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Labor and Employment Law Update

THE NATIONAL LABOR RELATIONS BOARD PROVIDES GUIDELINES FOR DETERMINING WHO IS A “SUPERVISOR”

Under the National Labor Relations Act (“Act”), a supervisor is not entitled to union representation or allowed to engage in activities in support of a union. Additionally, an employer has the right to demand complete support from a supervisor in the employer’s relationships or conflicts with unions. Section 2(11) of the Act defines a supervisor as an employee who:

- (1) has authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action;
- (2) exercises this authority through independent judgment, and the authority is not routine or clerical; and
- (3) holds that authority in the interest of the employer. The burden to prove supervisory authority is on the party asserting it.

Historically, the National Labor Relations Board (“NLRB”) and the federal courts have struggled with the application of § 2(11) to professional and highly skilled employees. In NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001), for example, the Supreme Court went so far as to chastise the NLRB for its consistent misapplication of § 2(11) in denying supervisory status to registered nurses who exercised independent judgment in directing less-skilled staff.

Divided 3-2 along party lines, the Board responded to the Supreme Court in Oakwood Healthcare, Inc., 348 NLRB No. 37 (Sept. 29, 2006), in which it had to determine whether a hospital’s permanent charge nurses were supervisors or non-supervisors under the Act. In its decision, the NLRB reexamined and clarified its interpretations of the terms “assign,” “responsibly to direct” and “independent judgment” as those terms are set forth in § 2(11).

Additionally, the Board essentially added a fourth element to the § 2(11) definition, by requiring that supervisory functions constitute a “regular and substantial portion” of the employee’s work time. In two companion cases released the same day, Croft Metals, 348 NLRB No. 38 and Golden Crest Healthcare Center, 348 NLRB No. 39, the Board applied the new supervisor standards.

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- **Assign.** In Oakwood Healthcare, the Board construed “assign” to refer to “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.*, tasks, to an employee.” The Board clarified that “choosing the order in which the employee will perform discrete tasks within an assignment would not be indicative of exercising the authority to ‘assign.’”
- **Responsibly to Direct.** The Board defined “responsibly to direct” to mean that an individual not only directs the work of employees, but is also accountable for the performance and work product of the employees whose work is directed. Moreover, the individual must have the authority to take corrective action with regard to such employees. Finally, “it also must be shown that there is a prospect of adverse consequences for the putative supervisor if he or she does not take these [that is, corrective action] steps.”
- **Independent Judgment.** To exercise independent judgment “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” Judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the instructions of a higher authority, or in the provisions of a collective bargaining agreement. The mere existence of company policies, however, does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.
- **Part-Time Supervisors.** The Board found that, to be a supervisor under the Act, an individual must spend “a regular and substantial portion of his/her work time performing supervisory functions.” “Regular” duties are ones undertaken “according to a pattern or schedule, as opposed to sporadic substitution.” The Board offered that supervisory duties performed for at least 10-15% of an employee’s total work time would be considered “substantial.”

IMPACT OF OAKWOOD HEALTHCARE ON EMPLOYERS

Oakwood Healthcare’s clarification of the § 2(11) definition of “supervisor” will affect virtually all industries. In Croft Metals, for example, the NLRB applied the new standard to a manufacturing employer.

While the Board’s recent guidance is instructive, it certainly does not provide a formula. Although union advocates immediately decried the Board’s newly articulated standards as stripping millions of professional employees of their right to organize, the impact of the Oakwood Healthcare, Croft Metals, and Golden Crest Healthcare Center decisions is probably less far reaching, as evidenced by the fact that only 12 of the 181 nurses considered in Oakwood Healthcare were excluded from the bargaining unit as § 2(11) supervisors. While the Board’s newly refined test is likely to result in more personnel being found to be supervisors than under the Board’s earlier tests, the true impact of these decisions will only be known after this test is applied in future cases.

It is clear, however, that the determination of whether an individual is a supervisor is extraordinarily fact-intensive and must be made on a case-by-case basis. While it is difficult to predict how the Board will apply the new standards in future cases, employers would be well-served to consult the following general principles regarding supervisory status:

- to the extent that individuals are responsible for the assignment of shifts or overtime, a stronger argument may be made for their supervisory status than that prior to the new NLRB decisions;
- an individual’s ability to direct employees to other areas of an employer’s operation, only if temporarily, will aid a showing of supervisory status;
- discipline or rewards received by individuals for the performance their subordinates provide direct evidence of their “authorization to responsibly direct” others and, therefore, supervisory status; and
- written guidelines for job tasks that specifically identify and incorporate the discretion of purported supervisors will help an employer establish the purported supervisors’ “independent judgment.”

These principles can be helpfully applied by employers who are in the process of creating new positions or redesigning old ones with a supervisory component. By incorporating specific functions into new or revised positions, employers can take significant steps toward ensuring supervisory status.

Similarly, unions can no longer argue that certain employees are automatically included in bargaining units. A union attempting to organize a workplace may propose to represent a unit that includes workers who can now be successfully challenged as supervisors - a challenge that may make the difference between winning and losing an election.

For employers who already have unions in place, they may be able to take steps to clarify the scope of the bargaining unit so as to exclude workers who fit within the definition of supervisor, thereby improving the management of their workforces.

Finally, all employers should review and update job descriptions to ensure that supervisory duties are clearly and adequately defined and fully address the NLRB's new guidelines.



EMPLOYEE'S WRONGFUL TERMINATION CASE DISMISSED FOR "EXTENSIVE AND EGREGIOUS MISCONDUCT" IN DESTROYING COMPUTER FILES

James Plasse, a former Tyco Electronics Corporation employee, filed a wrongful termination claim against Tyco in the federal district court in Massachusetts. Plasse v. Tyco Elecs. Corp., No. 3:04-CV-300556-MAP, 2006 WL 2623441 (D. Mass. Sept. 7, 2006). During the lawsuit, Tyco sought discovery of Plasse's personal computer to find evidence that would support its claim that Plasse had misrepresented his credentials when he applied for employment, that he had later lied in a deposition about his level of education, and that he falsified documents to support his false deposition testimony. At issue were several versions of Plasse's resume. Plasse had attributed "errors" in his resume to his own "mistake" or to "modifications" made by his employment agency.

When Plasse failed to produce the computer, Tyco moved to compel the production of the computer and to compel

further deposition testimony. The court granted Tyco's motion and ordered Plasse to submit to a further deposition for the sole purpose of identifying computers and other media storage devices used by him during relevant time periods. It also ordered Plasse to produce all computers and media storage devices presently in his possession, under his control or accessible to him, for inspection by Tyco's forensic expert.

The forensic expert's examination of Plasse's computer and disks revealed that he had modified or deleted several files pertaining to his resume *after* he filed his lawsuit and *after* the court had issued its order compelling production. The examination also revealed that Plasse had failed to produce other relevant documents and e-mails and had altered the system date on his computer.

Tyco argued that the only appropriate sanction for Plasse's evidence tampering was dismissal of his complaint and an award of attorney's fees and expert costs. The court agreed and held that "[c]lear and convincing evidence demonstrates that [Plasse] has engaged in extensive and egregious misconduct in this case."

In its exhortation of Plasse's conduct, the court highlighted that Plasse had been repeatedly put on notice that his resume, his computer and his computer files were at issue in the case long before the documents "disappeared." The court stated that Plasse's explanation for his behavior was "more than unconvincing; it verge[d] on the absurd."

The court concluded that Plasse had destroyed or concealed evidence and had engaged in a pattern of misconduct that hampered the case proceedings. In addition, the court found that Plasse had "consistently demonstrated an unwillingness to proceed fairly and openly in this litigation" and appeared "to believe that his actions were insignificant." While less drastic sanctions were available to the court, it determined that dismissal - with prejudice - was the only appropriate remedy for Plasse's conduct.



TIP-POOLING CASES TIP OFF MASSACHUSETTS EMPLOYERS TO PROPER WAGE PRACTICES

The Massachusetts Tip Pooling statute, Mass. Gen. Laws c.149, § 152A ("Tip Statute"), has been the subject of recent decisions and verdicts against major restaurants in

the Boston area. Many other tip pooling lawsuits remain pending, including cases filed against Gillette Stadium, Northeastern University, Weston Golf Club, Top of the Hub, Grill 23 & Bar, The Federalist and The Four Seasons. A number of other cases, including those involving room service at the Four Seasons and eating establishments at the Ritz-Carlton and Boston Harbor Hotel, have been settled.

Tip pooling is the relatively common practice of taking gratuities received from restaurant patrons and placing either the total or partial amounts of the tips in a central pool for distribution to other employees. The Tip Statute specifically permits an employer to implement and administer a tip pool, provided that only wait staff, bartenders and service employees participate. Kitchen staff and employees with managerial responsibilities may not participate in the pools.

Several of the lawsuits were initiated by wait staff who claimed both that their employers were in violation of the Tip Statute, and that their employers had retaliated against them for complaining about the employers' policies. Under the Wage Act's anti-retaliation provision, Mass. Gen. Laws c. 149, § 148A, it is an unlawful practice to terminate or otherwise retaliate against an employee because he or she makes a complaint of wage violations, including tip-pooling.

In Smith v. Winter Place LLC, for example, the plaintiffs were servers at Locke-Ober restaurant. When Locke-Ober reopened in November 2001 under new ownership, it instituted a tip pooling system that required servers to share their tips with bussers, bartenders, and the maitre d'. The servers complained to the maitre d' that they were not receiving all of their tips and that the maitre d' should not be sharing in the tip pool. Two of the servers also filed complaints with the Attorney General's office. After the maitre d' advised the restaurant owners that the servers were upset about the tip pooling system, Locke-Ober fired the servers and the maitre d', citing performance-related reasons.

At trial, Locke-Ober had successfully argued that the Wage Act's anti-retaliation provision only protects an employee who makes an official complaint to someone involved in the civil or criminal enforcement of wage and hour laws, such as the Attorney General. On appeal, however, the SJC disagreed. In August of 2006, the SJC

found that an employee who makes an internal complaint to a manager about a potential violation of the Tip Statute is protected by the Wage Act's anti-retaliation provision, even if the employee does not file an official complaint with the Attorney General. The SJC remanded the case to the trial court.

On July 24, 2006, just days prior to the decision in the Locke-Ober case, an Essex County jury decided another of the tip-pooling cases, Calcagano v. High Country Investor, Inc. d/b/a Hilltop Steak House and Marketplace. In that case, the jury awarded four former servers at the Hilltop Steak House substantial damages for wrongful termination in retaliation for complaining about the restaurant's tip sharing policy, which the jury also found illegal. Three of the four servers were awarded \$125,000 *each* for their retaliation claims; the fourth was awarded \$75,000. The jury also awarded a class of servers a much smaller amount - \$160,000 total - for the violation of the Tip Statute. The jury concluded that Hilltop Steak House had acted "outrageously, meaning with evil motive or reckless indifference" by firing the servers, thus allowing the court potentially to treble the damages awarded by the jury.

The lesson to be drawn from these decisions is that employers in the service and hospitality industries must be certain to develop and adhere to internal procedures requiring investigation of employee questions, concerns, or complaints about wage and hour issues, and to prevent or remedy any type of retaliation against employees who complain about potential wage and hour violations. Similarly, these employers should ensure that no employees with managerial responsibility or members of the kitchen staff receive any proceeds from a tip pool.



**EMPLOYEE DISMISSED AS PART OF EMPLOYER'S
"COST-CUTTING" EFFORTS CANNOT
SUSTAIN BAD FAITH TERMINATION CLAIM**

The Massachusetts Appeals Court recently refused to expand the circumstances under which an employee may claim that, by terminating the employee, the employer breached the covenant of good faith and fair dealing in an at-will employment agreement. In York v. Zurich Scudder Investments, Inc., the Appeals Court held that "cost-cutting" is a legitimate reason to terminate an employee,

constituting “good cause,” therefore negating any argument of bad faith termination.

In Massachusetts, employers may terminate an at-will employee for any reason, so long as that reason is not discriminatory or otherwise illegal. Since the 1977 case of Fortune v. National Cash Register Co., 373 Mass. 96, 101 (1977), however, Massachusetts has recognized a limited exception to that proposition. The exception holds that when an employer terminates an at-will employee in bad faith in order to deprive the employee of a commission due, or about to be due, so that the employer will benefit financially at the employee’s expense, the employee may recover compensation for work performed. Cases subsequent to Fortune have explained that the employer is only liable for compensation linked to the employee’s past, not future, services.

York, a salaried employee, sold group retirement plans for Scudder Investments. He also received incentive compensation based on the account value of each client that he recruited. Scudder’s Employee Handbook stated that all compensation, commissions, and benefits ceased as of the employee’s separation date from the company. Scudder’s incentive agreement also stated that employees who terminated their employment prior to the payment of incentive awards would forfeit those awards. In the spring of 2000, Scudder decided to cut costs by instituting company-wide layoffs. York’s position was eliminated as part of the cost-cutting efforts.

York sued, claiming that Scudder breached its implied covenant of good faith and fair dealing by terminating his employment to avoid paying him incentive compensation. The trial court granted Scudder’s motion for summary judgment and dismissed York’s good faith and fair dealing claim. On York’s appeal, the Appeals Court affirmed the dismissal. It held that Scudder’s nondiscriminatory discharge of York for cost-cutting reasons fell within the definition of good cause and was therefore in good faith.

The decision in York is good news for employers because it maintains the narrow scope of the Fortune ruling and limits the good faith and fair dealing doctrine. The decision is also significant because it recognizes that employers should be permitted to “implement cost-cutting measures when, in the employer’s judgment, these measures are necessary for the needs of the business.”

EMPLOYERS WHO STEREOTYPE MOTHERS MAY BE LIABLE FOR GENDER DISCRIMINATION

While the Fair Employment Practices Act, Mass. Gen. Laws c. 151B, does not expressly protect employees from discrimination based on motherhood or parental status, in Sivieri v. Department of Transitional Assistance, No. 02-2233, 2006 WL 1707954 (Mass.Super. June 22, 2006), the Superior Court held that an employer’s reliance on stereotyped views about women and the incompatibility of motherhood and employment may be a form of sex discrimination.

Sivieri worked as a paralegal for the Department of Transitional Assistance (DTA). During the time Sivieri had been unmarried and had no children, the DTA had reviewed her work positively. After Sivieri married and became pregnant, she applied for a promotion. The DTA awarded the position to another woman hired after Sivieri and who had no children. The DTA awarded two other promotions to female employees with less tenure than Sivieri. One of these employees had no children and the other had a grown daughter. When Sivieri asked the DTA why she was not promoted, her supervisor allegedly told her that the birth of her child had led the DTA to conclude that Sivieri was no longer interested in a promotion. Sivieri also alleged that she heard her supervisor make frequent comments regarding the negative effect of maternity leaves on the DTA’s productivity.

Alleging that the DTA’s failure to promote her constituted sex discrimination, Sivieri sued. Arguing that the law does not prohibit discrimination based on parental status, the DTA moved for summary judgment. The Superior Court denied the motion. It held that contrary to the DTA’s argument, Sivieri’s evidence reflected a discriminatory animus toward women, not parents. It rejected the DTA’s argument that in order for Sivieri to prevail on a gender discrimination claim, she had to produce evidence showing that male employees received promotions ahead of her. It stated:

[o]bviously, gender discrimination is more blatant when it works to the advantage of male employees ... discrimination against mothers is no less corrosive when that discrimination results in the advancement of another woman who is not a mother.

Sivieri, 2006 WL 1707954 at *6. Furthermore, the court characterized as “antiquated” the DTA’s expressed reason for the promotion decisions, which were based on a pre-conception that wives are primarily responsible for caring for young children and that mothers of young children will prioritize their child care obligations over their work-related responsibilities. Relying on federal cases interpreting Title VII, the court held that Chapter 151B prohibits an employer from basing employment decisions on stereotypes regarding motherhood.

The Sivieri decision serves to remind employers that Chapter 151B’s list of protected classifications does not necessarily define the broadest reaches of the statute. Employers should be cautioned by Sivieri to ensure that their employment practices are neutral in terms of employees in protected classes. Employers should also be cautioned against making any employment decisions even partially based on stereotypes, regarding, for example, women as mothers, older employees, or individuals with disabilities. Sivieri instructs that decisions should be based on an employee’s demonstrated abilities and stated preferences, not on assumptions about the employee’s capabilities or presumed interest, or lack thereof, in his or her position.



**APPEALS COURT FINDS THAT EMPLOYEE
WHO QUITS DUE TO CHILD CARE ISSUES
MAY BE ELIGIBLE FOR UNEMPLOYMENT BENEFITS**

One of the purposes of Massachusetts unemployment compensation statute is to avoid the disqualification of benefits to persons who, for compelling personal reasons, are forced to give up an otherwise available position. Mass. Gen. Laws c. 151A, § 25(e)(1). The courts have recognized a wide variety of personal circumstances as constituting “compelling reasons” under § 25(e)(1), including family relationships that cause a married spouse or nonmarital partner to leave her employment in order to relocate with her spouse or partner, pregnancy or pregnancy-related disability, and domestic responsibilities such as child care.

The Appeals Court recently addressed whether a mother’s decision to leave a job because she was unable to find suitable child care constituted such a “compelling reason.” In Norfolk County Retirement System v. Director of the Department of Labor & Workforce Development, 66

Mass. App. Ct. 759 (2006), the Appeals Court left open the possibility that such an employee might qualify for benefits, but sent the case back to the Division of Unemployment Assistance (“DUA”) to address whether the particular employee in that case had “acted reasonably, based on pressing circumstances in leaving her job.”

The plaintiff, Pamela Masson-Smith, had worked full time for the Norfolk County Retirement System for 16 years prior to the birth of her child. Although the County granted Ms. Masson-Smith six months of paid maternity leave, she returned to her position six weeks early. After a few weeks back on the job, Ms. Masson-Smith requested and was granted a temporary three-day work week to accommodate child care issues. When the County subsequently informed her that she had to return to her full time schedule, Ms. Masson-Smith explained that commercial care was too expensive and that her sister could care for her baby only three days a week. As an alternative to working full time in the office, she suggested that she be allowed to work from home two days, in the evenings, or on weekends. When the County did not accept her proposal, Ms. Masson-Smith resigned. She explained to the County that she did not want to leave her position, but that she “had to leave” to care for her child.

The DUA initially denied Ms. Masson-Smith’s application for unemployment benefits because it determined that her departure was voluntary and without good cause attributable to her employer. She appealed and, after a hearing, the DUA review examiner found that Ms. Masson-Smith was entitled to benefits because her departure from work was rendered involuntary by “urgent, compelling and necessitous reasons.” The DUA’s Board of Review affirmed the decision on appeal and awarded benefits to Ms. Masson-Smith.

The County challenged the DUA’s award of benefits in court. The District Court set aside the DUA’s decision as unsupported by substantial evidence. Ms. Masson-Smith appealed. The Appeals Court found the DUA’s decision to be “deficient,” not for insufficient evidence, but because the review examiner did not make all requisite findings and did not sufficiently explain his reasons or the evidence underlying his decision. For example, the review examiner had not ascertained whether Ms. Masson-Smith “acted reasonably, based on pressing circumstances” in leaving her job. The Appeals Court remanded the matter to the DUA.

Consequently, it is now possible that an employee who quits due to child care concerns may be eligible for unemployment benefits. While the burden to prove that compelling circumstances necessitated the resignation remains with the employee, employers should be mindful of these issues when contesting the DUA's award of benefits to an employee.



**RIGHT-HANDED WORKER NOT DISABLED
UNDER THE AMERICANS WITH DISABILITIES ACT
BECAUSE HE COULD MANAGE WITH LEFT HAND**

A popular misconception among employees is that the Americans with Disabilities Act ("ADA") automatically protects employees with any kind of injury or illness. In a recent case, the Eighth Circuit Court of Appeals affirmed that not every injury or illness constitutes a disability under the ADA. In Didier v. Schwan Food Co., No. 05-3911 (8th Cir. Oct. 16, 2006), the court determined that a right-handed employee who had broken his right arm was not disabled under the Americans with Disabilities Act because he could still care for himself by using his left hand.

Didier worked as a sales manager for Schwan Foods. He was required to drive a truck once a month and train new drivers. In the mid 1990s, Didier, who is right-handed, injured his right wrist and arm when he fell from a customer's porch while on a delivery. A few years later, Didier required more surgery on his right hand and arm. As a result, Didier was restricted from driving and from lifting more than 10 pounds.

Following surgery, Didier returned to his sales manager position, albeit with modified duties. He was restricted to carrying ten pounds or less, and also restricted from driving the route, due to the heaviness of the truck doors. Didier's physician opined that he had reached maximum medical improvement. Didier remained on light duty for approximately one year, at which point Schwan informed him that it could no longer provide light duty assignments, and that it would be terminating his employment effective January 1, 2004. Schwan had concluded that his condition would not improve to allow him to return to his former position.

Didier sued Schwan for disability discrimination under the ADA, claiming that his injured arm and wrist constituted a disability that substantially limited him in the major life activity of caring for himself. Didier argued that his injury made it difficult for him to clean himself, shave, brush his teeth, dial the phone, prepare meals, feed himself and dress himself. The trial court ruled in favor of Schwan, holding that that Didier was not substantially limited in those tasks because Didier admitted that he could perform the task with his left hand, even though it took longer than with his right hand. Importantly, Didier had not claimed that his injury substantially limited him in the major life activity of working.

On appeal, the Eighth Circuit affirmed. The court emphasized that to be covered by the ADA, the person must be "substantially" limited in the major life activity. The court held that the right arm, although experiencing a disability, did not prevent him from doing the activities of primary importance to everyday life. It held that taking longer to care for himself, compared to how unimpaired individuals normally care for themselves, was not a significant or substantial impairment within the meaning of the ADA.

The court also held that even if Didier was disabled within the meaning of the ADA, the accommodation he had requested of Schwan (having another employee drive open routes or handle the truck doors) was not reasonable since it did not relate to his claimed disability of being substantially limited in the life activity of caring for himself.



**FIREFIGHTERS WHO TAKE RITALIN TO
TREAT ADHD ARE NOT DISABLED UNDER THE ADA**

The Sixth Circuit Court of Appeals has ruled that three Ohio firefighters with attention deficit hyperactivity disorder ("ADHD"), under treatment with Ritalin, were not disabled within the meaning of the ADA because the medication they are taking prevents them from being substantially limited in the major life activity of learning. Accordingly, the court determined that the firefighters were not entitled to accommodations in taking promotion tests.

The firefighters sued the City of Columbus, Ohio for disability discrimination after the City had denied their

requests for accommodations in taking promotion examinations. They had requested additional time, a private room and oral explanations of the test directions. The firefighters repeatedly took the examinations without accommodations and failed.

The trial court granted the City's motion for summary judgment and dismissed the complaints on the grounds that the plaintiffs had failed to show they were disabled within the meaning of the ADA. Deciding the plaintiffs' appeal, the Sixth Circuit affirmed the dismissal. Although the Sixth Circuit agreed with the plaintiffs that their ADHD substantially limited the major life activity of learning, it stressed that the ADA protects only those employees whose impairments are not mitigated by corrective measures.

The Plaintiffs each testified that Ritalin had successfully treated their ADHD symptoms. Citing the Supreme Court's decision in Sutton v. United Airlines Inc., 527 U.S. 471 (1999), the Sixth Circuit explained that "[w]hen an ADA plaintiff can fully compensate for an impairment through medication, personal practice or an alteration of behavior, a disability under the ADA does not exist." The court found that because plaintiffs had not "shown that Ritalin is anything but an effective treatment for their disorder," the plaintiffs were not disabled under the ADA.

The Sixth Circuit's ruling in this case demonstrates that employers may have no obligation to accommodate employees suffering from ADHD or other impairments if the employees' symptoms can be effectively controlled or mitigated by medication. If an employee identifies him or herself to be suffering from an impairment and requests accommodations for it, the employer will be well served to obtain medical documentation regarding any medications or other treatments used by the employee to care for his or her identified impairment.

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