out of his poor evaluation.

After he filed the charge, the plaintiff continued to receive poor evaluations at work and on June 8, 2004, he received an "unsatisfactory" rating, which resulted in a demotion. In his subsequent federal lawsuit, he added a retaliation claim to the claims he had brought before the EEOC. The district court granted summary judgment on all three of the plaintiff's claims, finding that with respect to the first two complaints, the plaintiff failed to exhaust administrative remedies. As to the retaliation claim, the district court found no causal connection to the EEOC charge.

The First Circuit affirmed. As to the harassment and disparate treatment claims, the court held that under Title VII, employees must exhaust administrative remedies before filing in court, which requires the filing of a charge with the EEOC and either its subsequent dismissal or the issuance of a right to sue letter by the EEOC not less than 180 days after filing. Here, the plaintiff filed suit in district court while he still had one charge pending with the EEOC and before the 180 days had passed. The court therefore affirmed summary judgment for the first two charges of discrimination on the basis of failure to exhaust administrative remedies.

As to the retaliation claim, the Court of Appeals held that such a claim may be bootstrapped to a claim of discrimination that has already been before the EEOC for 180 days. This is so, the court said, because the retaliation grows out of the discrimination complained of in the underlying claim. Here, none of the claims were properly before the court, and there was therefore nothing to which the retaliation claim could relate.

**Cicarelli v. School Dep't Lowell, 877 N.E.2d 609 (Mass.App.Ct. 2007).**

The Appeals Court upheld a jury verdict finding retaliation by the deputy superintendent of the Lowell School department against a provisional teacher whose contract was not renewed. The Court also upheld the jury's award of emotional and punitive damages in the amount of \$50,000.

The plaintiff, Sara Ciccarelli, became a provisional teacher at Lowell High School in the 1995-1996 school year. She was in the process of gaining an advanced provisional certification, on a 5 year program involving on-the-job teaching experience and course work. In her first year, she received the highest ratings in her evaluations and was rehired by Lowell for the 1996-1997 school year. Prior to the beginning of her third year, both the high school headmaster and the superintendent reported their intention of rehiring the plaintiff.

On July 31, 1997, the city attorney received a list of witnesses for an MCAD case brought by a colleague of the plaintiff's. The plaintiff's name was on the list. Four days later, the deputy superintendent called the plaintiff to discuss her lack of progress toward advanced certification. Prior to this call, the plaintiff had never been criticized for her performance or work toward advanced certification. During this call, the plaintiff stressed that she still had 3 years to complete 3 courses, but the deputy superintendent doubted her ability to do so and told her she could not return to her job unless she took the courses immediately. The deputy superintendent ended the conversation by saying "how can I rehire you..." Despite the plaintiff's lawyer's attempts at securing her position for her again, the school refused. A month after she should have returned to her job, the school department could not find a replacement for the plaintiff, and therefore offered her reemployment one day before she was due to testify. She refused.

The court rejected the attorney's argument that the deputy superintendent could not make hiring and firing decisions and that the plaintiff had quit her job by failing to show up to work. The Massachusetts Education Reform Act states that although principals are responsible for hiring and firing of teachers, those decisions are "subject to approval by the superintendent." See Massachusetts Educational Reform Act of 1993. The judge concluded that the jury reasonably could have determined that the deputy superintendent had the authority to act and made the decision not to rehire the plaintiff.

The court also rejected the School's argument that there was no causal link between the adverse employment action and the protected activity. The court pointed out that a jury may infer a causal link if an adverse action occurs immediately after an employer becomes aware of the protected activity. Here, the

court reasoned that the jury could have found a causal link when she was not rehired only four days after the school learned that she was engaging in protected activity.

The court also upheld the award of punitive damages because there was ample evidence for the jury to determine that the defendant's action was "outrageous" and that it "warranted condemnation and deterrence." Here, the defendant responsible for the adverse action abused her position as a high-ranking public official, which the jury could have concluded was outrageous behavior. Furthermore, the jury could have inferred the offer of reemployment only one day before the plaintiff was scheduled to act as a witness was meant to change her testimony. The court reasoned that tampering with the legal process is a grave concern and punitive damages were therefore appropriate.

**Massachusetts Bay Transp. Auth. v. MCAD, 450 Mass. 327 (2008).**

The SJC affirmed a judgment that the MBTA had discriminated against the plaintiff by failing to undertake any investigation to determine whether it could reasonably accommodate the his sincerely held religious beliefs in violation of M.G.L. ch. 151B § 4.

The plaintiff's sincerely held religious beliefs prohibited him from working on the Sabbath, from sundown Friday until Saturday. The plaintiff was a successful applicant for a part time bus driver position with the MBTA until he explained that he could not work on Friday evenings. The MBTA, without conducting an investigation, determined that it could not accommodate him and therefore would not extend him an offer of employment. The plaintiff suffered extreme emotional distress as a result. The MCAD found that the MBTA had violated M.G.L. ch. 151B § 4 by failing to provide a reasonable accommodation, and by failing to even investigate whether such an accommodation was possible. The Superior Court affirmed.

The SJC analyzed whether (1) the MBTA had demonstrated that any possible accommodation of the plaintiff's religious beliefs would have been an undue hardship and (2) whether any accommodation would have imposed more than a de minimis cost on the MBTA in violation of the establishment clause. Although the SJC credited the MBTA's arguments that some of the accommodations would have been an undue hardship on the MBTA, the court found that the MBTA failed to

demonstrate that there were not other possible reasonable accommodations' that would not have resulted in an undue hardship- namely voluntary shift swapping which was a common practice at the MBTA.

The SJC declined, however, to affirm the Superior Court's holding that would require an investigation into the reasonableness of accommodations under all circumstances. Instead, the SJC held that an investigation is not always necessary. If an employer can prove without an interactive process that all possible accommodations would impose an undue hardship, then there is no obligation on the part of the employer to undertake such an investigation. Here, however, the MBTA did not establish that all possible accommodations would impose an undue hardship. Finally, the SJC held that the MCAD had the authority to require the MBTA to hire the plaintiff.

**Forrest v. Brinker Int'l Payroll Co, 511 F.3d 225 (1st Cir. 2007).**

The First Circuit affirmed a grant of summary judgment to an employer concluding that, although gender-based verbal abuse arising out of a failed romantic relationship at the workplace did constitute discrimination on the basis of sex, the employer was not liable because it took prompt remedial action.

The plaintiff was a server and bartender at Chili's. She had an on-again/off-again relationship with a co-worker. When the plaintiff began dating another man in March, 2005, the co-worker began to disparage her at work, using sex-based derogatory language. The plaintiff reported the verbal abuse to her manager, but asked him not to fire the co-worker. Chili's had a sexual harassment policy, which the manager followed, giving the co-worker an oral warning. A few weeks later, the plaintiff complained again, and the co-worker was issued a final written warning. The manager told the plaintiff to inform him if any other incidents involving the co-worker occurred. When the plaintiff complained about the co-worker 's behavior again two week later, he was fired.

The plaintiff brought a Title VII action alleging that Chili's had exposed her to a hostile work environment. The district court found that the plaintiff was not subjected to sexual harassment and that even if she was, Chili's was not liable for the co-worker harassment because it took prompt remedial action.

The First Circuit affirmed the decision, although it held that the plaintiff had been subjected to a hostile work environment. The court reasoned that the relationship would not have occurred but for the plaintiff's sex. The court also found an abundance of support for the proposition that the use of sexually degrading language is sufficient to establish a hostile work environment. However, liability for co-worker harassment attaches to the employer only when the employer fails to take prompt remedial action under Title VII. Here the court found no reasonable jury could conclude that the employer did not take prompt remedial action through its warnings and ultimate termination of the harasser.

**Mariani-Colon v. Department of Homeland Security, 511 F.3d 216 (1st Cir. 2007).**

Mariani-Colon, a provisional air marshal for the Transportation Security Administration, alleged he was discriminated against on the basis of his race, sex, color, and national origin after his employment was terminated. He also brought a retaliation complaint. The First Circuit affirmed the district court's grant of summary judgment in favor of the defendant on all counts.

The plaintiff was provisionally granted the position of federal air marshal in May, 2002. His initial rate of pay, like that of other incoming air marshals, was determined with reference to a list of qualifying factors. As a result, his pay was set at the same level as approximately 47% of the incoming air marshals, but was lower than that assigned to the other 53%. To become a permanent employee the plaintiff would have to complete a training program at the Federal Law Enforcement Training Center (FLETC) . The appellant had difficulty concentrating and failed a number of tests throughout the twelve-month program. He was eventually suspended for a serious rule infraction involving the use of deadly force in which another student could have been injured. As a result of this suspension, the appellant did not graduate, and his employment was eventually terminated.

The Court of Appeals concluded that while the appellant established *prima facie* cases of discrimination and retaliation, he was unable to overcome the defendant's legitimate nondiscriminatory reasons for its actions: the objective list of criteria used to set his initial pay, and the numerous safety violations, learning difficulties and untrustworthy behavior that result-

ed in his suspension and eventual termination. The court summed up the plaintiff's arguments of pretext as being based solely on subjective speculation.

**St. Fleur v. WPI Cable Systems/Murton, 450 Mass. 345 (2008).**

The SJC remanded this dispute over the existence of an agreement to arbitrate to the Superior Court to hold an evidentiary hearing pursuant to the expedited procedures of section 2 of the Massachusetts Arbitration Act.

Although there was a signed arbitration agreement, the parties disagreed about the circumstances of its execution. According to the plaintiff, in 2001, her manager requested her to sign a single page of an incomplete agreement. She did not know what she was signing, and when she asked her manager just told her "not to worry about it" and that "everybody had to sign it." In contrast, the employer alleged that the plaintiff had received a complete agreement along with copies of the Company's arbitration policy and a summary memo. According to the employer, the plaintiff was advised to consult with an attorney about the agreement. When she still had not signed after five months, she was asked to either sign the agreement or confirm in writing her refusal to do so, at which time she signed the agreement.

The employer argued that the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (2006) applied to the present case. The SJC noted that the Act contains specific references federal courts and the Federal Rules of Civil Procedure but none to state courts or state rules of procedure. The SJC therefore determined that the Act's procedures were inapplicable to state courts and determined that Massachusetts courts should follow the procedures set forth in M.G.L. ch. 251, § 2 relating to arbitration agreements. The court concluded that the provisions of Chapter 252, § 2 require an evidentiary hearing when there is a genuine dispute as to a material fact. Because this case presented a genuine dispute as to a material fact, whether there was fraud in the inducement of the plaintiff's signature on the arbitration agreement, the SJC remanded the case to the Superior Court for an expedited evidentiary hearing on the matter pursuant to Chapter 252, § 2.

*Submitted by **Chris Powell** and **Amanda Kellar**, Ropes & Gray LLP*

## Supreme Court Watch

**LaRue v. DeWolff, Boberg & Assocs., 552 U.S. \_\_\_\_ (Feb. 20, 2008).**

Drawing a distinction between "defined contribution plans" (such as 401(k) plans) and "defined benefit plans" (more traditional pension plans that pay out a defined benefit) the Court ruled that the Employee Retirement Income Security Act (ERISA) does provide a remedy to an individual claimed to have been injured by a breach of fiduciary duty on the part of the administrator of his 401(k) plan. The plaintiff, James LaRue, had sued his former employer and the administrator of his 401(k) plan after his individual 401(k) account lost \$150,000 in value because, he alleges, the plan did not follow his investment instructions in 2001 and 2002. The District Court and the Fourth Circuit rejected his claim. The Fourth Circuit, relying in the Supreme Court's 1985 decision in *Massachusetts Mutual Life Ins. Co. v. Russell*, ruled that the plaintiff, because he was seeking individual relief for himself rather than relief for the plan as a whole, had no remedy under Section 502(a)(2) of ERISA, which it claimed only provided remedies "for entire plans, not for individuals."

The Supreme Court disagreed, pointing out that the landscape of employee benefit plans has changed since *Russell* was decided and since ERISA was enacted. Retirement plans used to be predominantly defined benefit plans, where the employee received a fixed benefit based usually on years of service and compensation. Misconduct by the administrator of a defined benefit plan would not have changed an individual participant's entitlement to a defined benefit, unless the conduct created a risk of default by the entire plan. In those circumstances, individuals like the plaintiff in *Russell* could not sue to recover individual benefits (Russell's claim was not for a denial of benefits, but compensation due to a delay in paying her benefits). Today, by contrast, most employees have defined contribution plans, in which the value of the account is determined by the amounts the individual and employer have contributed over the years. In these accounts, misconduct by the administrator need not threaten the entire plan to reduce benefits to individuals, and this is the type of harm ERISA is meant to remedy. Therefore, the Court held, "although Section 502(a)(2) does not provide a rem-

edy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.”

**Sprint/United Mgmt Co. v. Mendelsohn**, 552 U.S. \_\_\_\_ (Feb. 26, 2008).

In a unanimous decision, the Supreme Court ruled that evidence of non-parties alleging discrimination by company supervisors who were not the decision maker is neither per se admissible nor per se inadmissible in an individual's age discrimination case. The plaintiff, Ellen Mendelsohn, sought to introduce evidence through five coworkers, of discriminatory comments and conduct that the coworkers had experienced. Sprint moved to exclude this so called “me too” evidence at trial on the grounds that it was not relevant because these coworkers worked in a different part of the company and for different supervisors from plaintiff and the decision maker. The District Court excluded the evidence as not relevant on the grounds that the five coworkers were not similarly situated to the plaintiff. Specifically, the District Court ruled that to be admissible, the evidence had to be from a coworker who was similarly situated meaning (1) the adverse action had to be by the same decision maker, and (2) there must be appropriate temporal proximity. On appeal, the Tenth Circuit ruled that the District Court had erroneously applied a per se rule that evidence of discriminatory behavior by non-decision makers is per se inadmissible. It then determined that the evidence was relevant and applied a balancing test to determine that it was not prejudicial and should have been admitted.

The Supreme Court vacated. It determined that a per se rule is very rarely appropriate when determining the relevancy of evidence. As to the evidence of alleged discriminatory conduct by non-decision makers, the Court concluded that it was neither per se admissible nor per se inadmissible. It explained that it “is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.” However, this was a question that the District Court, not the Court of Appeals, should have made, as questions of relevance and prejudice should be decided in the first instance by the trial court.

## **Employment Cases Awaiting Decision by the Supreme Court**

The Supreme Court has heard argument in some other employment cases and has recently granted certiorari in still more employment cases two of which will be heard and decided this term.

**Progress Energy, Inc. v. Taylor**, No. 07-539. The issue is whether, as the Fourth Circuit ruled, retrospective waivers of claims under the Family & Medical Leave Act (FMLA) when settling an FMLA claim are invalid unless approved by a court or the Department of Labor. The Court sought the input of the Solicitor General, who supports the position of the Department of Labor, that such retrospective waivers are valid and serve an important purpose in encouraging the private settlement of FMLA claims.

**CBOCS West, Inc. v. Humphries**, No. 06-1431. The issue is whether 42 U.S.C. § 1981 prohibits retaliation against individuals who complain of race discrimination. The plaintiff, Herndrick Humphries, who is African American, was fired after he complained about race discrimination. He brought claims for race discrimination and retaliation under both Title VII and § 1981. The Title VII claims were dismissed on procedural grounds. Section 1981, which prohibits race discrimination in the making and enforcement of contracts, does not contain explicit language outlawing retaliation. Nevertheless, the Seventh Circuit ruled that § 1981 does contain broad protection against retaliation. The Supreme Court decided to hear the case despite the lack of lower court conflict.

**AT&T Corp. v. Hulteen**, No. 07-543. The issue is whether AT&T's service credit policy which provides less service credit to women who were on maternity leave prior to the enactment of the Pregnancy Discrimination Act in 1979 (which amended Title VII), than to employees who were on other types of temporary disability leave is discriminatory. The Ninth Circuit ruled that AT&T's policy violated Title VII by denying service credit in calculating pension and retirement benefits to women who took maternity leave prior to 1979. The Pregnancy Discrimination Act required employers to treat women taking maternity leave the same as employees who took other forms of leave. AT&T claims that the Ninth Circuit's decision conflicts with the Supreme Court's decision last term in *Ledbetter v. Goodyear Tire & Rubber Co.*, arguing that plaintiffs' claims are untimely as AT&T's policy is not a discrete discriminatory action, but merely gives effect to prior, untimely acts of discrimination.

**MetLife v. Glenn**, No. 06-923. The issue is whether there is an inherent conflict of interest under ERISA when claims administrators wear two hats: they make the decision whether to grant benefits, and they fund the benefits. Oral argument is scheduled for April 23, 2008.

**Meacham v. Knolls Atomic Power Lab.**, No. 06-1505. The issue is who bears the burden of proof – the employer or the employee – to show that an employer’s policy that has a disparate impact on a protected class, is reasonable. In this age discrimination case, 26 employees who were laid off under a policy that weighted seniority as a factor proved that the policy had a disparate impact on them. The Second Circuit upheld the jury verdict and the Supreme Court vacated on the basis of its 2005 decision in *Smith v. City of Jackson*, which held that while disparate impact suits are allowed under the ADEA, an employer can avoid liability if its actions were reasonable. Oral argument is scheduled for April 23, 2008.

**Crawford v. Metropolitan Gov’t of Nashville**, No. 06-1595. The issue is whether an employee who participates in an internal investigation into discrimination (but who did not file the internal complaint herself) and is fired can bring a claim for retaliation under Title VII of the Civil Rights Act. Oral argument has not been scheduled for this Term, so the case will be heard next term.

Submitted by **Nina Joan Kimball**, Kimball Brousseau LLP

## Agency Update: Proposed Rule Changes to the Family and Medical Leave Act

By: **Amy C. Mainelli Burke , Kotin, Crabtree & Strong, LLP**

On February 11, 2008, the Department of Labor (“DOL”) published proposed rule changes to the Family and Medical Leave Act (“FMLA”), 29 U.S.C. §2601, *et seq.*, 29 C.F.R. Part 825. These modifications would be the most significant changes since the regulations were initially implemented in 1995.

Pursuant to the FMLA, covered employers must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period (as defined by the regulations) for one or more of the following reasons: (i) for the birth and care of the newborn child of the employee; (ii) for placement with the employee of a son or daughter for adoption or foster care; (iii) to care for an immediate family member (spouse, child, or parent) with a serious health condition; or (iv) to take medical leave when the employee is unable to work because of a serious health condition.

Since the FMLA was enacted, there have been numerous challenges in interpreting and administering the Act. The proposed regulations are meant to address some of those concerns and would amend certain provisions of the FMLA, including the following revisions:

### Employer Notice Requirements

Under the proposed rules, employers must still post a notice of general FMLA rights and responsibilities. In addition, employers will be required to distribute notice of FMLA rights to each employee through an employee handbook, or by distributing a copy annually in paper or electronic form, subject to certain conditions.

The proposed regulations extend the time for employers to send out both eligibility notices and designation notices from two business days to five business

days, notifying an employee that he or she is eligible for FMLA leave upon receiving a request for leave from the employee or designating a leave as FMLA leave after learning that an employee's leave qualifies.

The proposed rules would also require employers to provide employees with more specific written notice regarding FMLA leave requests. For example, where possible, an employer must notify employees regarding whether leave is still available in the applicable twelve month period, the number of hours, days or weeks that an employer will designate as FMLA leave and an employer must notify employees if leave will not constitute FMLA leave due to insufficient information or a non-qualifying reason.

### **Employee Notice Requirements**

Under the current regulations, employees must provide 30 days' notice of a need for FMLA leave when the need is foreseeable. If 30 days' notice is not possible, the employee must give notice "as soon as practicable." The proposed rules add a provision whereby an employee who gives less than 30 days' notice must respond to a request from the employer and explain why it was not practicable to give 30 days' notice. In most cases, an employee will be required to comply with the employer's usual and customary call in procedures for reporting an absence, absent unusual circumstances.

### **Medical Certification – Content and Timing**

The proposed rules seek to clarify medical certification requirements. Employers would have five days, rather than two, to request medical certification from the date of the employee's request for leave. If an employer determines that the subsequent information received is insufficient, the employer must provide written notice to the employee of what additional information is necessary and give the employee seven calendar days to resolve the deficiency. After the employee has been given this opportunity to cure any deficiencies, an employer may deny FMLA leave for any portion of the 12 weeks the required certification is not provided.

Employers would also be allowed to contact an employee's health care provider directly to obtain clarification or authenticate medical certification documents provided by the employee. Currently, such communications are only allowed between a health care provider who works for the employer and the employee's health care provider. Note that the employer may only ask

health care providers for information required on the certification form, nothing additional, and that the direct contact is allowed only after an employee has the chance to cure any certification deficiencies.

The DOL has also proposed changes to the medical certification form (DOL's Form WH-380) and would allow (but not require) healthcare providers to provide a diagnosis of the patient's health condition as part of the certification.

Employers would also be allowed to request medical recertification more often than under the current regulations, which prohibit employers from requesting recertification until the period of incapacity or treatment specified by a health care provider has passed, or every 30 days, whichever period of time is longer. Under the proposed rules, employers would be allowed to require recertification every six months even if the period of incapacity or treatment is longer.

### **Health Care Providers**

The list of health care providers already eligible to prepare FMLA medical certifications and treat employees has been expanded to include physician assistants (PAs.)

### **Intermittent Leave**

The DOL is not proposing changes to the current regulations regarding the permitted length of intermittent leave. Currently, employees may take the shortest unit of unpaid leave established under an employer's timekeeping systems. Employees must provide notice as soon as practicable and must follow the employer's workplace call-in procedures if they want to take unscheduled, intermittent leave, except when extraordinary circumstances exist (such as when the employee or a covered family member needs emergency treatment). Employers find administering such leave burdensome and have advocated increasing the minimum to at least a half-day. The DOL determined that it does not have the authority to alter incremental leave and that any such changes must be made legislatively.

#### **Definition of a "Serious Health Condition"**

The proposed rules add guidance on two regulatory terms related to the definition of a serious health condition.

Under the proposed regulations, "continuing treatment" for purposes of establishing a "serious health

condition” would be clarified to a period of incapacity of more than three consecutive calendar days and require that a worker visit a health care provider twice within 30 days of being incapacitated or receive treatment once, which results in a regimen of continuing treatment under the supervision of the health care provider. (The current regulations leave open the timing of these visits.)

“Periodic visits” for chronic serious health conditions are defined in the proposed regulations as visits at least twice a year to a health care provider.

### **Fitness for Duty**

If an employer requires a fitness-for-duty certification, the proposed regulations would allow an employer to list the employee’s essential functions and require that the certification address the employee’s ability to perform the essential functions of the job.

Employees on intermittent leave could be required to provide fitness-for-duty certifications every 30 days if reasonable safety concerns exist. The proposed regulations would permit employers to send an employee’s absence schedule to his or her health care provider to confirm whether or not the employee’s pattern of intermittent leave is consistent with the serious health condition and need for leave.

In addition, subject to certain limitations, employers would be permitted to contact health care providers to clarify or authenticate the fitness-for-duty certification.

### **Coordination with Paid Leave**

Under the current regulations, employees must follow the terms and conditions of an employer’s paid leave policy in order to use accrued paid leave during FMLA leave. The proposed regulations clarify the concept that unpaid FMLA leave runs concurrently with paid leave provided by an employer.

### **Attendance Bonuses**

Under the proposed regulations, an employer would not have to provide an award or bonus based on perfect attendance if an employee has not met the goal because he or she was out of work on FMLA-qualifying leave, unless such awards or bonuses are paid to employees on equivalent non-FMLA leave status.

### **Holidays**

The proposed regulations clarify that where an employee takes less than a full week of FMLA leave during a week containing a holiday, employers may not count the holiday against the FMLA leave entitlement if the employee would not have been required to work that day. However, if an employee takes a full week of leave, then the holiday will count against the employee’s FMLA leave entitlement.

### **Waiver and Release**

The proposed regulations clarify that employers and employees are permitted to voluntarily settle past FMLA claims without having to obtain permission from a court of law or the DOL. The FMLA’s waiver provisions allow retroactive waiver of FMLA rights, but not a prospective waiver of rights.

### **“Light-Duty”**

The DOL is proposing to eliminate a provision in the current regulations concerning light-duty time, clarifying that workers on “light duty” after returning from FMLA leave should not have that time count as FMLA leave in calculating their right to 12-weeks of unpaid leave. That right would not be diminished by the amount of time spent in a light-duty position.

### **Joint Employers**

The new regulations clarify the treatment of Professional Employer Organizations (“PEO”) (those that contract with employers merely to perform administrative functions, such as payroll, benefits, regulatory paperwork and updating employment policies). Such organizations would not be treated as joint employers so long as they (a) have no right to exercise control over the activities of the client’s employees; (b) do not have the right to hire, fire or supervise the client’s employees; and (c) do not benefit from the work the client’s employees perform. Where a PEO has the right to hire, fire, and assign work, a joint employer relationship is still likely to exist.

### **Non-consecutive Periods of Service in Determining Eligible Employees**

The new rules would clarify the definition of “eligible employee.” Employment prior to a five-year break in service need not be counted in determining whether

an employee is eligible for FMLA leave. Employers may count such prior service if they so choose. There are specified exceptions to this rule where the break in service is subject to a written agreement between the employer and employee which addresses the employer's intent to re-hire the employee or where the break in service was required by military service.

### **Placement of Adopted Child**

FMLA leave is available for the placement of adopted children. The new regulations specify that FMLA leave may include time to "travel to another country to complete an adoption." FMLA eligibility is not affected by the "source of an adopted child."

### **Military Leave**

The proposed rules will also include regulations concerning recently enacted legislation that provides FMLA leave to military personnel and their family members, H.R. 4986, the National Defense Authorization Act. The law provides two new types of FMLA leave related to military service. Effective upon the signing of the Act on January 28, 2008, an eligible employee can take up to 26 weeks of leave in a single 12-month period to care for a spouse, child, parent or next of kin who is a service member with a serious illness or injury incurred during active duty in the Armed Forces. Additionally, once the regulations become effective the law will permit eligible employees to take up to 12 weeks of FMLA leave in a 12-month period for "any qualifying exigency" that arises from a spouse's, child's or parent's active duty in the Armed Forces, including an order or call to duty. What constitutes "any qualifying exigency" will be determined by the regulations.

Comments on the proposed changes must be submitted to the DOL by April 11, 2008. The final rules are expected to be published prior to the end of President Bush's term. The full text of the proposed changes is at <http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>.

### **Attorney General's Office Proposed Advisory on the Independent Contractor Law**

Through January 25, 2008, Attorney General Martha Coakley sought public comments on a proposed advisory dealing with the Massachusetts Independent Contractor Law (M.G.L. c. 149, § 148B). If imple-

mented, the proposed advisory would provide new guidance with respect to the Independent Contractor Law and would supersede the advisory issued by the Attorney General's office in 2004. The proposed advisory is available for electronic viewing at [http://www.mass.gov/Cago/docs/Workplace/independent\\_contractor\\_proposed\\_advisory\\_121107.pdf](http://www.mass.gov/Cago/docs/Workplace/independent_contractor_proposed_advisory_121107.pdf)

The proposed advisory provides Enforcement Guidelines that describe specific areas of concern identified by the Attorney General's office. In particular, the Enforcement Guidelines focus on the Attorney General's concern over businesses created and maintained to avoid the Independent Contractor Law. In evaluating relationships between entities and businesses created to avoid the Independent Contractor Law, the Guidelines state that the Attorney General's office will consider, among other factors: (i) whether the alleged independent contractor is only a business requested or required by the contracting entity; (ii) whether the services of the alleged independent contractor are available to companies beyond the contracting entity; and (iii) whether the business of the contracting entity is different from the services performed by the alleged independent contractor.

The proposed advisory also lists factors which the Attorney General's office will consider as strong indicators of employee misclassification, as follows:

1. Individuals providing services for an employer that are not reflected on the employer's business records;
2. Individuals providing services who are paid "off the books", "under the table", in cash or provided no documents reflecting payment;
3. Insufficient or no workers' compensation coverage;
4. Individuals providing services are not provided 1099s or W-2s;
5. Independent contractors performing similar or identical services as employees of the same entity;
6. Contracting entity providing equipment, tools, and supplies to independent contractors or requiring the purchase of such materials directly from the contracting entity; and

7. Independent contractors not paying income taxes or into the Unemployment Compensation Fund.

The Attorney General's office is currently reviewing all of the comments it received regarding its proposed advisory, and it is expected to issue a final advisory shortly.

## Warning Signs That It May Be Time To Revise An Employment Policies Handbook

By Paul Holtzman, Esq., Krokidas & Bluestein LLP, Boston, MA

It is no mean feat to keep track of all the legal developments affecting your company's employment policies or employee handbook. Updating the employee handbook is a task that is forever being put off as a result.

However, it is critical to periodically update your employment policies and handbook, even if it is probably true that a revised handbook may soon be outdated in one respect or another because of the ever-evolving law.

While your newly revised handbook will never be the last word, your company will be better served by addressing the gaps and bringing the policies up to date. You should not wait for a lawsuit to remind you of the need to make sure your company's employment policies reflect the latest developments in technology, law and risk management.

Below are some warning signs that your company's employee handbook may be in need of some immediate attention.

### **1. Your policies have not been revised to account for the Goodridge decision granting equal marriage rights to same sex couples in Massachusetts.**

The Massachusetts Supreme Judicial Court's 2003 decision in *Goodridge v. Dept. of Public Health* has altered the landscape for policies ranging from health

benefits to bereavement leave. In particular, many companies have modified their longstanding policies regarding domestic partners in light of the doctrine of marriage equality. Of course, unless your company employs only Massachusetts residents, the issues can become quite complex as you try to be fair and consistent across state lines.

### **2. Your computer use policy has not kept up with the latest in technology.**

As reflected in recent headlines about the online financial message board postings by the CEO of Whole Foods, Inc., it is not always possible to craft a policy that anticipates the next new way employees can use or misuse company computers. Think of the Boston area physician who abruptly settled a malpractice claim when plaintiff's attorney confronted him on the witness stand about his rather irreverent blog postings concerning the trial and the jurors.

Whether listservs, instant messaging, chat rooms, blogs or the old standby of e-mail, there seems to be no end to the challenges faced by human resources managers in trying to craft the appropriate balance between enabling innovation and communication on the one hand, and preventing legal problems (from sexual harassment to insider trading, defamation and loss of critical intellectual property) on the other.

### **3. Your handbook's "disclaimer" is so boilerplate and familiar that your employees don't even notice it.**

Recent decisions highlight the importance of highlighting the disclaimer by which you remind employees that, despite the provisions of the handbook, they are at-will employees and that you reserve the right to unilaterally amend, revoke and interpret the handbook. Absent prominent placement (for example printing the disclaimer in large type on a different color paper than the rest of the handbook), all that legalese may not be worth the paper (or pixels) it is written on.

### **4. Your IT department has provided employees tools not envisioned by the policies in your handbook.**

Most companies have policies alerting their workers they should have no expectation of privacy in anything they type on the computer on their desk. But a recent decision highlighted the importance of ensuring your company's policy does not stop with that general admonition. If your employees are using their work com-

puters to access their “personal” Yahoo or AOL accounts, or are accessing your network from home or the road, it is wise to specifically warn that the rules on use of the “office” computer apply in these contexts as well. The same is true of PDAs, Blackberries and other mobile devices.

**5. Your policies haven’t kept up with the latest in cell phone technology.**

Camera phones, text messaging and GPS devices are among the new features on your employees’ cell phones that might have implications for your personnel policies. Each of these technologies raises issues for your policies on protection of intellectual property, harassment in the workplace and privacy.

**6. Your handbook does not reflect the latest legal developments concerning off-work conduct.**

Some companies have longstanding policies regulating or addressing what their employees do outside of work. Whether health-related policies (such as those designed to promote wellness), or policies regarding conduct that would embarrass the company, your handbook may have policies that unlawfully intrude into areas of your workers’ lives courts have held fall within a zone of privacy.

**7. You have a sexual harassment policy, but no policy prohibiting other forms of illegal harassment.**

Many employers still have their original boilerplate policy barring sexual harassment in the workplace. However, as companies that have been on the wrong end of any number of recent cases can attest, it is not only harassment on the basis of gender that can lead to a large jury verdict. As a result, handbooks should prohibit harassment on the basis of any protected class – and should include definitions and examples as they do for sexual harassment.

**8. Your handbook still reads like Enron never happened.**

Companies of all sizes have been reviewing and revising the full range of “compliance” policies. The new compliance environment has broad implications for employee handbooks – from rules regarding financial transactions and reporting, to protections for whistleblowers and those who cooperate with investigations whether internal or external.

**9. Your handbook was drafted before workplace violence and safety became the serious concerns they are today.**

Whether addressing weapons in the workplace or protocols for evacuation and emergency operations plans, many handbooks are somewhat outdated in this area. The same is true regarding the increasingly prevalent issues raised when an employee is either restricted by (or protected by) a restraining order issued in the context of allegations of domestic abuse or violence.

**10. Your policies on leaves of absence do not reflect the latest mandates under state and federal law.**

Whether it is the Massachusetts Small Necessities Leave Act or the latest guidance on intermittent leave under the Family and Medical Leave Act, your company needs to be sure its handbook is up to date. In fact, many claims of disability discrimination could be avoided by policies that reflect the latest case law regarding reasonable accommodations (including the provision of unpaid leaves of absence in appropriate circumstances).

**11. Your classifications of employees as “exempt” for purposes of overtime – and definition of “independent contractors” – are out of date.**

The last few years have brought significant changes in the landscape for “exempt” status under the Fair Labor Standards Act. Massachusetts employers have seen even more dramatic restrictions on their ability to lawfully characterize individuals as “independent contractors.” Handbooks that fail to reflect these new realities are problems waiting to happen.

# New & Pending Legislation

## **FMLA Expanded to Provide Additional Leave to Families of Service Members**

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 (“NDAA”). The NDAA amended the Family and Medical Leave Act of 1993 (“FMLA”) in two significant ways. First, the NDAA created a new category of FMLA leave entitled “Servicemember Family Leave.” Second, the NDAA added a new provision to the FMLA which allows employees to take FMLA leave due to a “qualifying exigency...arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty).” The amended version of the FMLA is available electronically at the Department of Labor (DOL) website:

<http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm>.

Under the new Servicemember Family Leave provision of the FMLA, an eligible employee who is the “spouse, son, daughter, parent, or next of kin” of a “covered servicemember” is entitled to take up to 26 weeks of leave during a 12-month period to care for the servicemember. The amended FMLA defines the term “covered servicemember” as a member of the Armed Forces (including a member of the National Guard or Reserves), who is “undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.” The Servicemember Family Leave provision became effective as soon as the NDAA was signed into law and as a result, employers must act in good faith in providing leave under it.

On the other hand, the new “qualifying exigency” provision of the FMLA is not yet binding on employers. This new provision will become binding when the DOL issues final regulations regarding it. The DOL has indicated that despite a lack of final regulations, employers are still encouraged to provide leave under this new provision.

In its February 11, 2008 Notice of Proposed Rulemaking, the DOL summarized the above-mentioned amendments to the FMLA and posed a series of questions to the public regarding them. For example, the DOL is seeking public comments on how broadly it should interpret the phrases “next of kin” and “qualifying exigency.” The DOL will be accepting public comments regarding its questions electronically and by mail until April 11, 2008. More information regarding the Notice of Proposed Rulemaking is available in the Agency Update Section of this Newsletter.

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