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Labor and Employment Law Update

RUBIN AND RUDMAN IN THE NEWS

UNEMPLOYMENT TAX EXEMPTION UPHELD

Michael R. Coppock, partner at Rubin and Rudman LLP, successfully argued at the Supreme Judicial Court that the Maimonides School was exempt from the Massachusetts unemployment tax.

In *Bleich v. Maimonides School*, 447 Mass. 38 (2006), the court affirmed a lower court decision that Maimonides School was exempt from paying unemployment tax because it is an organization operated primarily for religious purposes, and is principally supported by a church or convention or association of churches.

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RECENT DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION

The Supreme Judicial Court has recently issued four decisions concerning employment discrimination that are a mixed bag for employers.

In *Mammone v. President and Fellows of Harvard College*, 446 Mass. 657 (2006), the court held that "a handicapped employee who engages in egregious misconduct, sufficiently inimical to the interests of his employer that it would result in the termination of a non-handicapped employee, is not a qualified handicapped person within the meaning of G.L. c. 151B, and therefore is not entitled to the protection of that statute." The actions of the plaintiff, who suffered from bipolar disorder, were misconduct beyond what any employer should expect from an employee.

The plaintiff was a staff assistant at Harvard University's Peabody Museum. His workplace was at the museum's reception desk in the main lobby and his duties required significant contact with the public. He was required to direct visitors and tour groups to destinations inside the museum and answer any questions of the museum's guests.

Bipolar disorder manifests itself in occasional periods of depression and mania (paranoia, agitation, hyperactivity and irrationality are symptoms). There was no evidence prior to the incidents in this case that the plaintiff's disease negatively affected his work per-

formance, and his work record contained positive formal reviews and annual salary increases.

In August 2002, the plaintiff experienced a manic episode at work. He established a web site decrying low wages paid to some Harvard employees. He distributed flyers about his web site to co-workers and engaged them in loud conversations about the web site and its content. He sang and danced to protest songs from the web site while at the reception desk. His supervisor instructed him not to bring his laptop computer to work. He informed his supervisor he would not follow that instruction. The manic episode involved his non-work hours as he developed delusions of a conspiracy against him and would not go to his home. He developed a belligerent attitude to his co-workers and museum visitors.

On one morning the plaintiff spoke loudly on the telephone at the reception desk. When approached by his supervisor and asked to go into a private conference room, he refused and called her "evil" and to get away from him. The supervisor returned with the Director of Human Resources and two police officers and asked the plaintiff to leave the museum, and to return the next morning for a meeting. He refused to leave and was informed he would be arrested if he did not leave. The plaintiff was charged with trespassing and disorderly conduct and arraigned in court. After the arraignment, he returned to a second museum and was observed by his supervisors. He was ordered to leave and used profanity toward his supervisor and the Director of Human Resources as he left the building.

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He was terminated for returning to the museum and his conduct toward his supervisor and the Director of Labor Relations.

The court concluded that the above-described misconduct was egregious misconduct and as such the plaintiff precluded himself from “performing the essential function of the position” with or without a reasonable accommodation.

The plaintiff argued that *Garrity v. United Airlines*, 421 Mass. 55 (1995), which the court followed in the case, should be limited to cases in which the employee engages in egregious misconduct resulting from alcoholism and drug addiction. The court rejected the argument, pointing out the G.L. c. 151B does not create “significantly different levels of disqualifying disability-related misconduct based on whether the misconduct stems from alcohol or some other disability.”

In sum, an employer does not violate G.L. c. 151B by terminating an employee for egregious misconduct that flows from any recognized handicap, including a psychiatric handicap.

DEATH DOES NOT RELIEVE EMPLOYERS FROM LIABILITY FOR EMPLOYMENT DISCRIMINATION

In *Gasior v. Massachusetts General Hospital*, 446 Mass. 645 (2006), the Supreme Judicial Court considered for the first time whether an employee’s claim of unlawful discriminatory termination survived the employee’s death and, if so, what damages may be awarded.

The plaintiff, Gasior, worked as a plumber for Massachusetts General Hospital (“MGH”). He needed a leave of absence for treatment of a heart condition. A physician approved the plaintiff’s return to work and the plaintiff claimed from that point forward he could perform the essential functions of his job as a plumber with or without reasonable accommodations. Despite several vacant plumber positions, MGH refused to return the plaintiff to work as a plumber.

The plaintiff sued seeking reinstatement, back pay, front pay, lost benefits, emotional distress damages and punitive damages. The plaintiff died of causes unrelated to his medical leave one week before trial began. MGH sought to dismiss the lawsuit, arguing that a discrimination claim did not survive the death of the plaintiff.

In order to be successful, the plaintiff had to show that his claim was the type that survived at common law or is a tort specifically enumerated in the Massachusetts survival statute.

Contract claims survive a party’s death at common law, so the court concluded that the relevant provisions of G.L. c. 151B control a term of the plaintiff’s employment at MGH; and that term prohibited MGH from dismissing or refusing to reinstate the plaintiff because of invidious discrimination. Thus, the claim of discrimination survived the plaintiff’s death.

The court also reaffirmed the broad remedial purposes of G.L. c. 151B, which both mandates that the provision concerning remedies available to the victims of discrimination be construed liberally for the accomplishment of the statute’s purposes, and acts as a deterrent to employers that discriminate. The court held the plaintiff

would have available to him all remedies provided under the discrimination statute, including punitive damages.

VOLUNTEERS ARE NOT PROTECTED FROM SEXUAL HARASSMENT BY STATE STATUTE

In 1986 the Legislature passed an act prohibiting sexual harassment in the workplace and educational settings. In the employment context, the statute made it an unlawful practice for an employer or its agents to sexually harass an employee. G.L. c. 151B, § 1(18). This law applied to employers with six or more employees. Protection from sexual harassment for employees of employers with fewer than six employees is provided by G.L. c. 214, § 1C.

In *Lowry v. Klemm*, 446 Mass. 572 (2006), the plaintiff, who was a volunteer worker at a swap shop, filed a sexual harassment lawsuit against an employee. The plaintiff argued the term “person” in G.L. c. 214, § 1C, included protection from sexual harassment in any context. The court rejected the claim and held that the statute does not protect volunteers. The offending conduct must occur in an employment or educational setting.

The decision of the court protects employers from liability to volunteers for sexual harassment under G.L. c. 214, § 1C, but reaffirms that volunteers retain their common law rights to sue the offending party and the offending party’s employer.

EMOTIONAL DISTRESS DAMAGE AWARDS MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE

The Supreme Judicial Court struck down an award of emotional distress damages in *DeRoche v. Massachusetts Commission Against Discrimination*, 447 Mass. 1 (2006). This was the court’s first opportunity to further clarify the principles set out in *Stonehill College v. Massachusetts Commission Against Discrimination*, 441 Mass. 549 (2004), which factors include (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm.

DeRoche was an electrical worker for the Wakefield Municipal Gas & Light Department for forty-three years. He retired at sixty-five because he believed it to be a mandatory retirement age. The town retirement board processed his retirement application without informing him that he was mistaken about mandatory retirement and could work until seventy. Two years into retirement DeRoche became aware of the mistake and filed an age discrimination claim and sought reinstatement. DeRoche was reinstated by the employer but assigned to a line crew rather than a home service crew. Assignment to a line crew was more dangerous and physically demanding than a home service crew. DeRoche resigned one day later. His claim alleged age discrimination against the town retirement board by forcing him to retire because it did not inform him he was not required to retire, and retaliation in his assignment to the line crew. The Commission determined that there was no age discrimination in the retirement board’s failure to inform DeRoche he did not have to retire, but the Commission did find the assignment to the line crew was retaliation against DeRoche who had filed a complaint at the Commission.

In *DeRoche*, the court reaffirmed the concept that a finding of discrimination by itself is insufficient as a matter of law to permit an inference of emotional harm. Emotional distress to be compensable must be proved by substantial evidence of the emotional suffering that occurred as well as substantial evidence of a causal connection between the complainant's emotional distress and the respondent's unlawful act. The factual basis for the award must be clear on the record.

The plaintiff testified during the hearing that his overall health was exemplary, and he never needed to seek medical help or take medication for symptoms of emotional distress. There was no evidence the plaintiff experienced physical manifestations of distress such as loss of appetite, difficulty sleeping, or that he was compelled to curtail his life activities in any way due to the stress. The evidence of the plaintiff's emotional distress was generalized statements about his "not understanding the reasoning" that led to his assignment to a particular work crew upon his return to work from retirement. According to the court, the award of emotional distress damages in this case was the "classic example" of what the principles announced in the *Stonehill* decision were intended to discourage. There was no causal connection between his distressed emotional state and the illegal discriminatory act, and the evidence of emotional distress was weak.

The court in *DeRoche* also decided that public employers, similar to private employers, must pay interest on damage awards issued by the Massachusetts Commission Against Discrimination.

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OBLIGATION OF EMPLOYER TO REPORT EMPLOYEE'S VIEWING CHILD PORNOGRAPHY

A New Jersey appellate court has overturned a summary judgment decision in favor of a defendant corporation that failed to conduct a proper investigation into an employee's use of his company office computer.

The facts in the case established that an accountant for a New Jersey corporation was arrested on child pornography charges. A search of the employee's company office computer by law enforcement authorities disclosed that he had visited pornographic web sites, and transmitted and stored nude pictures of underage girls, including his ten-year old stepdaughter.

The stepdaughter's mother sued the New Jersey corporation, alleging that the employer knew or should have known that the accountant was using the company computer system to view, download and participate in child pornography. The mother claimed that the company had a duty to report the accountant to law enforcement personnel for prosecution for the crimes committed on its property during work hours.

During discovery, the administrator for the company computer network admitted that he used the network's daily log system to isolate and identify the pornographic web sites visited by the employee. The administrator did not open any specific sites but did report the fact that the employee contacted the pornographic sites to his supervisor. The administrator was told not to investigate further.

The accountant's immediate supervisor was also aware that he contacted pornographic web sites because he checked the employee's computer while he was at lunch and viewed the web sites he visited. The supervisor simply instructed the employee to stop this activity. No further action was taken.

The court ruled that if the company had conducted a proper investigation into the employee's computer use, it would have discovered the child pornography. The court further concluded that with this knowledge the company had an obligation to report to law enforcement personnel, since this is a violation of state and federal law. A proper investigation would also have required the company to take "effective internal action to stop the activities whether by termination or less drastic action." The court concluded that it was a jury question whether the failure to take appropriate action was the proximate cause of the continued molestation of the employee's stepdaughter.

The above case is further notice to employers that they should have:

- written internet and email policies in place;
- monitor employee internet use;
- investigate any violations; and
- report possible criminal violations.

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UNIVERSAL HEALTH CARE COUNTDOWN

The state of Massachusetts enacted the first universal health insurance law in the United States in April 2006. The new law mandates that employers and individuals take certain steps to obtain health insurance coverage or suffer consequences.

As of July 1, 2007, employers with eleven or more employees, who do not provide health insurance to employees or contribute to it, will be required to make a "fair share contribution" estimated to be approximately \$295.00 per full time employee to a fund to help the state pay for the uninsured. Additionally, employers with ten or more employees shall be required to offer a Section 125 plan (Cafetera plan) on a pre-tax basis.

Employers who do not provide insurance may be hit with a "Free Rider Surcharge." The surcharge will be triggered when an employee receives free care more than three times, or a company has five or more instances of employees receiving free care in a year. The surcharge will range from 10% to 100% of the state's cost of services provided to the employees, with the first \$50,000 in care per employer exempted.

Individuals must obtain health insurance coverage. Massachusetts residents will be asked to confirm that they have health insurance on their state tax forms filed in 2008. Coverage will be verified through a database of insurance coverage for all individuals. The Department of Revenue will be charged with the responsibility of enforcing this provision with financial penalties beginning with a loss of the personal exemption for tax year 2007 and then increasing to a portion of what an individual would have paid toward an affordable premium for subsequent years.

Individuals for whom there are not affordable products available will not be penalized for not having insurance coverage. A sliding “affordability scale” will be set annually by the Board of Connector, a separate authority charged with enforcement of the new law.

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RUBIN AND RUDMAN LABOR AND EMPLOYMENT GROUP WELCOMES NEW MEMBER



Julie Marçal has become a member of Rubin and Rudman’s Labor and Employment Law Group. She represents and advises management clients in all phases of workplace law. She joined the firm in the fall of 2005 after graduating from the University of Connecticut School of Law. Prior to joining Rubin and Rudman, Ms. Marçal worked at the Massachusetts Commission Against Discrimination and the National Labor Relations Board. She has also served as

a mediator in employment discrimination disputes.

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RULE AND REGULATION UPDATE

- Under the Veterans Benefits Improvement Act, employers must post information on the Uniformed Services Employment and Reemployment Act (USERRA). Copies of the required poster may be obtained at www.dol.gov/vets/programs/userra/poster.htm.
- EEOC Approved Revisions to EEO-1 Report, Effective in 2007.

Effective September 30, 2007, the Equal Employment Opportunity Commission has revised the EEO-1 Report. This report, formally known as the “Employer

Information Report,” is an annual requirement for employers with 100 or more employees and for employers with federal government contracts of \$50,000 or more and 50 or more employees.

The report must be filed by September 30 each year and requests the employer to provide a count of employees by job category and then by ethnicity, race and gender.

The new form has changes to the ethnic and racial categories, which include:

- adds a new category titled “Two or more races”;
- divides “Asian or Pacific Islander” into two separate categories: “Asian” and “Native Hawaiian or other Pacific Islander”;
- renames “Black” as “Black or African American”;
- renames “Hispanic” as “Hispanic or Latino”; and
- strongly endorses self-identification of race and ethnic categories, as opposed to visual identification by employers.

The new form also includes changes to the job categories section, which are:

A. First, the current category of “Officials and Managers” will be divided into two levels based on responsibility and influence within the organization.

These two levels will be:

1. Executive/Senior Level Officials and Managers (plan, direct and formulate policy, set strategy and provide overall direction; in larger organizations, within two reporting levels of CEO).
2. First/Mid-Level Officials and Managers (direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers; oversee day-to-day operations).

The revised EEO-1 also will move business and financial occupations from the Officials and Managers category to the Professionals category (to improve data for analyzing trends in mobility of minorities and women within Officials and Managers.).

Employers may use the current EEO-1 Report to file their September 30, 2006 Report.

RUBIN AND RUDMAN LLP PRACTICE AREAS:

Labor and Employment Counseling and Representation: grievances, arbitration, certification elections, collective bargaining, unfair labor practices at the NLRB, wage and hour claims, prevailing wage claims, discrimination claims before the EEOC and MCAD, wrongful discharge claims, representation in state and federal courts.

Real Estate Development and Leasing

Environmental, Land Use, Permitting, Zoning

Power Plant Siting, Licensing, and Rate Setting

Estate Planning; Estate and Trust Administration

Public and Private Construction Contracting and Claims

Corporate, Business, and Tax

Bankruptcy

Securities Regulation and Arbitration

Representation Before State and Federal Administrative Boards

Representation Before Medical and other State Licensing Boards

Alcoholic Beverages Licensing Issues

Legislative Representation

Complex Commercial Litigation

Criminal Defense

Domestic Relations