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Labor and Employment Law Update

DECEMBER 2010

In This Issue

Bullying In The Workplace

By William E. Hannum III

Employers should be focused on minimizing the risk of bullying in the workplace. While bullying at schools is getting an enormous amount of attention, there are real legal and practical risks to allowing bullies to roam the workplace. Moreover, the increased attention on school bullying, the widespread passage of anti-bullying laws for schools, and recent headline-grabbing examples of bullying in the workplace have already led to an increased focus on bullying in general. In turn, this is likely to lead to changes in the law, and in how courts handle other employment claims involving allegations of bullying at work. In order to prevent bullying at work, employers should follow the best practices outlined below.

Bullying at schools has led to numerous suicides in 2010, many of which grabbed headlines and occupied hours of national news programming. Tragically, this year's stories follow a decade in which 45 states passed laws expressly prohibiting bullying at school. In Massachusetts, the school anti-bullying law went into effect in May 2010, and typically requires schools to adopt best practices, including comprehensive preventive measures, anti-bullying policies and plans, and employee training. (Many of the concepts embodied in these state laws also serve as a resource for private employers who want to prevent bullying in the workplace.)

Of course, bullying is not limited to the school yard, and indeed, bullying in the workplace is clearly a real problem. For example, earlier this year, an employee of a prominent literary magazine in Charlottesville, Virginia, committed suicide – allegedly because of workplace bullying by his supervisor. An October 20, 2010, report summarizing the employer's investigation into the allegations concluded that although there had been no complaints of bullying prior to the suicide, there had been prior reports that the supervisor was "not being courteous or respectful, . . . but none ever seemed to rise to the level of a serious, on-going concern." Of course, as the report also pointed out, "[i]t is sometimes difficult to define where the line gets crossed between a tough manager and an unreasonable one."

Along these lines, currently there are no laws that expressly prohibit bullying in the workplace, although such laws have been in the works for a decade, have come close to being passed, and are likely to be passed in the future.

Regardless, even in the absence of new laws, there are real legal and practical risks to bullying in the workplace. Victims of workplace bullying have sought legal recourse through claims of unlawful harassment based on a protected characteristic (*i.e.*, race, gender, religion, etc.). For example, an employee who was repeatedly humiliated in front of board members and other employees received a jury award of $400,000 on her retaliation claim, even though her underlying discrimination claim was denied.

In many of these harassment cases, where some kind of bullying occurred, the employer's defense is, unfortunately, the "equal opportunity jerk" defense, where the manager admits that he (or she) uses foul language and yells at employees, etc.; *but* the "argument" is that this abusive behavior is not unlawful because the manager treats everyone in the same abusive manner. Unfortunately, this is not the story that the employer wants to tell a jury of the plaintiff's peers.

In addition, victims of workplace bullying may also pursue other state law claims, such as intentional infliction of emotional distress, assault and battery, tortious interference with business or contractual relations, and the like. While such claims do not always succeed, employers should expect that juries and judges will be more open to these

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New Hampshire Takes Aim At Unemployment And Layoffs

By Stephen T. Melnick

As unemployment continues to hover around nine percent nationwide, New Hampshire has taken steps to minimize layoffs, help the unemployed return to work, and provide unskilled workers with critical training. Specifically, effective May 2010, the Granite State enacted the "New Hampshire Working" bill, which sets out to achieve these goals through three separate programs, "Stay at Work," "Return to Work" and "Get Ready to Work," as discussed below.

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Employees May Challenge Neutrality And Card-Check Agreements

By Todd A. Newman

An employee who vigorously opposed being unionized had standing to sue his employer and a labor union to enjoin enforcement of a neutrality/card-check agreement, the U.S. Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") has ruled. The decision, issued in *Mulhall v. UNITE HERE Local 355*, No. 09-12683 (11th Cir.), provides employers with another good reason not to enter into such agreements: these agreements may engender employee lawsuits and ultimately be declared unenforceable.

Background Of *Mulhall* Case

In *Mulhall*, Mardi Gras Gaming ("Mardi Gras") and UNITE HERE Local 355 ("Unite") entered into a Memorandum of Agreement ("MOA"), which required Unite to lend financial support to a ballot initiative that would benefit Mardi Gras. In exchange, Mardi Gras was required to remain neutral during the Union's effort to organize the company's non-union employees and to recognize Unite as their exclusive bargaining representative based solely on signed authorization cards from a majority of these employees. In this regard, Mardi Gras waived its right to seek a secret-ballot election supervised by the National Labor Relations Board ("NLRB").

The MOA also provided that: Mardi Gras would give Unite an employee list containing names, job classifications, departments and home addresses; Mardi Gras would permit Unite to use its property, including non-public areas, for organizing; the parties would not file any charges against each other with the NLRB in connection with the MOA; and Unite, if successful in its organizing campaign, would refrain from picketing, boycotting, striking, or undertaking other economic activity against Mardi Gras.

Pursuant to the MOA, Unite spent more than $100,000 campaigning for the ballot initiative favored by Mardi Gras. Then, as expected, Unite notified Mardi Gras that it was commencing its organizing campaign and asked Mardi Gras to provide the organizing assistance promised in the MOA. However, on the advice of new counsel, Mardi Gras refused to provide this assistance, contending that the MOA was illegal and unenforceable.

Federal District Court Proceedings

Litigation between Unite and Mardi Gras to resolve their rights and obligations under the MOA ensued, and this, in turn, prompted Mardi Gras employee Martin Mulhall ("Mulhall") to take matters into his own hands. Mulhall vigorously opposed being unionized and, as such, did not like the prospect of having union representation foisted upon him by the MOA. Accordingly, Mulhall filed a civil action in the U.S. District Court for the Southern District of Florida seeking to enjoin enforcement of the MOA.

Mulhall brought his action under Section 302 of the federal Labor-Management Relations Act ("Section 302"), which makes it illegal for an employer to deliver to a union, or for a union to receive from an employer, any "thing of value," subject to limited exceptions not relevant to the dispute. 29 U.S.C. § 186(a)-(b). The purpose of Section 302 is to "protect employees in dealings between the union and employer," *Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816, Int'l Bhd. of Elect. Workers,* 646 F.2d 264, 267 (6th Cir. 1981), particularly "from the collusion of union officials and management," *Mosley v. Nat'l Maritime Union Pension and Welfare Plan*, 438 F. Supp. 413, 421 (E.D.N.Y. 1977). In this regard, the legislative history of Section 302 indicates that it was intended to "prohibit[], among other things, the buying and selling of labor peace." S. Rep. No. 98-225 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3477.

The District Court determined that Section 302 provides a "private right of action," *i.e.*, that individual employees have a right to seek relief for alleged violations of this statute, but that Mulhall lacked standing to proceed with the case. In this regard, the court reasoned that Mulhall failed to show an injury-in-fact that was "actual or imminent" because it was possible for Unite to fail in its organizing drive even if Mardi Gras provided the assistance promised under the MOA. Accordingly, the court dismissed Mulhall's complaint.

Reversal By The Eleventh Circuit

Mulhall appealed the order of dismissal to the Eleventh Circuit, which reversed the District Court's ruling. According to the Eleventh Circuit, the potential for Mulhall to be "thrust unwillingly into an agency relationship" with Unite was "real enough and concrete enough" to affect Mulhall's associational rights and, in turn, to confer him with standing to proceed with his case.

Importantly, the Eleventh Circuit ruled *only* that Mulhall may proceed with his case in District Court. The Eleventh Circuit did *not* make any rulings on the merits of Mulhall's claim. Accordingly, the District Court ultimately will determine in the first instance whether the consideration exchanged by the parties under the MOA, *i.e.*, Unite's support for the ballot initiative championed by Mardi Gras in exchange for Mardi Gras's support of Unite's organizing drive, constitutes "thing[s] of value" within the meaning of Section 302 so as to render the MOA a form of prohibited collusion under this law.

Nonetheless, the Eleventh Circuit's decision is significant because the nine federal district courts within this judicial circuit (three each in Florida, Georgia and Alabama)

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Employees May Challenge Neutrality And Card-Check Agreements

must follow its ruling that the validity of neutrality/card-check agreements may be challenged under Section 302 by individual employees who oppose unionization. Moreover, *Mulhall* may be cited as persuasive authority by courts in other judicial circuits that may be asked to decide whether to permit similar lawsuits to go forward.

Implications For Employers

The *Mulhall* decision gives employers another good reason to reject union demands to enter into neutrality/card-check agreements. In this regard, it is generally advisable for employers to avoid such agreements because, among other things, an employer may need to respond to inaccuracies or rhetoric communicated by the union in the course of its organizing campaign, and the existence of a "neutrality" pledge may prevent an effective response.

Moreover, employers asked to recognize a union based on signed authorization cards often will not know when the signatures were obtained, whether the union may have pressured one or more employees into signing, or whether the signatories understood the implications of signing the cards, concerns that do not arise in the context of NLRB-supervised secret-ballot elections.

Now, as a result of *Mulhall*, employers have yet another concern—employees opposed to unionization may be able to sue to challenge the validity of the neutrality/card-check agreement, imposing a potentially significant litigation burden on the employer, and raising the possibility that the agreement will be deemed unenforceable.

Recommendations For Employers

As a preliminary matter, non-unionized employers seeking to remain union-free should be sure to have enforceable non-solicitation, non-distribution of literature, and no-access policies in place *before* any union organizing drive gets under way. Attempting to promulgate such policies after a union organizing drive begins may be viewed by the NLRB as unlawful retaliation against union supporters.

The Mulhall *decision gives employers another good reason to reject union demands to enter into neutrality/card-check agreements.*

Next, employers asked by a union to enter into a neutrality/card-check agreementshould confer carefully with labor counsel about the legal implications of such an agreement before responding. Unionization affects virtually all aspects of an employer's business, for example, by making it more difficult to impose discipline, by restricting the employer's ability to communicate directly with employees, and by significantly limiting the employer's ability to make operational changes. It is critical to understand the big picture in order to evalate whether the concessions being offered by a union in a proposed neutrality/card-check agreement are sufficiently valuable to warrant serious consideration of the agreement.

For employers nonetheless interested in considering a neutrality/card-check agreement, it is important to acknowledge the developing state of applicable law. As *Mulhall* illustrates, the law is emerging as to whether employees will be able to enjoin enforcement of such agreements.

If you have any questions about the Mulhall *case, neutrality/card-check agreements or labor law generally, or if you may need assistance with union avoidance or in NLRB proceedings, please do not hesitate to contact us.*

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Bullying In The Workplace

claims in the future, as the concept of bullying continues to gain attention in the news and acceptance in the court.

For example, in 2008, a victim of workplace bullying was awarded a $325,000 jury verdict. The plaintiff complained that the bully (a surgeon) had told him he would "smack the s--- out of him," told him that he was "over" and "finished" and "history," and finally charged toward him with a clenched fist, causing the plaintiff to fear for his safety and well-being. As a result, the plaintiff suffered from depression, loss of sleep and loss of appetite. He brought suit for claims of assault, intentional infliction of emotional distress and interference with employment relationship, and was successful in demonstrating that the defendant committed an actionable assault.

In short, employers have been held liable for workplace bullying, under claims of unlawful retaliation under anti-discrimination statutes and under state law claims. Thus, this should serve as a wake-up call to employers: even in the absence of defined workplace bullying laws, there is potential liability for workplace bullying.

More importantly, there are real personal and practical costs to allowing bullying in the workplace. A 2010 survey by the Workplace Bullying Institute found that 35% of American employees – approximately 54 million employees – have experienced bullying firsthand, meaning workplace bullying was 4 times more prevalent than illegal harassment. A similar survey found that 45% of those employees who have been bullied in the workplace suffered from stress-related health problems (*e.g.*, anxiety, depression, post-traumatic stress disorder, etc.) attributable to such bullying, which contributes both to increased employee absenteeism and employers' increased health care costs. Additionally, approximately 40% of bullied employees voluntarily separate from their employment in direct response to ongoing workplace bullying, which results in increased employee recruitment and training costs for employers. Given these significant costs, workplace bullying is an issue employers would be wise to focus on preventing right now.

Not surprisingly, then, in the past decade, there have been numerous attempts to pass laws that prohibit workplace bullying. Since 2003, 19 states, including Massachusetts, New Hampshire, New York and Illinois in 2010, have attempted to pass such a law, although these attempts have been unsuccessful. One version of these proposed laws, the Healthy Workplace Bill, seeks to make it an unlawful employment practice to subject an employee to an abusive work environment, regardless of the employee's protected class status. An "abusive work environment" is generally defined as an environment in which an employee is subjected to abusive conduct so severe that it causes tangible harm to the employee.

In Massachusetts, a version of this bill was under consideration in early 2010. Also in 2010, the New York Senate passed a version of the law that would have established a civil cause of action for employees subjected to an abusive work environment. However, the bill was placed on hold by the Assembly Labor Committee on June 8, 2010, and is now slated for further action in 2011. While the future of the Healthy Workplace Bill is unknown, employers should expect that the law's supporters will continue to push state legislators for its passage.

Best Practices: Employers Should Actively Prevent Workplace Bullying

To reduce the growing risks associated with workplace bullying, employers should adopt a general anti-bullying program, including anti-bullying policies and plans, and anti-bullying training.

Pursuant to the laws prohibiting bullying at schools, state departments of education often disseminate excellent model policies and plans for schools to use in compliance with anti-bullying laws. These often serve as a great starting point for an employer seeking to implement a workplace anti-bullying program. These programs borrow concepts familiar to sexual harassment prevention programs, but the anti-bullying programs prohibit all forms of bullying, whether or not the bullying behavior is based on the employee-target's legally-protected characteristic(s).

The anti-bullying policy should define and prohibit bullying. A well-drafted anti-bullying policy should also provide employees with internal channels to seek recourse and assert their legitimate complaints of bullying, and should provide clear procedures for prompt investigation and response. An employer that provides its employees with an internal complaint process to address workplace bullying concerns, and clear guidance on its investigatory procedure, will not only increase the number of employment-related matters that it may resolve without judicial involvement, but also will afford itself the ability to unilaterally control any necessary investigations and disciplinary actions associated with workplace bullying.

In addition to implementing an anti-bullying policy, as part of the anti-bullying program, employers should also provide managers and employees with training on identifying and preventing workplace bullying. Such training should focus on the appropriate methods for addressing complaints of bullying, as well as potential personal and professional consequences of engaging in workplace bullying.

Implementing and adhering to a workplace bullying program that subjects employees to disciplinary action for engaging in bullying behavior should minimize the risks of bullying. It also has the potential to foster a positive work environment, which may lead to increased employee satisfaction and increased productivity.

Until new laws are passed that expressly prohibit workplace bullying, employers should expect that employees, courts and juries will find ways to work around that void, particularly as news reports and tragic suicides continue to follow allegations of bullying at school and at work. Accordingly, employers should implement an anti-bullying program to reduce the significant legal, practical and personal risks associated with bullying at work.

This article previously appeared in the November 2010 edition of New England In-House. *Will gratefully acknowledges* New England In-House *for its support in publishing this article. Will also gratefully acknowledges the efforts of Paul Dubois, who assisted in drafting this article.*

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New Hampshire Takes Aim At Unemployment And Layoffs

Stay At Work

Stay at Work, also known as New Hampshire WorkShare, allows employers to avoid layoffs by instead reducing employee hours on a company- or unit-wide basis. The state makes up the difference in pay by providing an equivalent amount to affected eligible employees under its unemployment program. Benefits paid by the state are charged to the unemployment insurance account of the employer, as they would be under any other unemployment claim.

Through Stay at Work, employers may reduce the hours of full- or part-time employees by ten to 50 percent for up to 26 weeks. To illustrate, if a company with 200 employees wants to reduce payroll by one-fifth, it could reduce all employees' hours by 20 percent, rather than lay off 40 workers. Eligible employees could then apply for 20 percent of their former weekly earnings in unemployment benefits. (Earnings received through other employment during this time may reduce an employee's unemployment payments.) Employee health insurance benefits must remain in effect as before the reduction in hours, though retirement contributions (and other fringe benefits) can be adjusted based on the hours actually worked.

There can be advantages to reducing employee hours instead of conducting a layoff, as the time, expense and possible litigation exposure of a layoff can be avoided. Likewise, when business picks up, it may be easier to increase hours for current employees than to recall laid-off workers or hire new employees. And equally important, this may serve to maintain employee morale and loyalty in difficult times.

To participate in Stay at Work, an employer must submit a plan to the New Hampshire Department of Employment Security (the "Department"). The plan must certify that the reduction in hours is in lieu of a layoff and state the reason for the reduction and its expected duration. Each affected employee must be identified by name and Social Security number. The employer also must specify both the present and the proposed reduced weekly hours of each affected employee. The reduction can be for all employees or for any definable unit of more than two employees (such as a department or shift). In either case, all affected employees must have their hours reduced equally.

The proposed WorkShare plan must be submitted at least 21 days before it is to go into effect. The Department will approve or reject a plan within 15 business days. Rejected plans cannot be appealed, but employers can submit revised plans. Finally, if there is a union in place, the Stay at Work plan must be approved by the union.

Return To Work

Return to Work allows employers to provide unemployed workers with up to 24 hours of weekly unpaid training for up to six weeks. The state continues to provide unemployment benefits to eligible individuals during this training period, which may allow employers to reduce hiring and training costs for potential new employees, as well as to assess whether a potential recruit would be a good fit with the organization. In order to participate, an employer must certify that the Return to Work training program will not displace any current employee or have an impact on any employee's promotion. Similarly, participants must acknowledge that they are not guaranteed employment upon the completion of the training.

Participating employers must structure these programs carefully. Under federal wage-and-hour laws, an employer can provide unpaid training to a person, but only if the following criteria are satisfied: (1) the training is similar to what would be given in a vocational school or to academic educational instruction; (2) the training is for the benefit of the trainee; (3) the trainee does not displace regular employees; (4) the employer derives no immediate benefit from the trainee; (5) the trainee is not entitled to a job at the end of the training; and (6) the trainee understands that he or she will not be paid. Failure to satisfy these criteria could lead to liability for the person's time spent in training, attorneys' fees, and even liquidated damages.

Notably, New Hampshire law further limits the circumstances in which businesses may employ volunteers (*e.g.*, when the volunteers are performing work for public, charitable, or religious facilities, and when the volunteers' duties do not necessarily or traditionally lead to paid employment). However, the New Hampshire Department of Labor has indicated that such additional restrictions are not applied to Return to Work because the state treats participating workers as being in the state's unemployment insurance program, as opposed to being in the participating businesses' employ.

In light of this federal and state law overlay, employers are advised to consult with legal counsel before implementing a Return to Work training program.

Get Ready To Work

Get Ready to Work doubles the state's Job Training Fund from $1 million to $2 million in 2011 and allows the Department to use those funds to train unemployed workers. In this regard, Get Ready to Work provides basic-skills assessments, skill certification, and remedial courses through the Community College System of New Hampshire.

The New Hampshire Working initiatives give New Hampshire employers additional ways to weather this difficult economy. If you have any questions about implementing a Stay at Work reduction in hours, a Return to Work training program, or a Get Ready to Work arrangement, please do not hesitate to contact us. We regularly assist employers with creative solutions to managing employment costs and would be happy to help.

Massachusetts Federal Court Extends Marriage-Based Federal Benefits To Same-Sex Spouses

By Jessica L. Herbster

The U.S. District Court for the District of Massachusetts recently held that the definition of "marriage" and "spouse" under Section 3 of the federal Defense of Marriage Act ("DOMA") is unconstitutional. Specifically, in *Gill v. Office of Personnel Management*, No. 09-cv-10309-JLT (D. Mass. July 8, 2010) (Tauro, J.), the court held that Section 3 of DOMA, as applied to the particular plaintiffs in that case, violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution. Because some of the plaintiffs were federal employees and were challenging their right to certain employment benefits denied by their employer, this ruling raises the possibility that both public and private employers may soon be required to recognize same-sex spouses for purposes of marriage-based federal employee benefits.

Section 3 of DOMA, enacted in 1996, defines the terms "marriage" and "spouse" for purposes of federal law. Under DOMA, "'marriage' means only a legal union between one man and one woman as husband and wife." The term "spouse" is defined as "a person of the opposite sex who is a husband or a wife." These terms are implicated in over one thousand federal statutory provisions, such as Social Security, family and medical leave, taxes, immigration, and healthcare.

The *Gill* Case

In *Gill*, seven same-sex couples who became legally married in Massachusetts and three survivors of same-sex spouses (who also became legally married in Massachusetts) brought an action for declaratory and injunctive relief against the Office of Personnel Management, the United States Postal Service, the Postmaster General of the United States, the Commissioner of the Social Security Administration, the United States Attorney General, and the United States of America. All plaintiffs were residents of the Commonwealth and a few were employees of the federal government.

In their complaint, the plaintiffs sought a determination that DOMA, as applied to plaintiffs, violates the United States Constitution by refusing to recognize lawful marriages for purposes of the laws governing benefits for federal employees and retirees, the Internal Revenue Code, and the Social Security laws. The three federal health benefits programs implicated in the action were: the Federal Employees Health Benefits Program ("FEHB"), the Federal Employees Dental and Vision Insurance Program ("FEDVIP"), and the federal Flexible Spending Arrangement ("FSA") program. A number of plaintiffs sought Social Security benefits under the Social Security Act ("SSA"), based on marriage to a same-sex spouse. In addition, a number of plaintiffs sought the ability to file federal income taxes jointly with their spouses.

Prior to filing the action, each plaintiff, or his or her spouse, made at least one request to the appropriate federal agency or authority for treatment as a married couple, spouse, or widower with respect to particular federal benefits available to married individuals. When denying each request, the government agencies responsible for administering the relevant programs all invoked DOMA's mandate that the federal government recognize only those marriages between one man and one woman.

The federal government argued that the Constitution permitted Congress to enact DOMA as a means to preserve the status quo, pending resolution of the debate in the states regarding same-sex marriage. The plaintiffs argued that denying certain federal marriage-based benefits that are available to similarly-situated heterosexual couples violates the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. In granting summary judgment for the plaintiffs, the court opined that domestic relations is the exclusive province of the states and that the federal government has always recognized differences in marriage laws. The court concluded with these harsh words about DOMA's definition of marriage: "Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves" and that "irrational prejudice plainly *never* constitutes a legitimate government interest."

In an amended judgment entered August 18, 2010 (the "Amended Judgment"), the court ordered that Section 3 of DOMA is unconstitutional *as applied to the plaintiffs by the defendants* in the administration and application of: (a) the FEHB; (b) the FEDVIP; (c) the FSA; (d) certain retirement and survivor benefit provisions of the SSA; and (e) the Internal Revenue Code. Specifically, individual plaintiffs were, among other things, entitled to (i) review of their benefit applications without regard to Section 3 of DOMA; (ii) designate their same-sex spouses as beneficiaries; (iii) receive reimbursement for denied benefits; and (iv) receive tax refunds from the IRS.

The Amended Judgment was appealed by the U.S. Department of Justice on October 12, 2010, and is now before the U.S. Court of Appeals for the First Circuit.

Companion Case

In a companion case decided the same day and by the same judge, *Commonwealth of Mass. v. Dept. of Health and Human Servs.*, No. 09-cv-11156-JLT (D. Mass. July 8, 2010) (Tauro, J.), the court also struck down the validity of Section 3 of DOMA in the context of certain federal-state programs. This case was initiated by the Commonwealth rather than a group of individuals. Specifically, the Commonwealth argued that certain federal-state programs violated the U.S. Constitution by forcing the Commonwealth to engage in invidious discrimination against its own citizens.

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Massachusetts Federal Court Extends Marriage-Based Federal Benefits To Same-Sex Spouses

The programs at issue were a military cemetery and the Commonwealth's Medicaid program ("MassHealth") that both required the Commonwealth to rely on the federal definition of "spouse" to make decisions regarding certain rights and benefits. The court agreed with the Commonwealth and held that DOMA violated the Spending Clause by imposing an unjustified condition on the receipt of federal funding and violated the Tenth Amendment by encroaching on a core area of state sovereignty – the ability to define the marital status of its citizens.

In a statement regarding the *HHS* decision, Massachusetts Attorney General Martha Coakley commented that "[i]t is unconstitutional for the federal government to discriminate, as it does because of DOMA's restrictive definition of marriage. It is also unconstitutional for the federal government to decide who is married and to create a system of first- and second-class marriages."

Impact Of *Gill*

As expressly stated in the Amended Judgment, the holding of *Gill* applies only to the individual plaintiffs in that case. In other words, the ruling does not declare Section 3 of DOMA unconstitutional in every circumstance. Moreover, if similarly-situated plaintiffs presently brought a case before another judge, there is no requirement that the judge follow the *Gill* decision. However, *Gill* could become precedential, depending on how the U.S. Court of Appeals for the First Circuit handles the pending appeal.

Although the eventual impact of *Gill* and *HHS* is difficult to determine, these cases may ultimately affect both public- and private-sector employers. For example, DOMA permits (but does not require) employers to deny same-sex spouses federal COBRA benefits and precludes an employee from making pre-tax contributions to a "cafeteria" plan on behalf of a same-sex spouse. The *Gill* and *HHS* rulings open the door for future challenges to these federal benefits (among others).

In addition, following *Gill*, employees in Massachusetts (and other states that recognize same-sex marriage) have more support for the argument that they are entitled to same-sex spousal benefits under the federal Family and Medical Leave Act of 1993 ("FMLA"). Specifically, the FMLA regulations define the term "spouse" as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides." 29 C.F.R § 825.122(a). Upon the enactment of DOMA, however, the U.S. Department of Labor clarified in a 1998 Opinion Letter that DOMA's definition of "spouse" overrides the referenced regulations. The *Gill* decision may pose a significant challenge to the federal government's current position.

> *"It is unconstitutional for the federal government to discriminate, as it does because of DOMA's restrictive definition of marriage. It is also unconstitutional for the federal government to decide who is married and to create a system of first- and second-class marriages."*
>
> *— Martha Coakley*

At a minimum, both the *Gill* and *HHS* decisions are clearly significant for same-sex couples in states that recognize same-sex marriage as persuasive authority that other judges may choose to adopt in both employment disputes and other contexts.

Recommendations For Employers

Only time will tell how influential these decisions will be in affecting employment rights on a broader scale. However, given the significance of these decisions, we recommend that employers take steps now to ensure that they are implementing their employee benefit plans and policies consistently and in accordance with applicable law. To that end, we recommend that employers:

- Review these decisions with counsel to consider the impact that they might have if they become precedent-setting. While most employers in Massachusetts automatically include the rights of same-sex spouses when implementing marriage-based benefits under state law, certain benefits governed in whole or in part by federal law may nonetheless be implicated (such as when an employer follows federal laws such as COBRA, the FMLA, HIPAA, or the Internal Revenue Code, , by offering tax-free health benefits).
- Review plan documents and policies to identify marriage-based benefits and the definitions of "spouse" and "marriage." For example, ensure that the definition of spouse and marriage under the employer's group health plan matches the company's actual practices and policies.
- Determine whether the company will voluntarily extend benefits to same-sex spouses in the absence of any legal mandate. If so, determine whether plan documents must be amended or certain administrative actions should be taken to ensure compliance with applicable law. For example, employers are not required to extend COBRA to same-sex spouses, but employers may choose to offer COBRA-like continuation benefits through their health plans. Likewise, employers may choose to amend their qualified retirement plans to provide comparable benefits to same-sex spouses.
- If employers are operating outside Massachusetts, consider if and when the company will (or must) recognize a same-sex marriage legalized by another state.

If you have any questions about these recent cases or would like assistance with reviewing your employee benefit plans and policies, please do not hesitate to contact us.

Court Clarifies Job Protections Under Massachusetts Maternity Leave Act

By Paul Dubois

Job protections guaranteed by the Massachusetts Maternity Leave Act (the "MMLA") apply only to an employee's first eight weeks of maternity leave – not to any additional leave period that the employer may offer, the Massachusetts Supreme Judicial Court ("SJC") has ruled.

In reaching this ruling, the SJC invalidated guidelines of the Massachusetts Commission Against Discrimination (the "MCAD") providing that the MMLA's protections would extend throughout any such additional leave period unless the employer notified the employee in writing prior to the start of the leave that they would not.

The SJC's ruling, in *Global Naps, Inc. v. Awiszus*, does not, however, mean that employers have carte blanche to take employment actions against those on maternity leave after the first eight weeks. Depending on the circumstances, such employment actions may be subject to claims for, among other things, breach of contract, gender discrimination, and failure to provide a reasonable accommodation. Thus, while *Global Naps, Inc.* operates to limit the MMLA obligations of employers, employers should continue to exercise caution before taking employment action affecting pregnant employees and/or parental leaves.

Note: While the MMLA expressly applies only to "female employee[s]," denying male employees the opportunity to take an equivalent eight-week paternity leave, as well as any extended leave typically offered to women in the maternity context, may constitute gender discrimination under state and federal law. Accordingly, employers are encouraged to consider treating such leaves as "parental leave" and to administer them without regard to gender.

Factual Background Of *Global NAPs, Inc.*

Sandy Stephens, a former employee of Global NAPs, Inc. ("Global"), alleged that Global promised her two additional weeks of maternity leave beyond the eight weeks of leave provided by the MMLA. After Global fired her during the additional leave period, Stephens sued Global, claiming that its termination of her employment violated the MMLA as interpreted by the MCAD in its MMLA guidelines. Stephens filed a charge of discrimination with the MCAD and then removed the case to the Superior Court. After a trial in the Superior Court, the jury returned a verdict in Stephens's favor, which resulted in Global being found liable to Stephens for damages in excess of $2.3 million, later reduced on remittitur to $1.3 million. Following a series of post-trial motions and appeals, the case made its way to the SJC, which clarified the leave entitlement provided by the MMLA.

The MMLA, which applies to Massachusetts employers having six or more employees, allows full-time female employees who have completed their initial probationary period (or, if there is no probationary period, who have completed three consecutive months of employment), to take an eight-week job-protected leave of absence for the purpose of giving birth or adopting a child. M.G.L. c. 149, § 105D. The MMLA further provides that an employee returning from an MMLA leave of absence "shall be restored to her previous, or a similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of her leave."

At the time of the dispute, the MCAD administered and enforced the MMLA in accordance with the following guidelines:

> "Nothing in the MMLA shall be construed to affect any bargaining agreement, employment agreement or company policy providing benefits that are greater than, or in addition to, those required under [the MMLA]. An employer may grant a longer maternity leave than required under the MMLA. ***If the employer does not intend for full MMLA rights to apply to the period beyond eight weeks, however, it must clearly so inform the employee in writing prior to the commencement of the leave."*** (Emphasis added.)

Stephens argued that because Global never gave her written notice that her MMLA leave would not extend beyond the first eight weeks of her maternity leave, she was entitled to return to her job following the conclusion of her leave.

While the MMLA expressly applies only to "female employee[s]," denying male employees the opportunity to take an equivalent eight-week paternity leave, as well as any extended leave typically offered to women in the maternity context, may constitute gender discrimination under state and federal law.

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Court Clarifies Job Protections Under Massachusetts Maternity Leave Act

SJC Decision

The SJC rejected Stephens's argument and, in doing so, ruled that the MCAD guidelines on which she relied were invalid. In particular, the SJC found that the MCAD guidelines conflicted with the clear and unambiguous language of the MMLA, which states that female employees are afforded rights under the MMLA when they are absent from employment "*for a period not exceeding eight weeks*" for the purpose of birth or adoption. (Emphasis added.) Thus, while acknowledging that agency guidelines are entitled to substantial deference if reasonable and consistent with the language of the statute, the SJC found that no deference was due in this particular case.

In conclusion, the SJC held that when an "employer provides additional [MMLA] benefits to a female employee and subsequently takes an adverse employment action, the employee's recourse is the initiation of a common-law action for breach of contract, breach of oral representations, detrimental reliance, or the like[,]" but not an action under the MMLA.

Other Potential Risks For Employers

As noted above, depending on the circumstances, the employee also may have independent claims under such theories as pregnancy/gender discrimination and failure to provide a reasonable accommodation, both of which are cognizable pregnancy-based claims when supported by appropriate facts.

Moreover, under both state and federal law, if an employee is disabled at the expiration of her maternity leave, her employer may have an obligation to provide a reasonable accommodation to enable her to return to work. In some circumstances, additional leave beyond the eight weeks provided by the MMLA, or beyond any additional parental leave that the employer might customarily offer, may constitute such a reasonable accommodation. Thus, employers would be wise to think of the eight weeks of job-protected leave provided by the MMLA as a "floor," rather than as a "ceiling."

Additionally, if the employer is covered by the federal Family and Medical Leave Act ("FMLA") and the employee satisfies its eligibility requirements, then the employee also may be entitled to supplemental unpaid leave under this statute.

Recommendations For Employers

In light of the SJC's *Global NAPs, Inc.* decision, we recommend that Massachusetts employers take the following steps:

- Review their policies and practices to ensure they are compliant with the MMLA.
- If the business presently offers only *maternity* leave, consider offering an equivalent *paternity* leave to male employees, or, alternatively, a gender-neutral *parental* leave, in order to minimize the risk of gender discrimination claims under state and/or federal law.
- Be circumspect in administering parental leave and confer with counsel before taking adverse employment action against an employee who is on parental leave.
- Carefully consider whether an employee on parental leave may be entitled to additional time off under the company's policies and practices, under the FMLA, or as a reasonable accommodation to a pregnancy-related disability.

Administering leaves related to pregnancy and parenting can be one of the most challenging human resources tasks that employers face. Thus, please do not hesitate to contact us with any questions you may have about the MMLA and its interplay with other workplace rights and obligations.

> *Thus, employers would be wise to think of the eight weeks of job-protected leave provided by the MMLA as a "floor," rather than as a "ceiling."*

If you would prefer to receive a copy of the Firm's Labor and Employment Law Update by e-mail in pdf (portable document format), please contact **Kathie Duffy** at **kduffy@shpclaw.com** or **(978) 623-0900** to let us know and to provide us with your correct e-mail address. (As you may know, you must have Adobe Acrobat Reader to view the Update in pdf.

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Schwartz Hannum PC is an experienced labor and employment law firm guiding businesses and non-profit organizations throughout New England and nationally. Located outside of Boston, the Firm represents hundreds of clients, from small New England-based businesses to Fortune 100 and 500 companies.

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