

Labor and Employment Law Update

\$2.1 Million Verdict For the Employee

In May, two lawyers from Rubin and Rudman LLP won a \$2.1 million verdict on behalf of their client. The Firm's client was recruited to be the Chief Financial Officer of the wholly-owned subsidiary of a large Boston bank. His offer letter said, "In addition to your compensation, you will participate as a member of the management team in an equity pool estimated at approximately 10% of the company." After accepting the offer and beginning work as CFO, he and the subsidiary's President started to work out the structure and allocation of the equity pool. However, the parent Bank took the project away, and made grants of its own restricted shares and stock options. Neither the Bank nor its subsidiary ever explicitly said that the Bank's shares and options were being given in substitution for the promise of participation in the subsidiary's equity. The subsidiary was sold in April, 2003, for \$182 million in cash, plus the buyer's assumption of \$3 million of the subsidiary's severance obligations to its executives. The CFO demanded a portion of the equity, which amounted to \$165 million after deduction of the subsidiary's debts. The Bank and its subsidiary re-

fused the claim. Rubin and Rudman LLP brought suit on behalf of the CFO. The defense was that the subsidiary's President did not have authority to make the offer of equity participation, and that the CFO had waived his claim by accepting the Bank's shares and options.

The case was tried by Rubin and Rudman LLP partner Michael Coppock, with the assistance of Brendan Mitchell. They called only one witness -- the CFO himself. He testified that, if the subsidiary had completed the agreed allocation of its own equity, he would probably have received a percentage equal to his share of the sum of the base pay of all of the participating executives -- 1.53% of the equity value realized by the parent

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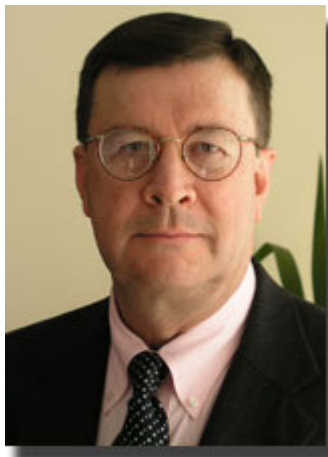
Bank on the sale of the subsidiary's assets.

The Bank and its subsidiary, represented by one of Boston's most prominent firms, put on a parade of witnesses, including a compensation expert who testified that the CFO's claim was disproportionate to customary executive compensation awards; and a corporate valuation expert who testified that the amount "realized" by the Bank was not \$165 million, but only \$141 million after consideration of the tax structure of the sale.

After six days of trial, a Middlesex Superior Court jury of eleven women and two men deliberated for two and one-half hours, and returned a verdict for \$2,172,000 in favor of the CFO.

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Michael Coppock is a member of Rubin and Rudman LLP's Litigation Group and Labor and Employment Law Group. He has tried many significant employment cases in state and federal courts, and appears regularly before the Massachusetts Commission Against Discrimination



Embryonic Stem Cell Research and Employment Law

May 31, 2005, was the effective date of a Massachusetts statute permitting embryonic stem cell research. Section 7 of the statute protects employees who object to participation in stem cell research because of "sincerely held religious practices or beliefs." Such employees cannot be required to engage in stem cell research, and cannot be retaliated against if they disclose or threaten to disclose activities which the employee "reasonably believes is in violation of any of the provisions of" the statute; or refuses to participate in any activity the employee believes to be in violation of the statute. This protection does not permit an employee to disclose confidential or proprietary information or trade secrets, unless disclosure is made directly and exclusively to the Attorney General or the Massachusetts Department of Public Health. An aggrieved employee must file a complaint with the Attorney General within two years. If the Attorney General does nothing, the aggrieved employee can file an action in Superior Court. Available relief includes reinstatement, recovery of three times lost wages and benefits, and recovery of attorneys' fees and costs. However, "if the court finds said action was without basis in law or in fact, the court may award reasonable attorneys' fees and costs to" the employer. Notice of these rights must be posted by the employer.

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Recent Developments in Handicapped Discrimination Law

Two recent Appeals Court decisions dealt with claims of handicapped discrimination by employees. In neither case was the outcome favorable to the employee. In Leach v. Commissioner of the Massachusetts Rehabilitation Commission¹, the employee had a hearing disability. The employer provided her with a teletypewriter so that she could communicate by means of typing messages carried over telephone lines. She also used a computer on a regular basis. The employee experienced physical symptoms of repetitive stress injury (RSI) in the fall of 1995, over a year after her employment started, but did not bring the condition to the employer's attention until March, 1996. The employer immediately responded with an accommodation. The employee contended that the employer "was obligated to anticipate the likelihood that she would develop RSI during the period of August, 1994 (her date of hire), through March, 1996 (when she first complained to the defendant of the condition), and arrange to provide accommodations after that time." The Appeals Court rejected this claim. "We consider this an unrealistically demanding standard and one not required by applicable legal principles. Ordinarily, an employer's obligation to attempt to accommodate a handicapped employee comes into being when the employee brings his or her need for accommodation to the employer's attention. * * * We recognize that there may be situations in which a request by the employee is unnecessary. These result from circumstances such as a condition that

¹ 63 Mass.App.Ct. 563 (2005).

makes it obvious that accommodation is required, or a condition that renders the employee incapable of making a request." That was not the situation in this case, so the employee's claim that the employer should have anticipated her need for an accommodation was rejected.

The employee in Smith v. Bell Atlantic,² was disabled as a result of polio, and was diagnosed with post-polio syndrome (PPS), a degenerative condition affecting some polio survivors. As an adult, Smith walked using wrist-braced crutches. For the last seven years of her employment she experienced increased fatigue, loss of body strength, and pain. She requested permission to work at home as an accommodation. Although the employer accommodated her to some extent, she was not satisfied, eventually left on total permanent disability, and made a claim of handicapped discrimination. She won a verdict for \$1.7 million, \$1.5 million of which was for future lost wages, future medical expenses, and future emotional distress. The award was based upon testimony of the employee's treating physician, an expert on PPS, "who stated that the company's failure to accommodate was the major contributing factor leading to Smith's rapid deterioration and inability to work."

After the verdict was returned, the trial judge struck the physician's opinion, ruling that it was not adequately supported in methodology or fact. Thus, the verdict was reduced by the \$1.5 million in future losses.

The Appeals Court affirmed the trial judge's action because the treating

² 63 Mass.App.Ct. ____ (2005).

physician's opinion "was lacking in specific factual foundation to support her analysis." "Dr. Silver's testimony revealed her to have little grasp of the specifics of Smith's life. Although she knew that there were long periods when Smith was on medical leave and did no work at all, she did not know the dates or extent of her absences. She was not familiar with Smith's daily activities, during the periods when she was out of work; nor was she aware of the number of hours that Smith spent working. She did not have a specific understanding of Smith's work activities, the detail and extent of Smith's surgeries and recoveries, or whether and in what ways the company had provided accommodation. We agree with the judge that these gaps in Dr. Silver's knowledge about Smith called into question the reliability of her conclusion that it was more probable than not that Smith's worsening PPS was due to the company's failure to accommodate, as opposed to other potential causes."

The lesson for employees: Your expert's testimony must "take meaningful account" of your "particular situation."

The lesson for employers: Carefully establish what the employee's expert does not know.

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Supreme Judicial Court Provides Guidance on Reductions in Force

In May the Massachusetts Supreme Judicial Court issued its first opinion in a case in which there was a claim of discrimination in connection with a reduction in force. The case was Sullivan v. Liberty Mutual Insurance Company.³ Sullivan was an attorney laid off during an effort by

Liberty to reduce its legal staff. She claimed sex and age discrimination. The SJC recognized that, "Mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a prima facie case." Rather, the employee must produce "some evidence that her layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination."

The SJC found that Sullivan had established a prima facie case of age and sex discrimination by showing that Liberty retained lower-rated, younger and male attorneys in the her job classification. Nonetheless, Liberty's motion for summary judgment was allowed, and Sullivan's case was dismissed, because Liberty offered a non-discriminatory explanation for Sullivan's layoff.

"As in all reductions in force, Liberty was forced to choose whom to terminate from among several presumably qualified attorneys. Although Liberty had evaluated its several attorneys over the preceding years, it was under no legal requirement to lay off the attorneys with the lowest performance ratings. While Liberty could (and did) take into account the performance evaluations of each attorney, Liberty could also take into consideration other business needs that a substantial reduction in its professional staff would surely occasion. It could consider the particular expertise of an attorney, or whether two candidates for layoff had overlapping expertise. It could in short determine which of the attorneys would best meet its ongoing business needs, provided it did not make the selection for impermissible reasons."

³ 444 Mass. 34 (2005).

Liberty proved that Sullivan was laid off as the result of a detailed review of the legal and non-legal performance of all lawyers, their areas of expertise, and the need of her group to obtain referrals from other groups within Liberty. This satisfied the Court that Sullivan's layoff was not based upon age or sex, and her claim was dismissed.

A reduction in force is a complex legal event. It must be done in the context of many state and federal laws - e.g., the Older Workers Benefit Protection Act, the Workers Adjustment and Retraining Notification (WARN) Act, ERISA, COBRA, and union collective bargaining agreements and seniority systems, as well as the discrimination laws. Careful planning is required. Please contact a member of the Rubin and Rudman LLP Labor and Employment Law Group if you have questions.

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How Not to Get an Effective Agreement to Arbitrate Employee Discrimination Claims

In 2001, General Dynamics sent an e-mail message to all of its employees with the subject line, "New Dispute Resolution Policy." When opened, the e-mail revealed a one page, single-spaced letter from the company's President, praising General Dynamics' dedication to, "open, forthright and honest communication," and announcing a new dispute resolution policy (DRP). There were two links -- one to the DRP policy handbook, and a second to a two-page flier that set out key provisions of the DRP in plain-language question and answer format. The flier said, in bold, highlighted text, "If the employee files a lawsuit against the Company, the Com-

pany will ask the Court to dismiss the lawsuit and refer it to the Dispute Resolution Policy," which required arbitration. Acceptance of the policy was a condition of continued employment.

Roderick Campbell was dismissed by General Dynamics in 2002. He brought a claim for disability discrimination, which ended up in the United States District Court in Boston. General Dynamics moved to have the case dismissed and ordered to arbitration pursuant to its DRP. Campbell said that he never received notice of the DRP. General Dynamics responded with evidence that Campbell had opened the e-mail. However, there was no evidence that he had clicked on the links that disclosed General Dynamics' policy of arbitration. Was General Dynamics' e-mail sufficient to deprive Campbell of his right to a judicial trial? Judge Nancy Gertner said no, finding that the volume of e-mails received by Campbell, combined with General Dynamics' failure to highlight the importance of this particular e-mail, failed to meet the requirement that employees be given "actual notice" of the employer's intent to implement mandatory arbitration of discrimination claims. Judge Gertner observed that General Dynamics, as author of the e-mail and the policies, was in a position to bring its importance to Campbell's attention, and to require that he acknowledge receipt and understanding of the arbitration policy by something as simple as clicking a box saying, "I accept." Thus, she ruled, General Dynamics had not obtained an effective waiver of Campbell's right to a judicial determination of his claim. She did not decide whether General Dynamics had met the requirement of both the Federal Arbitration Act and the Massachusetts Arbitration

Act that an agreement to arbitrate be “in writing.”⁴

The lesson is clear: If an employer wants to divert employee claims from the courts and into arbitration, it must give clear notice of that intent, and obtain the employee’s unambiguous written assent to the policy.

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Continuing Issues Regarding the Classification of Workers as Employees or Independent Contractors

Effective July 19, 2004, the Massachusetts Legislature enacted a statute making it more difficult to classify workers as independent contractors, rather than as employees. The statute explicitly refers to the Massachusetts Wage Payment and Minimum Wage Acts. It also refers to Mass. G.L. c.62B, the Massachusetts Wage Withholding Law. Thus, one would assume that employers must withhold taxes from everyone classified as an “employee” under the new statute. The Massachusetts Department of Revenue does not agree. In a draft⁵ Technical Information Release of March 8, 2005, the DOR said that its governing statute adopts the federal definition of “employer” found in the Internal Revenue Code, and the “20 factors” test of Internal Revenue Service Rev.Rul 87-41. The DOR accepts IRS determinations of employee work status.

Thus, even though a worker may be an “employee” for purposes of the Massachusetts minimum wage and timely wage

payment laws, that person is not necessarily an “employee” for purposes of withholding federal and state taxes.

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,
personnel policies and statutory compliance.

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

⁴ Campbell v. General Dynamics Government Systems Corporation, 321 F.Supp.2d 142 (D. Mass. 2004), aff’d, 407 F.3d 546 (1st Cir. 2005).

⁵ Even though the TIR is a “draft,” the Commissioner has indicated that his position will not change unless G.L. c.62B is amended.