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EMPLOYMENT and ANTI-DISCRIMINATION LAW UPDATE

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Disability Accommodation Update: Working from Home

Massachusetts General Laws 151B § 4 (16) and Title I of the Americans with Disabilities Act (the "ADA") prohibit discrimination against an employee or prospective employee with a disability who is able to perform the essential functions of the job with or without reasonable accommodation. An employer is required to engage in an interactive dialog with a disabled employee who requests an accommodation (or where the employer should know that an accommodation is necessary) regarding the type of accommodation to be provided to enable the disabled employee to perform the essential functions of the job. Permitting a disabled employee to work from home may be a reasonable accommodation.

Recently, the Massachusetts Court of Appeals addressed an employer's obligations in connection with permitting a disabled employee to work from home. In Smith v. Bell Atlantic, the Appeals Court found in favor of a disabled plaintiff who brought a failure to accommodate claim against her employer, Bell Atlantic. At the crux of the case was not whether Bell Atlantic permitted the plaintiff, Doreen Smith, to work from home, which Bell Atlantic did agree to, but whether Bell Atlantic failed to adequately accommodate the employee so she could work from home. The Court found that, while approving Ms. Smith's request to work from home, Bell Atlantic did not supply Ms. Smith with the resources necessary to make the accommodation work. In particular, the Court found Bell Atlantic failed to provide Ms. Smith with a computer, failed to support Ms. Smith's use of equipment that she purchased herself (computer, fax machine, copier, printer, software and office furniture), and failed to provide Ms. Smith with telephone service lines that she could use to connect with Bell Atlantic's network. A further aggravating factor was Ms. Smith's supervisor's habit of leaving instructions for her at Bell Atlantic's office and not re-connecting with her by telephone after breaks in meetings.

The award in the case was substantial. Ms. Smith received over $200,000 in emotional distress damages. It should be noted, however, that the jury had awarded the plaintiff over 1.7 million dollars, which was reduced after motions and the lower amount affirmed on appeal. The court also awarded Ms. Smith attorneys' fees.

Based on this ruling, it is clear that tacit approval of a work-from-home arrangement is not sufficient. A company must take reasonable steps to implement the arrangement and to make the arrangement successful. This may include providing an employee with the necessary office equipment to work from home as well as providing training and advice to its supervisory staff regarding continued inclusion of the employee in the company's business. ■

Wrongful Termination Claim—Regulations Governing Professionals Do Not Form Basis of Public Policy Violation

Employees who claim they have been wrongfully terminated must prove that the termination violated public policy, violated the implied covenant of good faith and fair dealing or violated an implied contract. These violations form the main exceptions to the employee-at-will doctrine that provides that an employer may discharge an at-will employee at any time and the employee may quit at any time.

The public policy exception to the at-will doctrine allows an employee to claim wrongful termination based upon asserting a legal right, such as a workers' compensation claim; performing a civic duty, such as serving on a jury; or refusing to commit an illegal act for an employer, such as perjury. The public policy exception has consistently been interpreted narrowly, however. Public safety must be at stake, for instance, or a law violated, to disregard the at-will doctrine. In addition, courts have held that internal matters of an entity are best resolved within the entity and should not be the basis for a public policy exception.

Previously, the Commonwealth's highest court had held that regulations governing a particular profession are not a source of a well-defined public policy sufficient to modify the general at-will employment rule. In that case, Wright v. Shriner's Hospital for Crippled Children, the court held that a nurse discharged after being critical of her employer in an internal hospital survey could not rely on nursing regulations concerning quality patient care to support a claim that her termination violated public policy.

A recent trial court decision agreed, holding that regulations governing accountants could not be the basis for an employee's claim for wrongful termination. The employee claimed he was following the standards of his profession, as set forth in the regulations, regarding his recommendations on an audit, and was fired as a result. The accounting firm disagreed with the employee's suggestions and, for other stated reasons, recommended his termination. The court found that the interpretation of the regulations, and how they are implemented, are best determined by the professionals themselves, based on accounting judgment. The court also stated that it did not discern the public interest at stake. Further, professionals should not be immune to the at-will employment doctrine simply because they claim to have the interests of the standards of their profession at heart. ■

Supreme Court to Address What Is Retaliation

The Supreme Court has agreed to review a case concerning what conduct by an employer constitutes retaliation. In the case to be reviewed, Burlington Northern & Santa Fe R. Co. v. White, the plaintiff was transferred to a more physically demanding job, although at the same pay and benefits, after she made an internal complaint of sexual harassment. She filed charges with the EEOC after that and was subsequently suspended without pay for insubordination. The federal trial court found for the employer on the sexual harassment claim, but in favor of the plaintiff on the retaliation claim. The Sixth Circuit affirmed the trial court's decision, holding that the suspension without pay (although she was reinstated and provided back pay) and the transfer to a more difficult job constituted retaliation.

There is currently a split in decisions of federal courts around the country as to what action can support a retaliation claim under Title VII. The statute prohibits employers from discriminating against employees who make a claim or charge of discrimination, such as a claim of sexual harassment. The prohibited discrimination must be an "adverse employment action", but federal courts of appeal have differed as to what that includes. Two Circuit Courts of Appeal have held that the retaliation must be an "ultimate employment decision" such as hiring, discharging, promoting or compensating. Two other such courts, and the EEOC, have adopted a broader view, including any adverse treatment based on retaliatory motive and reasonably likely to deter a possible claimant from making a claim.

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Supreme Court to Address What Is Retaliation *Cont'd*

Retaliation claims can be difficult to defend. As in the White case, in which she alleged sexual harassment, often the employer can defeat the original discrimination claim, but is left with a claim that the employer took an adverse employment action against the employee after the original claim of discrimination. Employers therefore need to take special care when considering conduct which could in any way be an adverse employment action against an employee who has made a complaint of discrimination. Although the employer's action might be warranted and based on legitimate business reasons, the conduct could result in a claim of retaliation against the employer. The Supreme Court's decision on this issue could provide guidance to employers regarding such claims. ■

Employer Liability for Third Party Acts of Sexual Harassment—Reasonableness Test

An employer may be held liable for failing to respond reasonably to acts of sexual harassment if the employer is aware, or should be aware, of the harassment, even if the harassment is being perpetrated by a third party, not an agent or employee of the employer. However, to avoid such liability, the employer's response to the harassment is judged by a reasonableness standard. If the employer takes prompt action, reasonably likely to end the harassment, that is sufficient, even if the employer's response does not succeed.

The case of Modern Continental/Obayashi v. Massachusetts Commission Against Discrimination, decided earlier this year by the Commonwealth's highest court, found that Modern Continental ("Modern") was not liable to its employee, a female apprentice carpenter, who alleged sexual harassment by an ironworker employed by a subcontractor. Although the court agreed that neither Modern nor its agents sexually harassed the female employee, the court stated that Modern was also prohibited from passively tolerating the creation of a hostile work environment. Modern's attempts to remedy the situation in this case, by identifying a harasser, requesting he be removed from the site, separating him from Modern's employee, and taking other steps to prevent any further harassment, although not satisfactory to the employee and not completely successful, were sufficient, and satisfied Modern's obligation to take prompt action reasonably calculated to end the harassment. In making this finding, the Court rejected the Massachusetts Commission Against Discrimination's decision imposing liability on Modern for the harassment based upon the facts that the remedial actions were not successful and Modern could have done more and acted more quickly.

Any employer who becomes aware of a third party sexually harassing one of the employer's employees needs to take steps to stop that harassment. The steps need to be taken promptly and be reasonably likely to prevent any further harassment. However, this case makes clear that the employer will not be held liable if it takes reasonable steps to combat the harassment, if the harassment is being perpetrated by someone the employer does not control. The employer's actions will be considered in light of its practical ability to control the actual perpetrators. ■

The FLSA's Administrative Exemption

The Fair Labor Standards Act requires most employers to pay employees at least the federal minimum wage for the first 40 hours worked in any week and overtime pay at one and one-half times the regular rate of pay for all hours worked over 40 in a single work week. An exemption form the payment of overtime is available to employees who are employed in executive, administrative, learned professional, outside sales or computer positions. Such employees are referred to as "exempt" employees. Employees cannot be classified as "exempt" from the minimum wage and overtime requirements unless they are guaranteed a minimum weekly salary and perform certain required job duties. Let's look more closely at the Administrative exemption.

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The FSLA's Administrative Exemption *Cont'd*

Minimum Salary. The employee must be compensated with a salary at the new rate of not less than $455 per week ($23,660 annually). In addition, an employee who receives a salary of at least $100,000 per year will most likely be found to be exempt as long as the employee meets at least one (but not necessarily all) of the numbered elements listed below for any of the exemptions.

Job Duties. The employee's primary duty must (1) be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and (2) include the exercise of discretion and independent judgment with respect to matters of significance. The employee must have the authority to (a) formulate, affect, interpret, or implement management policies or operating practices; (b) commit the employer in matters of significant financial impact; (c) waive or deviate from established policies and procedures without prior approval; (d) negotiate and bind the company on significant matters; (e) carry out major assignments in the operation of the business; (f) be involved in planning long- or short-term business objectives; or (g) investigate and resolve matters of significance on behalf of management.

"Salaried" Requirement: The exempt employee also must always be paid on a salaried basis. This guaranteed salary cannot be reduced because of variations in the quality or quantity of work performed; and, but for a few exceptions discussed later, the exempt employee must receive his or her full salary for *any week* in which the employee performs *any work* regardless of the number of days or hours worked. An employee is not considered to be paid on a salary basis if the employer makes deductions from the salary, for example, for absences caused by the employer or because of the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available, or not done due to inclement weather.

There are seven exceptions to this salary basis, "no pay-docking" rule. Employers may make deductions from salary of exempt employees for: (a) an absence from work for one or more full days for personal reasons, other than sickness or disability; (b) an absence from work for one or more full days due to sickness or disability if the deductions are made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences; (c) to offset any amounts received as payment for jury fees, witness fees, or military pay; (d) penalties imposed in good faith for violating safety rules of "major significance"; (e) unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules; (f) a proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment; and (g) unpaid leave under the Family and Medical Leave Act. ■

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