Boston Bar ASSOCIATION

Labor & Employment Law Section

Summer 2009 Newsletter

Inside this Issue

A PUBLICATION OF THE BOSTON BAR ASSOCIATION LABOR & EMPLOYMENT LAW SECTION

Section Co-Chairs' Corner

Jay Shepherd

Jody Newman

In our final message of the term year, we welcome our new Labor & Employment Section Co-Chair **Leigh Panettiere** of Sandulli Grace, P.C., who will serve the 2009-2011 term. Leigh is a former co-chair of the Labor Law Committee. At this time of renewed vigor in the practice, her labor law focus will add depth to the labor side the section. **Jay Shepherd** stays on for his second Co-Chair year and **Jody Newman** steps down, but will stay on the Steering Committee. As with the Hotel California, we may check out, but we never really leave (with apologies to the Eagles).

Since our last Co-Chair letter in April, our Brown Bag and CLE Committees, assisted by Section volunteers, put on several terrific programs. In May, we co-sponsored two programs. The first, on May 2nd, was the *36th Annual Workshop for Public Sector Labor Relations Specialists* at Harvard, an annual program designed to familiarize labor relations practitioners with current trends in collective bargaining and public employment. The second program on May 20th, co-sponsored with the Solo & Small Firm Section, was *Tax Traps for the Unwary: Tax Issues for the Non-Tax Law Practitioner.*

The Labor & Employment Section's annual Spotlight program on June 6 was *Spotlight on Washington: 2009 Legislation and Regulations*. Panelists **Nina Joan Kimball, Anne L. Josephson, Andrew J. Orsmond, and Andrew C. Pickett** presented a timely and informative program on the newly enacted laws and regulations under the Obama Administration as well as bills on the horizon. The Section's final Brown Bag lunch on June 23 was The Legal Landscape of Stereotyping and Unconscious Bias Cases. **Jody L. Newman** and **Mark H. Burak** presented on the role of stereotyping in the human cognitive process and how unconscious bias can operate to deny equal opportunity in the workplace. The program reviewed key implicit bias cases in the federal and Massachusetts courts and discussed tactics for bringing and defending such cases which will likely be on the rise.

The Labor and Employment, Intellectual Property, and Litigation Sections co-sponsored a very successful symposium on July 22 entitled: *Freedom To Compete? A Symposium on Bills Affecting Employee Non-Compete Agreements*. At the well attended seminar, Panelists **William N. Brownsberger; Russell Beck; Stephen Y. Chow; Michael L. Rosen; Hon. Gordon L. Doerfer (Ret.); and Scott Kirsner,** Boston Globe columnist**,** examined the argument that employee non-compete agreements have chilled the spawning of new enterprises in Massachusetts and the counter-argument that businesses large and small need these agreements enforced to protect their investments. The panelists also discussed pending bills before the General Court affecting employee non-compete agreements, namely, H. 1794 and 1799, as well as a bill to enact the Uniform Trade Secrets Act, H. 87 and H. 329.

We look forward to seeing Section members at our Annual Open house in early October. Come out and meet labor and employment colleagues over drinks and delicious hors d'oeuvres. In the meantime, enjoy the summer now that it has finally arrived in Boston.

— Jody Newman Jay Shepherd

Judicial Update

Christopher Powell, Vanessa Hackett and Jill Harrison
Ropes & Gray LLP

Supreme Court Cases

Ricci v. DeStefano, 129 S. Ct. 1694 (2009)

In this much-awaited "reverse discrimination" decision, the Supreme Court voted 5-4 to vacate a Second Circuit decision and to hold that the city of New Haven, Connecticut (the "City") violated Title VII when it discarded the results of a civil service promotion examination for fire department officers that yielded racially disparate results. The Court adopted a "strong basis in evidence" standard to govern circumstances in which an employer engages in intentional discrimination for the asserted purpose of remedying an unintentional disparate impact caused by an employee selection device.

The City had hired an outside consultant to design a standardized examination that purported to test job-related knowledge and skills for use in identifying candidates for promotion to lieutenant or captain. When the test was administered in 2003, the results indicated that seventeen white and two Hispanic firefighters would be eligible for promotion, but no black firefighters. After public debate over the examination's statistically disparate impact on minority candidates, the City did not seek to validate the test, instead deciding not to certify the results of the test, fearing a disparate impact lawsuit. A group of firefighters who would have been eligible for promotion if the test results had been certified then sued the City, claiming that it had discriminated against them on the basis of race in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment. After considering cross-motions for summary judgment, the District Court granted judgment in favor of the City, indicating that the City's "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent." The Second Circuit affirmed.

After declining to address the Equal Protection argument, Justice Kennedy, writing for the majority, held that absent a valid defense, the City's action would constitute disparate treatment of the successful test takers on the basis of race in violation of Title VII. Searching for the appropriate standard to impose on such a defense, the majority borrowed the "strong basis in evidence" standard fashioned by the Court for use in Fourteenth Amendment cases such as *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986). The Court concluded that this evidentiary standard would strike a balance between disparate impact and disparate treatment where they conflict because "[i]t limits [the] discretion [to make race-based decisions] to cases in which there is a strong basis in evidence of disparate impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation."

Having adopted the "strong basis in evidence" standard to govern the City's affirmative defense, the majority proceeded to apply the new rule to the facts in the record, concluding that the City could not satisfy its burden, reasoning that the sole evidence of potential disparate impact liability the City had – the statistical racial disparity – was insufficient as a matter of law The Court reasoned that, under Title VII, a statistical disparity in examination results only leads to liability where the test is not job-related and consistent with business necessity or where the employer has refused to adopt a less-discriminatory alternative. Here, the Court held that evidence in the record contradicted the City's arguments that the examination was not job-related or justified by business necessity. The Court also held that the City lacked a strong basis in evidence that an equally valid, less-discriminatory alternative to the examination was available. As the Court wrote, "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions." For these reasons, the majority held that the City's decision to discard the test results constituted impermissible race-based disparate treatment under Title VII and that the firefighter plaintiffs were entitled to summary judgment.

Writing for the dissent, Justice Ginsburg predicted that the opinion will not have "staying power." She first noted, apparently in dicta, that the white and Hispanic firefighters who scored high on the examinations had no vested right to promotion, but only a

mere expectancy, and contends that "the legitimacy of the employee's expectation depends on the legitimacy of the selection method." Justice Ginsburg also faulted the majority for finding a conflict between the disparate impact and disparate treatment aspects of Title VII, observing that the Court usually seeks to interpret separate provisions harmoniously.

Turning to the merits, the dissent argued that it would be more appropriate to hold that an employer must have "good cause" to believe that an employee selection device will not withstand examination for business necessity. Justice Ginsberg reasoned that when Title VII's disparate treatment and disparate impact provisions are properly viewed as being complementary to each other, then such a "good cause" standard more properly balances any tension between the two provisions and supports the ideal of voluntary compliance. Here, the dissent pointed to EEOC interpretive guidelines stating that Congress did not intend that an employer who seeks to comply with the Act should be liable for violating the Act itself. Finally, Justice Ginsburg denounced the failure of the Court to follow ordinary procedure and remand to the lower courts to implement the rule and determine whether the City met the "strong-basis-in-evidence" threshold that the examination was not consistent with business necessity.

Gross v. FBL Financial Services, Inc., 2009 WL 1685684 (S.Ct. June 18, 2009)

In a 5-4 decision, the Supreme Court held that an employee suing for discrimination on the basis of age under the Age Discrimination in Employment Act ("ADEA") must prove that age was the "but-for" cause of the alleged adverse employment action. Additionally, the Court held that the burden of persuasion remains with the plaintiff even upon a showing that the employer took age into consideration. In both holdings, the Court departed from its earlier decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that identical language in Title VII required only a showing that a prohibited criterion had formed a substantial part of the basis for the employer's action and that a burden-shifting paradigm applied in such "mixed-motive" cases.

The employer, FBL Financial Services ("FBL") reassigned the then 54-year-old petitioner, Jack Gross, and transferred many of his former job duties to a newly-created position, which it subsequently filled with an employee in her early 40s. Although Gross's pay remained the same, he believed he had been demoted due to the change in his responsibilities and filed suit under the ADEA, alleging a mixed-motive discrimination theory.

The Court reversed a decision by the Eighth Circuit, which had applied *Price Waterhouse* to Gross' claim. The Supreme Court vacated the Eighth Circuit's decision, explaining that the ADEA prohibits discrimination "because of" an employee's age and that here, unlike in Title VII, Congress intended the words "because of" to mean that age must be the sole reason for the adverse action. Therefore, the Court ruled, a plaintiff must prove that age was the 'but-for' cause of an employer's decision to take an adverse employment action in order to prevail under the ADEA. In distinguishing the identical language in Title VII, the Court observed that Congress had explicitly adopted its holding in *Price Waterhouse* by amending Title VII to provide expressly that a plaintiff may establish discrimination under that statute by showing that the protected characteristic was a motivating factor, but that Congress did not amend the ADEA in the same manner. As a result, the Court held that the plaintiff in an ADEA claim "must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action."

Justices Stevens and Breyer both dissented. Referring to the majority's decision as "an unabashed display of judicial lawmaking," Stevens pointed out that the majority had chosen to answer a question not directly raised by the petition for certiorari, and were construing identical language in the ADEA and Title VII differently. The close nature of this 5-4 decision, in addition to the apparent departure from the Court's earlier practice of tracking Title VII precedent in ADEA cases, has already led to speculation that Congress will amend the ADEA to permit plaintiffs to recover on mixed-motive theories.

14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (Apr. 1, 2009)

The Supreme Court vacated a Second Circuit decision holding unenforceable a provision in a collective bargaining agreement that clearly and unmistakably required employees to arbitrate ADEA claims against their employer. The Second Circuit had interpreted the Court's earlier decisions in *Alexander v. Gardner-Denver Co.* and *Gilmer v. Interstate/Johnson Lane Corp*. as permitting an individual employee to agree to compulsory arbitration of federal age discrimina-

tion claims, but prohibiting a labor union from making such an agreement on behalf of its members. The Supreme Court reversed, citing three main principles.

First, the Court observed that the National Labor Relations Act ("NLRA") allows unions to bargain collectively over the terms and conditions of employment and that, in the course of such bargaining, unions may agree to mandatory arbitration clauses in exchange for other concessions. Unless Congress clearly removes the subject matter of a federal statute from the scope of the union's authority under the NLRA to consent to mandatory arbitration, courts cannot interfere with the union's right to contract. In *Gilmer*, the Court had already held that Congress did not provide for such an exception to a union's authority in the ADEA. Second, the Court determined that such an arbitration clause is fully enforceable under *Gardner-Denver* and its progeny because those decisions addressed only the issue of whether arbitration of contract-based claims precludes subsequent judicial resolution of statutory claims, and did not control here where the contractual provision at issue expressly covered both contractual and statutory claims. Third, while the Court noted that it had expressed skepticism of the arbitration of federal statutory rights in *Gardner-Denver*, the Court has since abandoned that view, concluding that arbitration of claims does not amount to a waiver of such rights, only a right to seek judicial relief in the first instance.

AT&T Corp. v. Hulteen, 129 S.Ct. 1962 (2009)

Reversing the Ninth Circuit, the Supreme Court held that an employer does not violate the Pregnancy Discrimination Act ("PDA") when it calculates pension benefits under an accrual rule providing less credit for pregnancy leave than for other medical leave for leaves taken before the PDA was enacted.

In this case, AT&T had calculated pension benefits pursuant to a seniority system that included downward adjustments in service credit for periods of time when the employee was not working. For pregnancy leaves taken before passage of the PDA in 1978, employees' service credits were adjusted downward by the number of days of leave taken over thirty days. The result was that the plaintiffs received smaller pensions than they would have if they had received full credit for their pregnancy leaves taken before the effective date of the PDA. In contrast, employees who missed work for other medical reasons or who took a pregnancy leave after passage of the PDA suffered no downward adjustment to their service credit.

The Court had approved the use of downward adjustments with respect to pregnancy leave in *General Electric Co. v. Gilbert,* 429 U.S. 124 (1976), where it held that such differential treatment of pregnancy leave did not violate Title VII. In the instant case, the Court further held that when Congress enacted the PDA in 1978, superseding *Gilbert*, it did not intend the new law to apply retroactively. Because AT&T's seniority system was in compliance with the PDA for post-enactment leaves, and was otherwise *bona fide* and not based upon any intent to discriminate, the Court held that it was protected by the *Gilbert* interpretation of Title VII for leaves taken before the PDA came into effect.

First Circuit Cases

Northeastern Land Services v. NLRB, 2009 WL 638248 (1st Cir. 2009) *and Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB,* 564 F.3d 469 (D.C. Cir. 2009)

In these two cases, the First and DC Circuits reached opposite conclusions concerning the validity of recent decisions by of the National Labor Relations Board ("Board"). In each case, the Courts of Appeals ruled on claims that actions by the Board were invalid because a two-member panel did not constitute a quorum under the National Labor Relations Act ("NLRA"). Under the NLRA, the Board is to consist of five members and three members are required for a quorum. Before that date, in anticipation of the expiration of the terms of two members, the Board, which then had only four members, delegated all of its powers to a three-member panel on which sat the two members whose terms would not soon expire. Following the expiration of the other two members' terms, the remaining two members have continued to exercise the Board's authority.

In *Northeastern Land Services (*"NLS"), an employee alleged that NLS's confidentiality clause "discouraged employees from engaging in protected concerted activities" in violation of the NLRA. The two-member panel reversed an ALJ's finding, determining that NLS had engaged in an unfair labor practice. The First Circuit upheld the decision, holding that the exercise of the Board's authority by the two remaining members was lawful because the NLRA permits the Board to

delegate all of its power to a three-member panel, which it did, and because the two remaining members still constitute a quorum of that three-member panel. Additionally, the Court relied on a provision of the NLRA which states that a vacancy "shall not impair the right of the remaining members to exercise all the powers of the Board."

The D.C. Circuit reached the opposite result in the more recent *Laurel Baye Healthcare of Lake Lanier, Inc*. decision. In that case, the Court of Appeals held that even a valid delegation of powers to a two-person panel "cannot survive the loss of quorum on the Board itself." The Court also noted that the NLRA clearly mandates that a quorum of the Board consists of three members and noted that the NLRA expressly states that such requirement is to be met at all times.

As any party may petition the D.C. Circuit for review of a final NLRB order, regardless of where the unfair labor practice occurred or the NLRB proceeding took place, this decision will likely cause a race to the courthouse by parties who disagree with an NLRB decision. The Court in Laurel Baye did suggest, however, that ratification by a properly constituted Board or by Congress could fix the procedural infirmity.

Bergeron v. Cabral, 560 F.3d 1 (1st Cir. 2009)

In an interlocutory appeal concerning a claim of qualified immunity by the Suffolk County Sheriff, the First Circuit held that the Sheriff's decommissioning of certain deputy sheriffs, as a result of which the deputies became ineligible for security detail work, constituted an adverse employment action. Several jail officers had sued Sheriff Andrea Cabral after she decommissioned them as deputy sheriffs in 2005, alleging that Cabral was retaliating against them for their union activities and support for her political opponent.

Cabral contended that the officers did not suffer an adverse employment action when they were decommissioned and, therefore, could not show that they were deprived of a constitutionally protected right as required to make out a § 1983 claim. The Court of Appeals disagreed. In a § 1983 claim, the Court observed, an employment action is adverse when it objectively "place[s] substantial pressure on the employee's political view" and this can include actions that result in pecuniary loss. Because only commissioned officers are eligible to work security details, decommissioning the plaintiff officers reduced their supplemental earning capacity. The threat of such a deprivation, the Court held, is "a classic example of pressure designed to coerce political orthodoxy," and therefore amounted to an adverse employment action.

Chadwick v. Wellpoint Inc., 561 F.3d 38 (1st Cir. 2009)

The First Circuit reversed the district court's award of summary judgment in favor of the defendant employer in a Title VII sex-based discrimination claim. The plaintiff, who was mother to an eleven-year-old and to six-year-old triplets, alleged that the employer promoted a less-qualified female candidate, whose two children were nine and fourteen years old, because of a sex-based stereotype that women who are mothers of young children neglect their workplace responsibilities. When informing Chadwick that she had not been selected for the promotion, her supervisor made comments such as, "It was nothing that you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now." Rejecting the District Court's requirement that the manager's statements explicitly refer to the employee's sex as the basis for the manager's assumption that she would be unable successfully to balance family and work demands, if promoted, the First Circuit held that the manager's statements constituted sufficient evidence of discrimination to survive summary judgment.

Federal District Court for the District of Massachusetts Cases

Stanton v. Lighthouse Fin. Services, Inc., 2009 WL 931659 (D. Mass. March 25, 2009)

District Judge Gertner reaffirmed her prior ruling that the plaintiff president and co-founder of a startup company, Lighthouse Financial Services, was an "employee" under the Massachusetts Weekly Payment of Wages Act (the "Act") and that his base salary constituted "wages," such that an agreement to defer wages until the company was profitable was void under the statute. Here, Stanton, who served as the company president, and Drunsic, the chief executive officer, had signed employment agreements fixing their salaries at $144,000. Both contracts included provisions deferring their salaries at the sole discre-

tion of the Board of Directors.

After resigning from Lighthouse, Stanton filed a complaint raising claims under the Act against the company and Drunsic for non-payment. The Court rejected Lighthouse's contention that Stanton could not be an employee because he was an employer, concluding that an individual may be an employer in relation to subordinates and an employee in relation to superiors. Similarly, the Court dismissed the defendant's argument that startup co-venturers should be excluded from the statute, holding that it was the legislature's task to incorporate such an exemption if it deemed one necessary. Because Stanton was an employee and his salary constituted wages, the Court concluded that the deferral agreement was void under the Act as violating the prohibition against the use of special contracts to exempt oneself from the requirements of the Act.

Supreme Judicial Court Cases

Mass. Bay Transp. Auth. v. Boston Carmen's Union, Local 589, 454 Mass. 19 (2009)

The Supreme Judicial Court vacated an arbitration award in which the arbitrator found that the MBTA had violated a collective bargaining agreement when it settled a discrimination charge by providing an employee with retroactive seniority and a higher rate of pay. The complainant, William Wick, alleged that the MBTA had unlawfully rescinded his employment offer after refusing him the reasonable accommodation of wearing his hearing aid during a physical examination, which caused him to fail the hearing test. The MCAD found probable cause. Before the claim was finally adjudicated, the MBTA settled the matter by employing the complainant as a rail repairer at the top applicable hourly rate with seniority retroactive to the initial offer of employment, in addition to paying him money damages.

The union grieved this action through arbitration on behalf of another employee, who had greater seniority and lost the rail repairer position to Wick, arguing that the MBTA could not unilaterally set the wages and seniority of new employees contrary to the collective bargaining agreement's terms in the absence of a formal finding of discrimination. The arbitrator agreed with the union that in the absence of a finding of discrimination by the MCAD, the settlement was merely a private agreement that must yield to the collective bargaining agreement.

The SJC, however, agreed with the MBTA that the strong public policy against discrimination permits employers to grant retroactive seniority in failure to hire cases. Rejecting the union's contention that the public policy exception does not apply absent an adjudication of discrimination, the Court reasoned that public policy favors the settlement of discrimination claims and that the employer should not be forced to proceed to trial to obtain a finding of discrimination before it can remedy apparent discrimination. The Court concluded that the MBTA's settlement agreement had a "presumption of legitimacy" that the union was required to rebut by demonstrating that the MBTA and the complainant colluded to circumvent the collective bargaining agreement. Because the union did not rebut the presumption, the Court held that public policy required that the collective bargaining agreement yield to the settlement agreement.

Elec. Data Systems Corp. v. Attorney General, 2009 WL 1608857 (Mass. June 11, 2009)

The Supreme Judicial Court affirmed a Superior Court decision that the Massachusetts Weekly Payment of Wages Act (the "Act") required Electronic Data Systems Corporation ("EDS") to pay accrued vacation time to an involuntarily terminated employee despite language in its vacation pay policy stating that vacation time was not earned, did not accrue, and would not be paid at termination. This decision clarifies the issue left open in an earlier case involving EDS and another (*"EDS I"*) over whether a vacation policy may lawfully provide that unused vacation will not be paid out upon involuntary termination. In *EDS I*, the Court had held that ambiguous language in the policy, which stated that unused vacation would not be paid out when an employee left the company, would be construed against EDS to apply only to voluntary departures.

When EDS terminated Plaintiff Tessicini's employment on April 8, 2005, Tessicini had used only one vacation day in 2005, even though he was eligible for five weeks of vacation. Based on its policy, EDS did not pay Tessicini for his unused vacation time upon separation. Tessicini subsequently filed a complaint with the Attorney General's Office. The Attorney General cited TDS for failure to make timely payments and required that EDS pay out the accrued, unused vacation.

The SJC held that vacation time provided to employ-

ees under EDS's policy, was earned, despite explicit language in the policy stating that "vacation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time." Deferring to Attorney General Advisory 99/1 regarding the Act's treatment of employers' vacation policies, the Court determined that such vacation time constituted wages notwithstanding the policy language. The court adhered to the Advisory, stating that while there is no requirement in the Act that an employer offer paid vacation to its employees, when an employer does choose to provide employees with paid vacation time, that vacation pay is a form of compensation, and must be paid out upon involuntary discharge.

Stanley E. Walker's Case, 453 Mass. 358 (2009)

The Supreme Judicial Court held that the Department of Industrial Accidents ("Board") did not err when it ruled that the date it initially issued a decision awarding benefits on an employee's claim, and not a later date on which it issued an amended decision clarifying the earlier one, was the date of "final decision" for the purposes of computing the average statewide weekly wage under G.L. c. 152, § 51A to determine the amount of the compensation award. Section 51A provides that the date of "final decision," rather than the date of injury, should be used to calculate the statewide average weekly wage when the injured employee has not received any compensation prior to the final decision. The SJC affirmed the Board's holding that that a final decision under § 51A occurs upon the issuance of "any decision awarding benefits on a claim for which 'no compensation has been paid' previously."

On May 15, 2002 the Board issued a decision which ostensibly affirmed an ALJ's earlier opinion denying Walker's workers compensation claim, but which actually reversed and awarded Walker compensation. The Board released its final amended decision on July 30, which corrected the inconsistency in the May 15 decision by explicitly reversing the ALJ's decision. In the interim, having understood that it would be ordered to pay Walkers' claim, Barnstable paid him benefits based on the average weekly wage as of the date of his injury in 1995. Walker then requested that the benefits be recalculated using the May 15, 2002 average weekly wage, pursuant to §51A. Barnstable objected, arguing that because it had paid benefits before the July 30 decision, § 51A did not apply.

The Board and the Court agreed with Walker, holding that the May 15, 2002 decision was the "final decision." The Court reasoned that to hold otherwise would frustrate the purpose of § 51A, which is to ensure the prompt payment of claims. Because the average weekly wage on the date of a final decision is typically higher than the rate on the date of injury, the Board's holding would properly encourage employers to pay claims promptly without waiting for a final decision.

City of Boston v. Comm. Employment Relations Bd., 453 Mass. 389 (2009)

The Appeals Court affirmed the decision of the Labor Relations Commission that the city of Boston had committed an unfair labor practice by failing to negotiate with the Boston Police Patrolmen's Association in good faith over the adoption of a work rule implementing the partial public safety exemption provided under § 207(K) of the Fair Labor Standards Act ("FLSA"). Implementation of the exemption would increase the average number of hours that the employee officers would have to work before becoming entitled to overtime compensation. Here, the city decided to implement a 28-day working period as permitted under § 207(K). The union demanded that the issue be included in collective bargaining, but the city refused to submit the decision for negotiation, arguing that the FLSA preempted its obligations under G.L. c. 150E.

The Appeals Court rejected the city's preemption argument, concluding that the FLSA neither contains an express preemption provision nor conflicts with state labor law. Because § 207(k) of the FLSA is permissive, rather than mandatory, and because the FLSA's purpose is to improve the working conditions of employees, including their compensation, it was consistent with the goals of state labor law. And, because the definition of work period would have an impacts the employees' wages, the Appeals Court held that the city's adoption of the exemption provided by § 207(k) is a mandatory subject of bargaining about implementation of which it was obligated to bargain with the union.

Appeals Court Cases

Sec'y of Admin. & Fin. v. Comm. Employment Relations Bd., 74 Mass. App. Ct. 91 (2009)

The Appeals Court affirmed a determination by the Labor Relations Commission that the Executive Office for Administration and Finance violated G.L. c. 150E § 10(a)(1) and 10(a)(5) by implementing mandatory reporting and withholding on the taxable portion of free parking provided to employees without engaging in collective bargaining over the impact of the decision. After an audit of Boston parking rates, the Commonwealth had concluded that the fair market value of the free parking exceeded the exclusions provided by IRS regulations regarding employer-provided parking, thereby triggering the reporting and withholding obligations. To comply with the regulations, the Commonwealth began adding amounts reflecting the taxable value of the parking benefit to the employees' taxable federal and state gross income. The union objected to the change in the terms and conditions of employment, but the Commonwealth refused to meet with the union to discuss the issue.

While both parties agreed that the Commonwealth had no duty to bargain over the application of the income tax law requirements, the Appeals Court concluded that the State was required to negotiate over the impact of the change on the union members' wages because it had discretion over the implementation of those requirements. The Appeals Court distinguished this case from *West Bridgewater Police Ass'n v. Labor Relations Comm'n*., 18 Mass. App. Ct. 550 (1984), in which it had held that unscheduled, irregular overtime was too peripheral to be a mandatory subject of collective bargaining and that regularity of the compensation is the determinative issue. Here, the application of the tax laws increased gross taxable wages, causing a $300 loss in annual take home pay, which the Appeals Court held was material and therefore obliged the Commonwealth to engage in effects bargaining.

Visnick v. Caulfield, 73 Mass. App. Ct. 809 (2009)

The Appeals Court reversed the Superior Court's denial of Caulfield's motion for summary judgment in this defamation case, concluding that discrimination complaints made to administrative agencies and human resources departments enjoy an absolute privilege. Here, Caulfield alleged that Visnick, a hotel restaurant manager, who had supervised her when she previously worked at the restaurant, sexually harassed her during a job interview when she reapplied for employment as a bartender. Following the interview, Caulfield wrote a letter to the restaurant claiming sexual harassment and requesting settlement, then later filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). Subsequently, Visnick filed a defamation suit against Caulfield and his former employer. The Appeals Court held that absolute privilege protected both Caulfield's letter and the EEOC filing, as the letter's contents anticipated litigation and the EEOC proceedings were sufficiently judicial in nature to fall under the privilege.

Lev v. Beverly Enterprises-Massachusetts, Inc., No. 08-P-58 (June 18, 2009)

The Appeals Court affirmed the Superior Court's award of summary judgment to the defendant employer in a case involving an employee, John Ahearn, who struck the plaintiff, Charles Lev, with his car after consuming alcohol with his supervisor at a post-shift work-related meeting in a local restaurant. The Court followed SJC precedent set out in *Mosko v. Raytheon Co.* 416 Mass. 395 (1993) and *Kelly v. Avon Tape, Inc*., 417 Mass. 587 (1994) in holding that the employer could not be liable for Lev's injuries because it did not furnish or control the alcohol consumed by Ahearn. The Court stated that the fact that the employer had a policy prohibiting employees from drinking alcohol on company premises or while conducting company business off-premises, a fact not present in the previous cases, did not alter the analysis. To adopt such a position, the majority held, would dissuade employers from implementing policies prohibiting alcohol for fear that it may be "a predicate for tort liability." Furthermore, the Court reasoned that the doctrine of respondeat superior would preclude a finding for the plaintiff, as the accident occurred during the employee's commute home, a time which the employer is not liable for torts committed by an employee because it is not within the scope of employment.

In dissent, Justice McHugh argued that because the employer in this case could have controlled the employee's alcohol consumption, as a result of its control of the meeting and as exemplified by its "no-alcohol" policy, there was a "critical distinction" from the usual social host/social guest context, in which there are severe practical obstacles to the host's preventing drunken driving by the guest. Accordingly, he argued, the matter should have gone to the jury to determine whether the employer was negligent.

Agency Update

Christopher Powell, Esq.
Ropes & Gray LLP

EEOC Preparing Revised Regulations To Implement the ADA Amendments Act

On June 17, 2009, the EEOC voted 2-1 to approve a notice of proposed rulemaking concerning changes to its ADA regulations to conform with the ADA Amendments Act. Following a period of review and comment by other federal agencies, which includes approval by the Office of Management and Budget, the EEOC will publish the proposed rules for public comment.

While the proposed rules are not yet publicly available, during the June 17 meeting, Associate General Counsel Koczynski, who was part of the team that drafted them, provided a summary of the proposed rules. According to that summary, the Office of General Counsel's revisions were driven by Congress' statement in the Act that the definition of disability should be construed in favor of broad coverage and should not require extensive analysis. Highlights of the summary include the following points:

- The proposed rules contain lists of disabilities that EEOC views as "obviously" substantially limiting a major life activity such that they will consistently meet the ADAs definition of disability. These include blindness, deafness, intellectual disabilities, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cancer, cerebral palsy, diabetes, epilepsy, HIV and AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder and schizophrenia.
- The proposed rules will also include all of the major life activities listed in the ADA, as well as some not included therein but previously recognized by the EEOC, including reaching, sitting, interacting with others and activities of the hemic, lymphatic and musculoskeletical systems.
- The proposed rules contain an explicit statement that an impairment need not severely restrict, or significantly restrict, a major life activity, to meet the "substantially limits" element of the definition of "disability." While the degree to which the proposed rules provide positive guidance concerning meaning of the "substantially limits" standard is unclear, AGC Kuczynski did mention that the rules will specify that "temporary non-chronic impairments of short duration with little residual effects" will not meet the standard, citing such examples as, colds, influenza, sprains, and broken bones that are expected to heal completely.
- The rules include five rules of construction with examples illustrating how the "substantially limits" standard is to be applied, as follows:

1. The first rule restates three principles: (a) the focus of ADA cases should be on whether discrimination occurred, not on whether someone meets the definition of "disability," (b) the term "substantially limits" should be construed broadly, and (c) deciding whether a person's condition constitutes a disability should not demand extensive analysis.
2. The second rule states that an individual with an impairment that substantially limits a major life activity need not demonstrate a limitation on the ability to perform activities of central importance to daily life. As an example, the Assistant General Counsel stated that someone with a non-temporary twenty pound lifting restriction would not also have to demonstrate that this restriction substantially limits him or her in performing of activities central to daily life that require lifting.
3. The third rule provides that an impairment that substantially limits one major life activity need not limit other major life activities to be considered substantially limiting. Here, the example given was that of a person with diabetes, whose insulin-producing function is substantially limited and who will not also be required to show that this results in a substantial limitation on eating or any other major life activity.
4. The fourth rule provides for common-sense comparison of individual's limitations with the abilities of those in the general public without recourse to scientific or medical evidence. Here, the Assistant General Counsel cited the example of an individual with epilepsy, who will have a disability because he is limited in brain function, and during seizures may also be limited in seeing, hearing, speaking, walking or thinking.

5. Finally, the fifth rule provides that impairments that last fewer than six months may still meet the "substantially limits" standard, notwithstanding the "transitory and minor" exception to the "regarded as" disability definition.

- With respect to the major life activity of working, the proposed rules provide that an impairment will be substantially limiting where it limits the ability to perform or meet the qualifications for a "type of work", instead of the "range or class of jobs" concept previously developed by the courts. Examples of this "type of work" concept cited by the Assistant General Counsel include commercial truck driving, assembly line jobs, food service jobs, clerical jobs or law enforcement jobs.

A full transcript of the meeting, which includes the entire summary provided the Assistant General Counsel, is available at: http://www.eeoc.gov/abouteeoc/meetings/6-17-09/transcript.html.

The proposed rules are likely to generate controversy when they are made available for public comment. Indeed, EEOC Commissioner Barker voted against the proposed rules, citing, the addition of the "obviously" disabling impairments described in the first bullet above and the replacement of the "range or class of jobs" concept with the "type of work" concept described in the fifth bullet point, among other objections.

White House Directs Federal Agencies to Extend Benefits to Same-Sex Partners of Employees

On June 17, 2009, the White House released a memorandum to the heads of Executive Departments and agencies directing them to extend benefits to same-sex partners of employees where permitted by federal law. The memorandum acknowledges that, while private-sector companies are free to extend the full range of benefits to same-sex partners of their employees, the federal government is limited in its ability to do so. It explains that the Secretary of State and Director of the Office of Personnel Management (the "Director") have worked with the White House to identify benefits that can be extended to same-sex partners and directs them to do so. The heads of all other executive departments and agencies are also directed to review their benefit offerings to determine which can be extended to same-sex partners and to report their conclusions to the Director for implementation.

According to a White House "Fact Sheet" released the same day, under this program civil service employees will be able to obtain long-term care insurance coverage for their same-sex partners and will be permitted to use sick leave to care for an ill same-sex partner or a non-biological, non-adopted child. The same-sex partners of foreign service employees will gain access to medical facilities at overseas posts, will be eligible for evacuation from overseas posts and will be counted as part of the employee's family in determining housing allocations. Employees in other agencies of the federal government will presumably receive the benefits identified by their agency heads during the 90-day period.

Obama Nominations to the NLRB

On April 24, 2009, President Obama announced his intention to nominate two union-side labor attorneys to the NLRB. Craig Becker is an Associate General Counsel to both the SEIU and AFL/CIO. He has taught and practiced labor law for 27 years. Mark Pearce is a founding partner of a Buffalo, New York union-side law firm and has also served on the New York Industrial Board of Appeals. If confirmed by the Senate, Becker and Pearce would join current Board members Democrat Wilma Libman (chair) and Republican Peter Schaumber to fill four of the five seats on the NLRB. With the two Democratic appointments the NRLB would be expected to reverse many Bush-era decisions in which now-Chairman Liebman dissented. However, notwithstanding the April 24 announcement, the White House has not yet formally appointed Becker and Pearce, leading to media speculation as to the Administration's reasons for not pressing forward.

Given the ongoing controversy over the validity of decisions released by the two current NLRB members, one might expect the Administration to be pressing for rapid Senate confirmation of Becker and Pearce. As reported in this issues' Judicial Update, the Circuit Courts of Appeal are taking opposite views on the validity of actions being taken by the two-member board. At present the DC Circuit has taken the position that such actions are null for lack of a quorum, while the First Circuit and Seventh Circuits have reached the opposite conclusion, calling into question hundreds of calls recently decided by and pending before the NLRB. According to news reports, the employer in the Seventh Circuit case, *NewProcess Steel, LLP v. NLRB*, 564 F. 3d 840 (7th Cir. 2009), has filed a petition for certiorari with the Supreme Court, which could conceivably result in the NLRB being effectively shut down until the President's new appointments are confirmed.

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
Ogletree, Deakins, Nash Smoak & Stewart, P.C.
1 Boston Place, Suite 3220
Boston, MA 02108
(617) 994-5700
mark.burak@ogletreedeakins.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
mskimberlyyjones@gmail.com

MBA Liaison

Patricia Washienko
Wagner, Cook, Freiberger & Washienko, LLC
1 Beacon St Suite 3333
Boston, MA 02108
(617) 723-0008
pwashienko@wcfwlaw.com

MCAD Liaisons

Suzanne Suppa
Novartis Vaccines & Diagnostics, Inc.
350 Massachusetts Ave
Cambridge, MA 02139
(617) 871-8235

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
Office of Attorney General
One Ashburton Place 18th Floor
Boston, MA 02108
(617) 727-2200
aklibaner@gmail.com

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

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

Anne Ladov
Jackson Lewis LLP
75 Park Plaza 4th Floor
Boston, MA 02116
(617) 367-0025
ladova@jacksonlewis.com