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Labor & Employment Law Section

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Section Co-Chairs' Corner

The Labor and Employment Section got off to a rousing start this fall with our annual Open House. The event drew over 90 Section members who came to have a drink (or two), a bite to eat and to schmooze with other employment lawyers and government officials in a relaxed setting. One of the real benefits of Section membership is the opportunity to get out of your office and connect with colleagues. Doing so promotes the collegiality that is unfortunately lacking among lawyers today, the partisan employment bar being no exception. Those of us who have gotten involved in the BBA L&E Section through the Steering Committee, CLEs or special projects truly believe that this service has made our professional relationships smoother, from zealous, but friendly adversaries, to strong referral networks and even real friendships. Put another way, try it, you'll like it.

The Section continues its tradition of providing members with informal but informative lunchtime educational programs at the BBA on the first Tuesday of each month. Our initial program, on October 7, 2008, was a presentation by Scott Connolly of Morse, Barnes-Brown & Pendleton and Sally Adams of Law Offices of Sally Adams, on the expansion of the duty of loyalty to rank and file employees after *Talentburst v. Collabera*. The 2008 Amendments to the Wage Act was the topic of our most recent program on November 18 at which John Tocci of Tocci, Goss & Lee and Dan Field of Morgan, Brown & Joy provided valuable insights on litigation trends since the changes to the law. We will also be presenting CLEs throughout the year on a wide variety of topics covering the latest on basic legal issues to cutting-edge employment issues. Our section co-sponsored the 16th Annual Robert Fuchs Labor Law Conference at Suffolk Law School on October 16. On tap for CLE programs for the rest of the term is a program on damages in January, a program on the big changes expected in employment law under the Obama Administration in February, and a program on Wage and Hour Class Action litigation in March. We urge you to attend these programs and to contact us if you would like to propose a topic or participate in a presentation.

On the public-service-project front, our section's publication, *Employment Law Guide: A Practical Guide to Understanding Massachusetts Employment Law*, is available in book form as well as the electronic version on the BBA website. Copies were distributed to

section members at the Open House and it is available for purchase until December 31. This guide is the product of over two years of dedicated effort by several members of our Steering Committee, and it makes a handy desk reference and a useful gift for clients and referral lawyers and smaller or non-profit businesses who do not have employment law counsel on retainer. The "Plain English" phase of our current public policy project to redraft M.G.L. c.151B, first with an eye to making the statute more accessible, coherent and internally consistent, is in full gear. Our Public Service Committee, run by Marc Freiburger, Alex Klibaner, Anne Ladov, and Sarah Laub, are working with a group of section members using wiki technology to help manage the massive editing project. The goal is once we can read the statute, we will tackle low-controversy changes and then move on to more controversial issues.

Please communicate with us about any ideas you have for programs or events and attend as many programs as possible! We look forward to working with all of you to make Section membership as rewarding and productive as possible.

Jody Newman and Jay Shepherd

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Judicial Update

Christopher J. Powell and Vanessa Hackett
Ropes & Gray LLP

Supreme Court

Meacham v. Knolls Atomic Power, 128 S.Ct. 2395 (June 19, 2008). In this case, the Supreme Court clarified the burdens of the parties with regard to the reasonable factor other than age (“RFOA”) exception to the Age Discrimination in Employment Act, reversing the Second Circuit. The Court of Appeals had interpreted the Supreme Court’s decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), as placing the burden of persuasion on the plaintiff on the RFOA issue. Justice Souter, writing for the Court, examined the text of the ADEA and concluded that Congress had intended the RFOA exception to function like any other affirmative defense as to which the defendant bears the burden of persuasion.

First Circuit

Welch v. Ciampa, 542 F.3d 927 (1st Cir. Sept. 23, 2008). The First Circuit partially vacated the District Court’s award of summary judgment from the bench to the defendants on a plaintiff police officer’s claim that the chief of police of Stoughton had engaged in political discrimination in violation of the First Amendment, retaliated against him in violation of the Massachusetts whistleblower statute and committed tortious interference with the officer’s relationship with the town. Officer Welch had decided to remain neutral concerning a campaign to recall and replace Stoughton selectmen who had voted against renewal of the police chief’s contract. Welch also assisted a special prosecutor appointed by the town to investigate allegations of police misconduct. After the recall failed and the police chief was indicted and placed on administrative leave by the town, the new police chief, Ciampa, did not reappoint Welch to a detective sergeant position. Ciampa had actively supported the recall campaign as a sergeant prior to the removal of the old police chief.

The Court held that Welch’s non-reappointment to the detective-sergeant position constituted an adverse employment action, despite that he retained his base salary, because he lost an additional stipend, other pay opportunities and his status

as the highest-ranking detective. The Court also concluded that Welch’s neutrality on the issue of the recall was a display of his political affiliation such that taking an adverse employment action against him on the basis of his neutrality would violate the First Amendment. The town could be liable for Ciampa’s action, because he had the final authority to select detective-sergeants. The Court also found that there was sufficient evidence in the record to create a material issue of fact as to whether Ciampa had engaged in a pattern of retaliation against individuals who assisted in the special prosecutor’s investigation and likewise that there was a material issue of fact as to whether Ciampa had acted with the requisite malice necessary to support the tortious interference claim.

Chaloult v. Interstate Brands Corp., 540 F.3d 64 (1st Cir. Aug. 28, 2008). In this case, the First Circuit rejected the argument that where an employer has adopted a sexual harassment policy requiring all supervisors to report possible sexual harassment, then the knowledge of a supervisor who is a peer of the alleged victim is imputed to the employer and defeats the employer’s Faragher-Ellerth defense. The plaintiff, Chaloult, a former entry-level supervisor, filed suit after resigning her employment, alleging that her supervisor at IBC had repeatedly made unwelcome sexual comments about her prior to her resignation. The employer, IBC, had adopted a sexual harassment policy that required all supervisors to report any “violation or possible violation” of EEOC sexual harassment guidelines to upper management. Facts in the record showed that a peer of Chaloult’s in the entry-level supervisor position had some knowledge of the facts Chaloult claimed constituted sexual harassment, but that the supervisor had not reported those facts.

The First Circuit upheld the District Court’s grant of summary judgment to IBC, reasoning that to impute the knowledge of Chaloult’s peer to the Company would depart from the Supreme Court’s Faragher-Ellerth reasonableness approach and discourage employers from going beyond what

the law requires. The majority also reasoned that because the peer supervisor had testified that he had not recognized the alleged conduct as sexual harassment, even if his knowledge had been imputed to the employer, it would not have acted unreasonably by taking no action. Judge Lippez dissented, arguing that the Company's policy should have been enforced as written, that the majority had impermissibly used Chaloult's failure to report the harassment to excuse the employer's obligation to act reasonably to prevent sexual harassment and that the majority had failed to recognize that there was sufficient evidence for a jury to find that the conduct known to the peer supervisor should have placed him on notice of sexual harassment.

Supreme Judicial Court

Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337 (Sept. 23, 2008). The Supreme Judicial Court vacated the Superior Court's decertification of a class of current and former Wal-Mart employees who allege that the company wrongfully withheld compensation for time worked and denied or cut short rest breaks to which the employees were contractually entitled. It also reversed summary judgment for Wal-Mart on a claim that the company had wrongfully denied or cut short meal breaks and on a claim that the three year statute of limitations on wage claims should be equitably tolled pursuant to the discovery rule.

The SJC held that the Superior Court had committed error in excluding an expert analysis of Wal-Mart's payroll records offered by plaintiffs in support of their claims. The Superior Court found this expert testimony, which consisted of an evaluation of the business records, extrapolation of data from those records, calculations of putative damages, and opinions about features and abnormalities of the data, unreliable and insufficient to support the claims. The motion judge reasoned that the underlying records were unreliable and that while the records purported to represent instances of "time shaving," in which employee's working time was inaccurately recorded, and instances of deprived meal and rest breaks, those records could not explain the underlying reasons for apparent inaccurate recording of time or for missed breaks. The SJC held the motion judge had erred by not treating the records as presumptively reliable business records. Further, the motion judge had erred by treating arguments about the expert's

conclusions as going to the admissibility of the evidence, where such arguments properly went only to the weight to be given the evidence.

The SJC also held that the motion judge had failed to recognize that evidence was sufficient to demonstrate a predominance of common questions of fact as to liability, including whether there were implied contracts concerning rest breaks and off-the-clock work. In doing so, the motion judge made at least two errors of law, requiring plaintiffs to include in their trial plan testimony from witnesses representative of all different job positions held in all Massachusetts stores by misapplying FLSA precedent to a Massachusetts Rule 23 class action; and second, by misapplying the SJC's holding in *Aspinall v. Philip Morris Cos.* 442 Mass. 381 (2004) by requiring plaintiffs to demonstrate that the number of uninjured class members was *de minimis*.

The SJC also reversed the grant of summary judgment to Wal-Mart on the plaintiff's denied meal break claims. While the Court agreed with the motion judge that G.L. ch. 149, § 100 does not create a private right of action for denied meal breaks, it held that there was sufficient evidence to create a genuine issue of material fact on the issue of a contractual obligation to provide such breaks. The SJC rejected the motion judge's determination as a matter of law that, because the meal breaks were unpaid, their denial could not lead to recoverable damages. The Court reasoned that contractual benefits such as an unpaid meal break may have an independent value to employees, over and above the economic value of wages, and that the issue of damages must be resolved by a jury.

With regard to the equitable tolling claim, the SJC held that plaintiffs had created a material issue of fact as to whether a reasonable person would have noticed the small amounts of time allegedly "shaved" by Wal-Mart from their paychecks. Accordingly, it was error for the motion judge to grant summary judgment to Wal-Mart on the statute of limitations issue.

Thurdin v. SEI Boston, 452 Mass. 436 (Oct. 24, 2008). The Supreme Judicial Court vacated the Superior Court's dismissal Thurdin's sex discrimination claim under the Massachusetts Equal Rights Act (MERA). The Superior Court had concluded that G.L. c. 151B is the exclusive rem-

edy in employment discrimination cases and that, because the Legislature had limited Chapter 151B to employers with more than six employees, it did not intend for discrimination cases to lie against employers with fewer than six employees under MERA. Additionally, the Superior Court held that Thurdin could not pursue a claim under MERA because the statute's language "make and enforce contracts" only applied to hiring process discrimination.

The Supreme Judicial Court held that MERA could be used where Chapter 151B did not apply. The SJC observed that nothing in the language of either statute supported a contrary conclusion, and that Chapter 151B specifically provides that "nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth relating to discrimination." It also rejected the Superior Court's interpretation of the phrase "make and enforce contracts" as limiting application of MERA to cases of discrimination in the hiring process. The lower court had relied on the U.S. Supreme Court's interpretation of similar language in 42 U.S.C. §1981 in *Patterson v. McLean Credit Union*, 419 U.S. 164 (1988), where the Court had held that the word "enforce" applies only to claims concerning efforts to prevent a person from gaining access to legal process to enforce contract rights. The SJC reasoned that the natural reading of "enforce" included efforts to give effect to a contract during employment, and that this includes efforts to ensure that the contract is carried out free of discrimination.

Appeals Court of Massachusetts

Damiano v. Contributory Retirement App. Bd., 72 Mass. App. Ct. 259 (July 23, 2008). The Appeals Court upheld the denial of accidental disability retirement benefits by the Contributory Retirement Appeal Board (CRAB) for injuries sustained in the workplace by Damiano, a civilian 911 dispatcher. CRAB determined that Damiano was ineligible for accidental disability retirement benefits under G.L. c. 32 § 7 because her injury did not occur "while in the performance of her duties." A co-worker injured Damiano's wrist and elbow when he engaged in horseplay by placing Plaintiff in a headlock, as she stood up from her desk. While CRAB determined that Plaintiff sustained injuries "as a result of" her duties because she was at work, it held that the harm caused

had nothing to do with the actual performance of her job duties.

The Appeals Court affirmed CRAB's decision, reasoning that to hold that Plaintiff incurred the injury "while in the performance" of her duty "would render insubstantial the requirement that there be a nexus between the claimant's injury and the actual performance of her job." The Court contrasted Damiano's injury with those sustained by a firefighter injured while entering a burning building or a police officer injured while directing traffic, both of which, according to the Court, would constitute injuries in the performance of individual's duty. Because Damiano's injury was a result of a co-worker's actions unrelated to the performance of her job, she was not entitled to accidental disability retirement benefits.

Mike's Case, 73 Mass. App. Ct. 44 (Oct. 28, 2008). The Appeals Court, as a matter of first impression, affirmed the Department of Industrial Accidents Reviewing Board's (the "Board") exclusion of unemployment compensation benefits from the calculation of worker's compensation benefits. The plaintiff employee, who was injured in the course of employment as a seasonal line stripe painter of highways and parking lots, regularly received unemployment benefits during the winter months. The Board rejected the employee's contention that the employer should include unemployment benefits in its determination of his average weekly wages for the preceding year, holding that long-standing principles barred the inclusion of such benefits as "earnings." The Appeals Court agreed, holding that the explicit exclusion in G.L. c. 152 §38 of "savings or insurance of the injured employee independent of this chapter" from the calculation of workers' compensation was dispositive. Because unemployment compensation is a form of insurance not provided under Chapter 152, it could not be used in the calculation of workers' compensation benefits.

Driscoll v. Worcester Tel. & Gazette, 72 Mass. App. Ct. 709 (Sept. 25, 2008). The Appeals Court affirmed a District Court determination that a news carrier was an employee within the meaning of G.L. c. 151A for unemployment compensation purposes. The District Court concluded that the Plaintiff was an employee within the meaning of the unemployment compensation statute and re-

versed the Division of Unemployment Assistance determination that he was ineligible for unemployment benefits due to his independent contractor status with the newspaper.

The Appeals Court applied the “ABC” test used to determine the existence of an employment relationship for unemployment purposes, which posits that there is an employment relationship unless the services are performed (a) free from control or direction, (b) outside the usual course of business or outside all of the places of business, of the enterprise, and (c) as part of an independently established trade, profession or business of the worker. Examining the facts, the Appeals Court held that the newspaper exercised sufficient control over its carriers’ performance of their duties to render them employees, despite a written contract with the carriers describing them as independent contractors. The Court observed that the newspaper (a) retained ownership of the product until delivery, (b) established the amount of payment for delivery based on length and complexity of the route, (c) paid the carriers regardless of whether they collected subscription fees from customers, (d) employed district managers to supervise and evaluate carriers, (e) provided training to carriers, and (f) required carriers to receive authorization before delegating duties to substitute carriers. The Court noted that the ability of the employees to obtain additional employment did not diminish the control exercised over the carrier’s performance by the newspaper.

Thomas O’Connor Constr. Inc. v. MCAD, 72 Mass. App. Ct. 549 (Sept. 9, 2008). The Appeals Court upheld a Superior Court decision (affirming an MCAD decision) that a general contractor was liable to an employee of a subcontractor because it failed to take corrective action after it learned that one of its supervisors had engaged in racially offensive conduct against the subcontractor’s employee. The Appeals Court agreed with the Superior Court and MCAD that, despite the absence of an employment relationship between the plaintiff and O’Connor, the company was liable under G.L. c. 151B, §4(4A), which makes it unlawful “[f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter.”

In this case, the subcontractor’s employee com-

plained about racially offensive comments made by a supervisor employed by O’Connor. A manager for O’Connor learned of the complaints and promised the employee that he would investigate. After an investigation that disclosed corroborating evidence, the manager for O’Connor returned the offending supervisor to the worksite without taking disciplinary action and without reporting back to the plaintiff. The Appeals Court held that 151B §4(4A) applied because O’Connor had “interfered” with the plaintiff’s enjoyment of a workplace free from unlawful racial harassment. The Court declined to decide, as had the MCAD and Superior Court, whether §4(4A) would support a finding that O’Connor would be strictly liable in the absence of knowledge of the racially hostile work environment under the SJC’s decision in *College-Town, Div. of Interco, Inc. v. MCAD*, 400 Mass. 156 (1987) instead holding O’Connor liable because it had knowledge of the unlawful conduct but did not take corrective action.

Supreme Court Explains Disparate Impact Analysis for Age Bias Claims Involving RIFs

David Henderson

Nutter McClennen & Fish LLP

Most employers know that they must anticipate and prepare for legal challenges to their method of selecting employees affected by a reduction in force (RIF). If, for example, the ages of the selectees suggest the possibility of age bias, then the employer has to consider its proof that the selections were based on a defense explained in the Americans with Disabilities Act: “reasonable factors other than age (RFOA).” On June 19, 2008, the United States Supreme Court issued an illuminating opinion involving this type of case, thereby resolving a conflict that had existed in the lower courts. The new opinion explains how plaintiffs may use statistics and a theory of “disparate impact” to attack a RIF, how employers may defend by trying to prove RFOA, and how the judicial system ultimately will evaluate the lawfulness of the layoffs by placing the burden of persuasion on the *employer* for showing that the RFOA defense actually applies.

The case at issue was *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008). In *Meacham*, the Knolls Atomic Power Laboratory had laid off 31 salaried employees, all but one of whom were at least 40 years old. The laboratory chose the 31 by grading and comparing a larger group of employees on the basis of their “performance” (i.e., their two most recent appraisals), “flexibility” (their perceived ability to work on other assignments), and “criticality” (a measure of how important their individual skills were). Twenty-eight of the 31 then sued. They claimed that age discrimination was proven by the “disparate impact” of the selection process on older workers. According to their arguments, the three facially neutral RIF selection criteria were in fact unfairly biased against them because of their age. This was apparent, they said, because only 1203 (58%) of the laboratory’s 2063 salaried workers were 40 years of age or older, and only 179 (73%) of the 245 salaried workers who were at risk in the RIF were that old.

At trial, the *Meacham* plaintiffs sought to prove their case with a statistics expert who testified that the laboratory’s layoff selections were skewed by age far too much to be explained by chance. The

expert testified that the chances of this particular RIF outcome were only 1 in 348,000 (based on a population of 2063 salaried workers), 1 in 1260 (based on a population of the 245 workers at risk of layoff), or 1 in 6639 (when analyzed by sections of the company). The expert also testified that the two RIF selection criteria over which managers had the most discretionary judgment were “flexibility” and “criticality,” and that those two relatively subjective criteria also had the firmest statistical ties to the flawed selection process outcomes. The plaintiffs’ implication was obvious: notwithstanding the facial neutrality of the selection process, managers had allowed unlawful age bias to taint employee grading in the two areas where grading was most subjective.

The primary question before the Supreme Court was procedural: which side of the lawsuit should have the burden of persuasion? The laboratory argued, as one court of appeals had held, that this burden should be on the plaintiffs because a plaintiff generally has the burden of proving a successful claim. But the Supreme Court did not agree, and it thus ruled against the laboratory. The court explained that a plaintiff will fall short in his claim when all he does is allege a disparate impact or point to some generalized policy that leads to such an impact. To prove a *prima facie* case of disparate impact, a plaintiff also must “isolate and identify the specific employment practices that are allegedly responsible for the statistical disparities.” But once a plaintiff meets that threshold burden, then the burden of persuasion will fall on the *employer* to prove its RFOA defense. The Court acknowledged the adverse impact its ruling might have on employers as follows: “[T]here is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production; nor do we doubt that this will sometimes affect the way employers do business with their employees. But at the end of the day, [these] concerns have to be directed at Congress, which set the balance where it is”

Legislation Update

Nina Joan Kimball
Kimball Brousseau LLP

Americans With Disabilities Act Amendments Act (ADA AA)

The most far-reaching changes in employment legislation of this past year are the Amendments to the Americans with Disabilities Act, Public Law 110-325, which President Bush signed into law on September 25, 2008, and which will become effective on January 1, 2009. This statute brings sweeping changes to how the ADA (42 U.S.C. § 12101 et seq.) will be interpreted and applied, and reverses several Supreme Court decisions that had narrowly interpreted the ADA.

In the Findings and Purposes, Congress specifically rejects the Supreme Court's decisions in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), and its companion cases and *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 134 (2002), stating that those decisions "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect" and that as a result "lower courts have incorrectly found . . . that people with a range of substantially limiting impairments are not people with disabilities." The Amendments are meant to "reinstate" a "broad scope of protection" under the ADA.

The primary focus of the Amendments is to broaden how the term "disability" is defined and applied so that it will be easier for an individual to prove that he or she is disabled. Here are the main provisions of the Amendments.

1. Definition of disability. Although the definition of disability remains the same, Congress has added definitions for the terms "substantially limits" and "major life activities" which currently are only defined in the EEOC regulations, and added a broad rule of construction. ADA AA § 4(a). Congress also specifically delegates to the EEOC, the Attorney General and the Department of Transportation the authority to issue regulations to define terms within the definition of dis-

ability, thus assuring the deference to be paid to their regulations. ADA AA § 6.

2. "Substantially limits." The Amendments define "substantially limits" to mean "materially restricts." This is a broad standard that explicitly rejects the holding of *Toyota Manufacturing*, which had said that the terms "substantially" and "major" were meant to be interpreted "strictly to create a demanding standard for qualifying as disabled" such that the impairment "prevents or severely restricts" activities of "central importance to people's daily lives." By explicitly rejecting this language of *Toyota Manufacturing*, Congress clarifies that "substantially" does not mean "severe," and the new standard of "materially restricts" should be given a very broad reading in favor of finding a person disabled rather than not. ADA AA § 4(a)(2).

3. "Major life activities." To make sure that courts will interpret the term "major life activity" broadly, the Amendments add a non-exhaustive list of examples of "major life activities" which currently are found only in the EEOC regulations. The list adds some new activities not found in the EEOC regulations, specifically eating, sleeping, standing, lifting, bending, reading and communicating. The Amendments also clarify that major life activities include bodily functions, and provide a list of non-exhaustive bodily functions "including but not limited to, functions of the immune system, normal cell growth, digestive behavior, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." ADA AA § 4(a)(3).

4. "Regarded as." In order to restore a broad interpretation of the third prong of the definition of disability – "being regarded as having an impairment" – Congress clarified that to meet this standard an individual does not have to prove that his or her actual or perceived impairment limits or is perceived to limit a major life activity. ADA AA § 4(a)(4)(A). By doing so, Congress rejects

the Supreme Court's narrow interpretation of the third prong from the Sutton decision and reinstates the Supreme Court's reasoning in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), where the Court, interpreting the identical provision of the Rehabilitation Act, explained that "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment." *Id.* at 284. This will allow the EEOC to return to its original interpretation of the "regarded as" prong where it had said that an individual who suffers an adverse action because of the "myths, fears, and stereotypes" associated with an impairment is covered under the "regarded as" prong.

The Amendments provide that the "regarded as" prong does not apply to impairments that are "transitory and minor," specifying that "transitory" means a duration of six months or less. ADA-AA § 4(a)(4)(B). In addition, the Amendments provide that an employer need not make a reasonable accommodation to an individual who is regarded as disabled. ADA AA § 6.

5. Rules of construction. In order to ensure that courts will follow Congress's directive to "reinstate" a broad scope of protection under the ADA, the Amendments add rules of construction, including that the definition of disability is to be "construed broadly" and that an impairment need only limit one major life activity to be considered a disability. ADA AA § 4(a)(5)(A) & (B).

6. Episodic or in remission impairments count. Another rule of construction clarifies what had been controversial, that an impairment that is "episodic or in remission is a disability if it would substantially limit a major life activity when active." ADA AA § 4(a)(5)(C).

7. Mitigating measures don't count. Rejecting the Supreme Court's *Sutton* trilogy, the Amendments provide that the determination of whether an impairment substantially limits a major life

activity "is to be made without regard to the ameliorative effects of mitigating measures" such as medication, medical supplies, equipment or appliances, and low-vision devices. However, ordinary glasses or contact lenses would not be considered mitigating measures. ADA AA § 4(a)(5)(D).

8. Temporary disabilities might count. The Amendments do not address whether a disability that is only temporary in nature – such as a serious short-term illness or pregnancy-related disabilities – are covered. However, an argument can be made that since Congress only applied the exception for transitory and minor impairments to the "regarded as" prong, it indicates that transitory impairments that do in fact substantially limit a major life activity would count as a disability under the first prong of the definition.

Agency Update

Nina Joan Kimball
Kimball Brousseau LLP

FMLA Final Regulations. The Department of Labor issued final regulations for the FMLA on November 17, 2008. They are effective in 60 days, on January 16, 2009, just four days before the end of the Bush Administration. The final regulations can be found at:

http://www.federalregister.gov/OFRUpload/OFRData/2008-26577_PI.pdf.

Because of publication deadlines and the massive size of the final regulations (762 pages of the Federal Register), only a few highlights can be noted here:

- Employer notice.** Employers have four notice obligations. There is the general notice that must be posted and in a handbook. Once an employee requests FMLA leave, there are three additional notices that must be sent (1) notice of eligibility explaining if employee is eligible or not for FMLA leave; (2) notice of rights and responsibilities; and (3) designation of leave as FMLA leave. DOL has prototypes for these forms. Employers may provide this specific notice within 5 business days rather than the current 2 days.
- Employee notice.** In requesting leave, employees must comply with employer's regular call-in policies (which could mean calling in before the start of a shift) and must request leave "as soon as practicable" which has been narrowed from two days to the same or next business day. The regulations add information that employees may give, but unlike in the proposed rule, the information is not mandatory.
- Serious health condition.** The new regulations add a requirement that to have a serious health condition defined as "absence plus treatment" the treatment must include the first visit to the health care provider within 7 days of incapacity, and the second visit within 30 days unless there are "extenuating circumstances." For persons with a chronic condition, they must see a health care provider at least twice a year.
- Medical certification – Content.** The medical certification now requires the health care provider to provide additional types of facts to describe the serious health condition, which can include a diagnosis, as well as information that establishes that an employee cannot perform the essential functions of his or her job.
- Medical certification – Incomplete or Questions.** If the employer deems a medical certification incomplete, it must designate in writing what is missing and give the employee 7 days to complete it. If the employer has questions about the authenticity or needs clarification, the new regulations allow certain persons (HR professional, a health care provider, a leave administrator, or a management official, but not the employee's supervisor) to contact the health care provider directly to seek "authentication" or "clarification" of information on the medical certification form. By contrast, the current regulations only allow a health professional designated by the employer to contact the employee's health care provider.
- Military leave.** The regulations include provisions governing the new military family caregiver leave and leave for qualifying exigencies contained in the Family and Medical Leave Act Amendments.
- For the many other changes far too numerous to include here, see the regulations, contained in the November 17, 2008 issue of the Federal Register. The actual regulations are contained in pp. 556-762 of the document, to be codified at 29 C.F.R. Part 825.

EEOC Compliance Manual on Religious

Discrimination. On July 22, 2008, the EEOC issued a detailed new Compliance Manual on religious discrimination, which provides guidance and instructions for investigating and analyzing charges of discrimination based on religion covering issues including definitions of the term religion, what is “sincerely held,” employer inquiries, general employment decisions, harassment, and reasonable accommodation, including common methods of religious accommodation in the workplace. The Compliance Manual can be found on the EEOC’s website at <http://www.eeoc.gov/policy/docs/religion.html>.

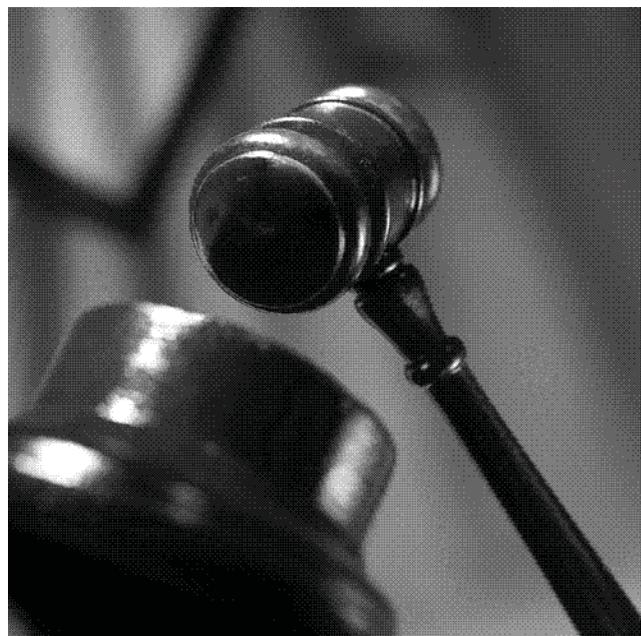
Regulations to Implement Security Breach

Act, M.G.L. c. 93H. On September 22, 2008, the Massachusetts Office of Consumer Affairs and Business Regulation (OCABR) issued final regulations to implement the Security Breach Act, M.G.L. c. 93H, to establish standards for how businesses in Massachusetts protect and store individuals’ personal information. The regulations are effective May 1, 2009. In addition, Governor Patrick signed Executive Order No. 504 to apply similar standards to state agencies. The regulations, codified at 201 C.M.R. 17.00, require any person (which includes employers) that owns, licenses, sells or maintains “personal information” about a Massachusetts resident to develop a “comprehensive, written information security program applicable to any records containing personal information.” “Personal information” means a person’s name plus either their social security number, driver’s license number, or financial account, or credit or debit card number. The regulations contain detailed requirements for a written security program which include among other things:

- (a) designating employees to maintain the security program;
- (b) identifying internal and external risks to security;
- (c) developing security policies;
- (d) imposing disciplinary measures;
- (e) preventing terminated employees from

accessing records containing personal information by immediately terminating electronic access;

- (f) verify that third-party service providers protect personal information;
- (g) limiting amount of personal information collected and limiting access;
- (h) identifying where personal information is stored;
- (i) impose reasonable restrictions for access;
- (j) adopt regular monitoring, review scope of security measures, and document responsive actions; and
- (k) follow the requirements set out for computer systems security.



Section Leadership

Section Co-Chairs

Jody Newman
Dwyer & Collora, LLP
600 Atlantic Ave - 12th Floor
Boston, MA 02210
(617) 371-1000
jnewman@dwyercollora.com

Jay Shepherd
Shepherd Law Group, PC
One Beacon Street 16th Floor
Boston, MA 02108
(617) 439-4200
jay@shepherdlawgroup.com

Brown Bag Lunch Committee

Daniel Field
Morgan, Brown & Joy LLP
200 State Street
Boston, MA 02109
(617) 523-6666
dfield@morganbrown.com

David Cogliano
Davis, Malm & D'Agostine, PC
One Boston Place
Boston, MA 02108
(617) 589-3612
dcogliano@davismalm.com

Andrew Orsmond
Foley Hoag LLP
Seaport World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600
aorsmond@foleyhoag.com

Brian MacDonough
Shilepsky O'Connell Casey Hartley
Michon LLP
225 Franklin Street, 16th Floor
Boston, MA 02110-2898
(617) 723-8000
bmacdonough@shoclaw.com

EEOC Liaison

Andrew Pickett
Jackson Lewis LLP
75 Park Plaza 4th Floor
Boston, MA 02116
(617) 367-0025
picketta@jacksonlewis.com

Events

Christopher Kauders
Pre-Trial Solutions, Inc.
10 Liberty Square 6th Floor
Boston, MA 02109
(617) 542-2005
cpkauders@verizon.net

L&E CLE Committee

Mark Burak
Morse, Barnes-Brown & Pendleton,
PC
1601 Trapelo Road
Waltham, MA 02451
(617) 345-1242
mhb@mabbp.com

Sharen Litwin
Kotin, Crabtree & Strong LLP
One Bowdoin Square
Boston, MA 02114
(617) 227-7031
slitwin@kcslegal.com

Valerie Samuels
800 Boylston Street, 33rd Floor
Prudential Tower
Boston, MA 02114
(617) 973-6100
vsamuels@pbl.com

Justine Brousseau
Kimball Brousseau LLP
One Washington Mall 14th Floor
Boston, MA 02108
(617) 367-9449
jbrousseau@KBattorneys.com

Labor Law Committee

Robert Morsilli
Jackson Lewis LLP
75 Park Plaza 4th Floor
Boston, MA 02116
(617) 367-0025
morsillr@jacksonlewis.com

Nicole Decter
Segal Roitman, LLP
111 Devonshire St., 5th Fl Suite 500
Boston, MA 02109
ndecter@segalroitman.com

Litigation Section Liaison

Kimberly Jones
Foley Hoag LLP
Seaport World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600
(617) 832-1178
kjones@foleyhoag.com

MBA Liaison

Patricia Washienko
Yarashus, Wagner, Cook, Freiburger
& Washienko
1 Beacon St Suite 3333
Boston, MA 02108
(617) 723-0008
patricia@washienkolaw.com

MCAD Liaisons

Suzanne Suppa
Littler Mendelson, PC
One International Place Suite 2700
Boston, MA 02110
(617) 378-6004
ssuppa@littler.com

Paul Holtzman
Krokidas & Bluestein LLP
600 Atlantic Avenue 19th Floor
Boston, MA 02210
(617) 482-7211
pvh@krokidas-bluestein.com

New Lawyers Section Liaison

Sara Smolik
Rodgers, Powers & Schwartz LLP
18 Tremont Street Suite 500
Boston, MA 02108
(617) 742-7010
sara@theemploymentlawyers.com

Newsletter Committee

Nina Kimball
Kimball Brousseau LLP
One Washington Mall, 14th Floor
Boston, MA 02108
(617) 367-9449
nkimball@KBattorneys.com

Christopher Powell
Ropes & Gray LLP
One International Place, 4th Floor
Boston, MA 02110
(617) 951-7836
christopher.powell@ropesgray.com

Matt Moschella
Sherin & Lodgen, LLP
101 Federal Street
Boston, MA 02110
mcmoschella@sherin.com

Public Policy

Michael Doheny
Segal Roitman, LLP
111 Devonshire St., 5th Floor
Suite 500
Boston, MA 02109
(617) 742-0208
mdoheny@segalroitman.com

David Henderson
Nutter, McClennen & Fish, LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02110
(617) 439-2000
dhenderson@nutter.com

Bret Cohen
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo P.C.
One Financial Center
Boston, MA 02111
(617) 348-3089
bcohen@mintz.com

Public Service

Alexander Klibaner
Sally & Fitch LLP
One Beacon Street 16th Floor
Boston, MA 02108
617 542-5542
ak@sally-fitch.com

Marc Freiburger
Shilepsky O'Connell Casey Hartley
Michon LLP
225 Franklin Street, 16th Floor
Boston, MA 02110-2898
mfreiburger@shoclaw.com

Sarah Laub
City of Boston
One City Hall Plaza
Boston, MA 02201
(617) 635-1185
sarah.laub@cityofboston.com

Anne Ladov
Shepherd Law Group, PC
One Beacon Street 16th Floor
Boston, MA 02108
(617) 439-4200
anne@shepherdlawgroup.com