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SHPC Legal Update

THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

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IN THIS ISSUE

It's Time For More Effective Workplace Training

By William E. Hannum III and Gary D. Finley

In the wake of extensive news coverage about sexual assault and harassment, from Roger Ailes to Harvey Weinstein, the problem of sexual harassment in the workplace, in the boardroom, and beyond, is very much on the minds of employees and employers alike.

Perhaps not coincidentally, a year ago, the U.S. Equal Employment Opportunity Commission's ("EEOC") Select Task Force on the Study of Harassment in the Workplace released a report indicating that harassment remains a persistent and pervasive problem in the workplace. Importantly, this EEOC report explored ways that employers can better help to create positive, harassment-free work environments.

The EEOC report found that the way that many employers are conducting anti-harassment training is ineffective at best. Most notably, the report found that the traditional way of teaching about sexual harassment – *i.e.*, training that is focused almost exclusively on legal definitions and company reporting procedures – wasn't optimally effective, and was only a small part of effective prevention of workplace harassment.

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SJC Ruling May Require Massachusetts Employers To Accommodate Medical Marijuana Use

By Brian D. Carlson and Sarah H. Fay

In a decision this past August, the Massachusetts Supreme Judicial Court ("SJC") opened the door for potential claims under the state employment discrimination statute, Chapter 151B, by employees with disabilities who use marijuana for medical purposes.

In *Barbuto v. Advantage Sales and Marketing, LLC*, the SJC held that Chapter 151B may require an employer to permit off-duty, prescribed medical use of marijuana as an accommodation for an employee with a disability. The SJC's ruling – which stands in contrast to those of most other state courts that have considered similar claims involving employees' medical use of marijuana – is likely to have significant implications for Massachusetts employers that have previously prohibited all marijuana use by employees.

Statutory Background

A majority of states, including Massachusetts, now have laws permitting the possession and use of marijuana for medical purposes. Under the Massachusetts statute (known as the "Act for the Humanitarian Medical Use of Marijuana"), a "qualifying patient" – meaning someone who has been "diagnosed by a licensed physician as having a debilitating medical condition" – may obtain a prescription for the medical use of marijuana. The statute specifies that a person may not be "denied

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any right or privilege for" obtaining such a prescription.

However, marijuana remains classified as a Schedule I Controlled Substance under federal law. Thus, even with a state-authorized prescription for medical use, the possession and use of marijuana remains a federal crime.

The *Barbuto* Case

This conflict between federal and state marijuana laws was at the heart of the *Barbuto* case.

The plaintiff, Cristina Barbuto, accepted an entry-level position with Advantage Sales and Marketing ("ASM"), promoting the products of ASM's clients at supermarkets. After accepting the job offer, Barbuto was informed that she would have to take a pre-employment drug test. Barbuto told her supervisor that she would test positive for marijuana, as she suffered from Crohn's disease and irritable bowel syndrome, and her prescribed medical treatment was marijuana. She also indicated that she did not use marijuana daily and would not consume it before or at work.

In response, Barbuto's supervisor told her that her lawful use of marijuana should not be an issue. Barbuto then submitted to the drug test. After Barbuto had completed training and her first day in the field, ASM's Human Resources Department informed her that she was being terminated, effective immediately, for testing positive for marijuana use. By way of explanation for its decision, ASM told Barbuto that the company followed federal law, rather than state law, with regard to marijuana use.

Barbuto brought suit against ASM in state court, alleging various claims, including disability discrimination, wrongful termination in violation of public policy, violation of the state medical marijuana statute, and invasion of privacy. On motion by ASM, a Superior Court judge dismissed all of Barbuto's claims, with the exception of the privacy claim, which was stayed pending her appeal from the dismissal of her other claims. Subsequently, the SJC granted a motion for direct appellate review, bypassing the state Appeals Court.

SJC's Decision

Reversing the Superior Court, the SJC held that when a disabled Massachusetts employee seeks permission to use marijuana off-duty in accordance with a medical prescription, the employer is obligated to consider and discuss with the employee – in what is known as an "interactive process" – whether such an accommodation can be reasonably provided. In the SJC's words, "Where, in the opinion of [an] employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation" under Chapter 151B.

Thus, because ASM had refused even to consider accommodating Barbuto's medical use of marijuana, the SJC reinstated her claim for disability discrimination, sending it back to the Superior Court for further consideration. (However, the SJC affirmed the lower court's dismissal of Barbuto's claims under the Massachusetts medical marijuana statute and for wrongful termination, finding that the medical marijuana statute does not create a private right of action and that Chapter 151B preempted any wrongful-termination claim.)

The Court rejected ASM's argument that Barbuto was not a "qualified handicapped person" because the specific accommodation she sought – to be allowed to use marijuana off-duty, in accordance with a doctor's prescription – conflicted with federal law. Instead, the SJC focused on Massachusetts law, under which medical marijuana is as lawful as any other prescribed medication. Further, the Court observed that only Barbuto herself – and not ASM – faced any possibility of legal sanctions under federal law for her use of marijuana.

The SJC also cited the Massachusetts medical marijuana statute, which, as noted above, allows a qualified patient to obtain a prescription for marijuana and protects the individual from a denial of "any right or privilege" on the basis of his or her medical use of marijuana. The SJC found that this language further supported its conclusion that ASM had an obligation, under Chapter 151B, to explore the feasibility of permitting Barbuto to use marijuana off-duty as a reasonable accommodation for her disability.

Significantly, the SJC emphasized that there are some situations in which permitting an employee to use medical marijuana would be likely to create an "undue hardship" for the employer – for instance, if an employee's job responsibilities are such that any use of marijuana would create "unacceptably significant safety risks," or where an employer has a supervening statutory obligation not to allow marijuana use by employees (*e.g.*, federally regulated commercial vehicle drivers). In such cases, a Massachusetts employer would not be obligated to consider permitting off-duty marijuana use as a reasonable accommodation.

Finally, it should be emphasized that the *Barbuto* decision applies only to situations involving the *medical* use of marijuana. At least for the present, Massachusetts employers remain free to prohibit recreational use of the drug.

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SJC Ruling May Require Massachusetts Employers To Accommodate Medical Marijuana Use

Recommendations For Employers

We recommend that Massachusetts employers carefully review their drug-free workplace, drug testing and disability accommodation policies and practices and, with the aid of employment counsel, revise those policies and practices as necessary to comply with the *Barbuto* decision. In particular, employers should be wary of categorical prohibitions on marijuana use. Conversely, employers should also assess whether there are any special factors – such as major safety concerns – that might warrant an absolute prohibition on marijuana use.

Barring such special considerations, the SJC's *Barbuto* decision obligates Massachusetts employers to consider the feasibility of allowing a disabled employee to use marijuana for medical reasons. Here, as well, counsel can assist an employer in determining whether the employee's medical condition and job duties are such that the employee should be permitted to use the drug.

If you have any questions about how the Barbuto *decision may affect your obligations as an employer, or otherwise need assistance with any disability-related issues, please feel free to contact us.*

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It's Time For More Effective Workplace Training

Rather, the report found trainings should also "describe conduct that, if left unchecked, might rise to the level of illegal harassment [and] focus on the unacceptable behaviors themselves."

Other key takeaways from the report are that effective compliance training:

- is tailored to the specific realities of different workplaces;
- includes separate targeted training for middle-management and first-line supervisors;
- clarifies what conduct is not harassment and is therefore acceptable in the workplace;
- educates employees about their rights and responsibilities if they experience or witness unacceptable workplace conduct;
- describes in simple terms how a workplace's formal complaint process will proceed;
- is supported at the highest levels of leadership;
- is conducted and reinforced on a regular basis for all employees; and
- is conducted by qualified, live, and interactive trainers.

More globally, the report found that "to be effective in stopping harassment, training cannot stand alone, but rather, must be part of a holistic effort undertaken by the employer to prevent harassment."

What Employers Should Do

Today's climate offers a "call to action" for employers, and the EEOC report offers a roadmap for bringing about change.

The EEOC report envisions a comprehensive harassment prevention plan that includes traditional compliance training together with workplace civility training and bystander intervention training. And management at all levels must be committed to creating a positive and harassment-free workplace, and to ensuring that workplace complaints are treated seriously.

Specifically, then, now would seem to be the ideal time to:

- Review and update your workplace's current sexual and other harassment policy, reporting procedures, and anti-retaliation language.
- Make sure that all employees – and all levels of management (including your Board) – understand and follow (and enforce) the established policies and procedures.
- Review any recent harassment complaints with the aid of counsel, to consider whether complaints were resolved properly or need to be revisited.
- Evaluate current harassment training to ensure that it comports with the best practices identified in the EEOC report.
- Conduct a comprehensive training program to minimize the risk of not only workplace misconduct, but also the disruptions that can follow.

If you have any questions about how to achieve any of these goals, or any other questions related to preventing and/or addressing workplace harassment, please feel free to contact us.

SJC's *Blanchard* Ruling Narrows Scope Of Massachusetts Anti-SLAPP Statute

By Gary D. Finley

Earlier this year, the Massachusetts Supreme Judicial Court ("SJC") issued a landmark ruling that has the potential to shift the balance of power in many types of legal actions, particularly lawsuits involving common-law claims such as defamation and tortious interference with contractual relations.

In *Blanchard v. Steward Carney Hosp. Inc.*, 477 Mass. 141 (2017), the SJC expanded parties' ability to avoid the reach of the so-called Massachusetts "anti-SLAPP" statute, which provides a means for litigants to obtain swift dismissal of legal claims against them prompted solely by litigants' protected "petitioning activities," such as lobbying elected officials or making public statements on a controversial issue. One important result is that employers should have greater leeway to assert counterclaims, where appropriate, in lawsuits brought against them by former employees or other parties.

Background: The Massachusetts Anti-SLAPP Statute

Under the Massachusetts anti-SLAPP (Strategic Litigation Against Public Participation) law, which was enacted in 1991, a party to a lawsuit facing civil claims that "are based on said party's exercise of its right to petition under the constitution of the United States or of the commonwealth" has the statutory right to file a special motion for expedited dismissal of those claims. If granted expedited dismissal, the moving party is also entitled to an award of its reasonable attorneys' fees.

The primary purpose of the Massachusetts anti-SLAPP statute (codified as Mass. Gen. L. ch. 231 § 59H) is to provide parties with a swift and cost-effective remedy when claims (often under theories of defamation, malicious prosecution, or intentional/tortious interference with contract) have been asserted against them primarily for the purpose of chilling their right to petition. The prototypical example is where a group of individuals speaks out against a real estate developer's proposed plans and are then sued by the developer for defamation, tortious interference or similar claims, apparently prompted directly by their public statements. In such cases, the special motion to dismiss provided for under the statute can be a potent remedy (and deterrent to frivolous claims).

Anti-SLAPP motions can arise in other contexts as well. For example, where a former employee makes public statements alleging that the employer violated the law in some manner, the employer might be tempted to respond with counterclaims for defamation or the like. If the former employee can show that those counterclaims are based solely on his or her petitioning activities (*i.e.*, the public statements), the former employee may be able to obtain swift dismissal of the counterclaims, along with an award of his or her attorneys' fees.

Previous Standard For Anti-SLAPP Special Motions

In evaluating a special motion to dismiss under the anti-SLAPP statute, Massachusetts courts have followed a judicially created standard that closely mirrors the text of the statute, and that was first articulated in the SJC's ruling in *Duracraft Corp. v. Holmes Prod. Corp.*, 427 Mass. 156 (1998). Under *Duracraft*, in order for a special anti-SLAPP motion to be granted, the moving party must first establish that the claims against it are based on its petitioning activities alone and have no substantial basis other than those petitioning activities. If the moving party makes that showing, the burden then shifts to the non-moving party, who must then establish that the moving party's petitioning activity was merely a "sham" – *i.e.*, lacking in any reasonable basis in fact or law.

The *Duracraft* standard has been highly advantageous for many litigants facing defamation and similar claims. *Duracraft* has provided a mechanism whereby, with little or no discovery, courts can swiftly dismiss claims designed to chill the expression of opposing viewpoints, particularly by less well-heeled individuals and entities who may not have the means to engage in a lengthy court battle.

However, as a number of courts have noted, *Duracraft*, by its very efficiency, has the potential to be over-inclusive, pulling within its sweep legitimate claims that, though based on an opposing party's non-sham petitioning activities, are aimed at remedying actual harm caused by the moving party, rather than chilling legitimate petitioning activity.

The *Blanchard* Decision

With this backdrop, the SJC's recent *Blanchard* ruling revises the *Duracraft* standard in a way that will likely make it more difficult for parties to obtain expedited dismissal of SLAPP claims.

The *Blanchard* case arose out of events that occurred at Steward Carney Hospital in the spring of 2011. After reports of abuse in the adolescent psychiatric unit at the hospital, Carney's president fired all of the unit's registered nurses and mental health counselors. Soon thereafter, and while the Massachusetts Department of Public Health ("DPH") was considering revoking the hospital's license to run the unit, the hospital made two separate statements, one to hospital employees and the other to the *Boston Globe*, both of which could be read to imply that the employees had been fired at least in

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part for their culpability for the incidents that had taken place within the unit.

Nine of the fired nurses filed suit against the hospital and related parties, asserting, in part, claims for defamation based on the hospital's statements. The defendants responded by promptly filing a special motion to dismiss the defamation claims pursuant to the anti-SLAPP statute. The defendants argued that the plaintiffs' claims were based solely on petitioning activity – here, the hospital's exercise of its right to petition the DPH in an attempt to keep its license. The trial court denied the special motion to dismiss, but the state Appeals Court reversed that decision. Subsequently, the SJC agreed to consider the issue.

In its decision, the SJC recognized that if it were to apply the existing *Duracraft* standard, the motion should likely be granted. After all, the plaintiffs' defamation claims – at least to the extent they were based on statements made to the *Boston Globe* – arose directly from the hospital's attempts to keep its DPH license. Further, it would likely be impossible for the plaintiffs to establish that the hospital's activities in petitioning the DPH were merely a "sham."

Based on those factors, the SJC opined that the *Blanchard* case did not have the "classic indicia of a 'SLAPP' lawsuit" and that the existing *Duracraft* framework "does not provide adequate means to distinguish between meritless claims targeting legitimate petitioning activity and meritorious claims with no such goal." In other words, courts should not construe the anti-SLAPP statute in a way that leaves parties with no potential remedy when they are harmed by an opponent's false or misleading statements in the course of otherwise protected petitioning activity.

In order to address these concerns and avoid early dismissal of cases in which "legitimate petitioning activity forms the basis of a meritorious adverse claim that is not primarily geared toward chilling such petitioning," the SJC announced a new, augmented framework for analyzing anti-SLAPP special motions to dismiss:

- At the first stage, as under *Duracraft,* the moving party must demonstrate that its opponent's claims are based solely on the moving party's petitioning activities.
- At the second stage, in order to defeat the special motion to dismiss, the non-moving party must establish *either:*
  - That the moving party's petitioning is without a reasonable basis in fact or in law – in other words, that the petitioning is a sham; *or*
  - That each of the non-moving party's claims in question was not primarily brought for the purpose of chilling the moving party's legitimate petitioning activities.

The SJC then remanded the case to the Superior Court for further consideration based on this new standard.

Implications Of The *Blanchard* Ruling

The new standard announced by the SJC in *Blanchard* allows for greater nuance than the prior *Duracraft* standard, in recognition that not all claims based on an opposing party's petitioning activities are meritless.

Massachusetts employers, among other parties, may well benefit from this new standard. For instance, if another party – such as a former employee or a business competitor – makes false or misleading public statements about an employer that may result in harm, the employer should have a greater ability to have resulting legal claims heard by a court.

If you have questions about the impact of the Blanchard *ruling – either with regard to a specific litigation matter or more generally – please feel free to contact one of our experienced litigators. We would be happy to help.*

Sara Goldsmith Schwartz, William E. Hannum III, & **Jaimie A. McKean** Named To ***2017 Super Lawyers®*** List –

Sarah H. Fay Named To ***2017 Rising Stars®***

Schwartz Hannum PC is thrilled to announce that three attorneys have been named to the 2017 Massachusetts Super Lawyers® list and one has been named to the 2017 Rising Stars® list.

Sara Goldsmith Schwartz, William E. Hannum III, and **Jaimie A. McKean** have been selected for inclusion in the **2017 Massachusetts Super Lawyers®** list in the area of Employment & Labor Law.

Sarah H. Fay has been selected for inclusion in the **2017 Massachusetts Rising Stars®** list for the first time. Sara and Will were first acknowledged by Super Lawyers® in 2004. This is Jaimie's fourth year selected for inclusion, after previously being named to the Rising Stars list from 2008-2013.

The Firm is proud of its Super Lawyers® and congratulates each of them on this achievement. We also extend our gratitude to the entire Schwartz Hannum PC team for their continued hard work and service.

New NLRB Majority Poised To Reverse Important Obama-Era Decisions

By Joseph E. Santucci, Jr. and Brian B. Garrett

The National Labor Relations Board ("NLRB" or the "Board") may soon begin undoing a number of important federal labor-law decisions handed down by the Board during the Obama Administration.

As anticipated, President Trump nominated, and the Senate recently confirmed, two Republican appointees, Marvin Kaplan and William Emanuel, to fill vacancies on the five-member Board. Members Kaplan and Emanuel have joined Chairman Philip Miscimarra to create a Republican-majority Board. (The Board's two current Democrats are Members Mark Gaston Pearce and Lauren McFerran, whose terms expire in August 2018 and December 2019, respectively.)

Under the Obama Administration, the Board consistently applied the National Labor Relations Act (the "Act" or "NLRA") in a strongly pro-union fashion. The newly composed Board is widely expected to reverse several of these rulings. In anticipation of these potential changes, this article highlights four decisions that seem particularly likely to be revisited and potentially overturned.

Browning-Ferris

In its 2015 *Browning-Ferris Industries of California, Inc. ("BFI")* decision, the Board dramatically broadened the circumstances under which an employer may be found to be a "joint employer" of workers employed by another business. In *BFI,* the Board ruled that if an employer has a right to control essential terms and conditions of employment of workers employed by another business (such as a staffing company), the employer may be considered a joint employer of those employees – meaning, in part, that the employer would be obligated to bargain with the employees regarding terms and conditions of their employment. In rendering its decision, the NLRB reversed decades of precedent holding that an employer must exercise *actual* control over workers' terms and conditions of employment in order to be considered a joint employer.

Applying this loosened standard, the Board held that BFI, a California waste-management company, was a joint employer of workers at its plant who were directly employed by an outside staffing agency. Key to the Board's ruling was the fact that BFI had a contractual right to control certain essential terms and conditions of employment for those workers.

As a result of the *BFI* decision, employers that secure workers through staffing agencies have faced an increased risk of being obligated to bargain collectively with those workers. However, the decision was appealed to the U.S. Court of Appeals for the D.C. Circuit, which may well remand the case to the Board with a request that the Board explain its departure from its traditional standard on this issue. In that event, rather than providing a justification for the new standard, the newly constituted Board may well return to its prior joint-employer standard.

Specialty Healthcare

In a 2011 decision, *Specialty Healthcare and Rehabilitation Center of Mobile,* the NLRB announced a stricter standard for employers to challenge narrow, or "micro," bargaining units.

Under *Specialty Healthcare,* in order to challenge a proposed bargaining unit, an employer must show that workers excluded from the proposed unit share "an overwhelming community of interest" with those falling within it. Previous Board precedents afforded employers significantly greater leeway in objecting to proposed bargaining units.

The stricter *Specialty Healthcare* standard has therefore made it much more difficult for employers to challenge the composition of unions' proposed bargaining units. For instance, in a 2014 decision involving a Macy's department store, the Board found that a proposed unit comprising only cosmetics and fragrance employees was an appropriate unit for a union representation election.

Employers have argued that *Specialty Healthcare* opens the door to chaos in the work environment by permitting any number of bargaining units to exist within a single work facility. Chairman Miscimarra has agreed, stating in his dissent in a 2017 Board decision, *Cristal USA, Inc.,* that *Specialty Healthcare* was "wrongly decided" and "promotes instability by creating a fractured or fragmented unit."

Several federal Courts of Appeals, however, including the Second, Fifth, and Sixth Circuits, have upheld the *Specialty Healthcare* standard, meaning that any return to the prior standard for employer challenges to proposed bargaining units will likely need to come from the Board itself. But with the new Republican majority on the Board, and in light of Chairman Miscimarra's already-expressed position, it will not be surprising if such a reversion comes about.

Purple Communications

In 2014, the Board ruled in *Purple Communications, Inc.,* that, under Section 7 of the Act, employees generally have a right to use an employer's email system for purposes of union organizing or other protected concerted activities. The *Purple Communications* decision overturned the Board's prior ruling, in the 2007 *Register Guard* decision, that an employer could ban all non-business email communications, including communications related to protected concerted activities, on

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What Employers And Schools Need To Know About The Rescission Of DACA

This past September, the Trump Administration announced that it was unwinding the Deferred Action for Childhood Arrivals program, known as "DACA." DACA provided a temporary reprieve from deportation and the ability to work for over 800,000 young people (known as "Dreamers") who were brought to the U.S. during childhood and have resided here without legal authorization.

Background

Created through a 2012 Executive Order by the Obama Administration, DACA served as a form of prosecutorial discretion, under which the government chose to defer potential deportation proceedings against qualifying undocumented immigrants. To qualify for DACA, an applicant was required to (a) have been under the age of 31 at the time the program was announced, (b) have been brought to the U.S. prior to the age of 16, (c) meet certain physical presence requirements, and (d) be a current student, high school graduate, GED holder, or honorably discharged veteran of the U.S. Coast Guard or Armed Forces. In addition, applicants were required to pay filing fees, meet criminal background requirements, and not pose a threat to national security.

Successful DACA applicants were given a two-year deferral from removal (deportation) proceedings and the ability to apply for employment authorization, subject to renewal.

Current Status Of DACA

Attorney General Jeff Sessions announced that the Trump Administration will end the DACA program by phasing it out in an "efficient and orderly fashion," finding that "it is likely" that the courts would find the program to be unconstitutional. Current DACA recipients will remain protected for their approved period of deferred action and be permitted to retain their employment authorization documents until they expire, unless they are terminated or revoked.

It is important to note that DACA recipients who have current employment authorization will continue to be eligible to work until their employment authorization documents expire, even if the expiration date is beyond March 5, 2018. However, unless Congress acts in the interim or President Trump changes his mind, once a recipient's employment authorization documents expire, they will not be able to be renewed, and the recipient will lose employment authorization.

What Should Employers Do?

Employers who have or may have employees with employment authorization through DACA should tread carefully to ensure they are complying with their Form I-9 employment authorization verification requirements, while not acting in a discriminatory manner.

First, employers should not take any immediate action based on the wind-up of the DACA program, as current employment authorization documents are not being rescinded. However, it is important that employers have a system in place to ensure that employment authorization is re-verified in Section 3 of Form I-9, prior to the expiration of employees' employment authorization documents. In doing so, it is important that employers not treat DACA recipients differently than other workers, as this would be in violation of the anti-discrimination provisions of the Immigration and Nationality Act. Rather, ***all*** workers whose employment authorization documents are set to expire should be re-verified as necessary.

Employers should also plan ahead for the possibility that current workers will be unable to renew their employment authorization as DACA is phased out. However, employers should not terminate or refuse to hire DACA recipients based on their immigration status.

What Should Schools Do?

Because DACA affects younger people, many independent schools may also be concerned about the ability of their students to continue to attend school. Unlike employment, there is no federal requirement that schools check students' immigration status. Therefore, students affected by the DACA phase-out can still attend school. However, students who work on campus or otherwise participate in a work study program may no longer be eligible to work lawfully in the U.S.

In addition, many schools have declared themselves "sanctuary campuses" and aim to protect all students, regardless of immigration status. Schools should give consideration to issues raised by such policies. Although USCIS has stated that it will not "proactively" share information from DACA applications with Immigration and Customs Enforcement ("ICE"), this does not mean that ICE will not ask for information if ICE believes a DACA recipient meets criteria for being placed into deportation proceedings. Therefore, it is important that schools adopt clear policies regarding how to handle ICE inquiries.

For example, schools should designate a specific administrator to handle ICE inquiries. This person should have a clear understanding of the school's rights and obligations in connection with ICE inquiries, such as when a warrant must first be obtained. In addition, schools may wish to evaluate which areas of their campus should be treated as "public," as this can limit where ICE agents can enter without a warrant. Finally, schools – particularly those that have adopted "sanctuary campus" policies – should consider communicating to their students when they can protect students' privacy in connection with ICE inquiries, and when they must respond to ICE.

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New NLRB Majority Poised To Reverse Important Obama-Era Decisions

the rationale that an employer's email system is its property.

The impact of *Purple Communications* has been far-reaching. Because Section 7 of the NLRA applies to unionized and non-unionized employers alike, nearly all private employers have been forced to accommodate employees' expanded email rights.

As with *Specialty Healthcare*, Chairman Miscimarra has made clear his disagreement with *Purple Communications*. In his dissent earlier this year in *European Imports Inc.*, Chairman Miscimarra argued that *Purple Communications* is "incorrect and unworkable" and that the Board should return to the *Register Guard* standard, which recognized an employer's right to prohibit non-business use of its email and other communications systems, so long as the employer did not discriminate against communications related to union or other Section 7 activities.

With the new Republican majority now in place, the Board may well follow Chairman Miscimarra's lead and cast aside *Purple Communications* in favor of the prior *Register Guard* standard.

Banner Health

Finally, in its 2012 decision in *Banner Health Systems*, the Board held that an employer may instruct employees to keep an ongoing internal investigation confidential only if the employer can demonstrate a legitimate business justification for doing so that outweighs employees' Section 7 rights to discuss the investigation.

As part of the *Banner Health* ruling, the Board held that an employer cannot simply assert that all workplace investigations must be kept confidential. Rather, an employer must show the existence of one or more specific circumstances establishing a need for confidentiality in each individual case, such as a need to protect witnesses, avoid fabrication of testimony or destruction of evidence, or prevent a cover-up.

In March 2017, the D.C. Circuit Court of Appeals remanded a portion of *Banner Health* to the Board, finding that there was insufficient evidence that Banner Health had categorically limited employees' right to disclose information about ongoing investigations. The newly composed Board will thus have an opportunity to revisit the *Banner Health* decision.

Conclusion

While each of these recent Board holdings appears ripe for reversal, those changes may take some time to come about, as the new NLRB majority must wait for appropriate cases to be brought before the agency. Further, as Chairman Miscimarra will be exiting the Board when his current term expires on December 16, 2017, there may be a hiatus before a new Chairman is nominated by President Trump and confirmed by the Senate.

Nonetheless, with the next presidential election still three years away, the Board will remain under Republican control for at least that time period, meaning that employers can anticipate changes in these and other important labor-law issues in the foreseeable future.

If you have any questions about these developments or other anticipated changes under the NLRA, please feel free to contact one of our experienced labor lawyers. We regularly assist employers with all types of union-related issues and would be pleased to help.

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What Employers And Schools Need To Know About The Rescission Of DACA

What's Next?

It is possible that Congress will enact legislation that will provide relief to the Dreamers in the absence of DACA. If not, President Trump has stated that he may "revisit" this decision prior to March 5, 2018.

However, as nothing is certain, it is important that employers be vigilant when completing Form I-9s both for new employees and when re-verifying employment authorization. Further, schools (as well as other employers) should have policies in place regarding ICE inquiries to ensure that they respond in a consistent, non-discriminatory manner.

Please feel free to contact us if you have any questions about the termination of the DACA program and its potential effects on your business or school.

Labor And Employment Webinar Schedule

December 14, 2017
Getting It Write:
Employee Handbooks
12:00 p.m. to 1:30 p.m. (EST)

January 18, 2018
Massachusetts New Pay Equity Law: Prepare Now To Avoid Litigation Later
12:00 – 1:30 p.m. (EST)

January 31, 2018
Sexual Harassment In The Workplace: Developing And Implementing A Comprehensive Prevention Plan
12:00 – 1:30 p.m. (EST)

February 8, 2018
Conducting An I-9 Audit:
Tips, Traps And Best Practices
12:00 p.m. to 1:30 p.m. (EST)

May 3 & 4, 2018
(Two-Day Seminar)
Employment Law Boot Camp at SHPC
May 3 - 8:30 a.m. to 4:00 p.m.
May 4 - 8:30 a.m. to 4:30 p.m.

Please see the Firm's website at **www.shpclaw.com** or contact the Firm's Seminar Coordinator, **Kathie Duffy**, at **kduffy@shpclaw.com** or **(978) 623-0900** for more detailed information on these seminars and/or to register for one or more of these programs.

New Connecticut Law Illustrates Growing Background Check Obligations For Schools

By Sarah H. Fay

Over the past few years, incidents of inappropriate teacher-student relationships have increasingly captured the public's attention. From movies to front-page headlines detailing civil lawsuits against schools or criminal prosecutions of perpetrators, incidents ranging from inappropriate text message exchanges to allegations of sexual assault and rape have garnered both local and national attention.

A growing number of states, including Connecticut, Oregon, Missouri, Pennsylvania, and Texas, have responded with new legislation intended to ensure tougher background checks and vetting requirements for educators. One of the main goals of such laws is to prevent school employees from quietly resigning amid allegations of inappropriate sexual or other personal conduct and obtaining a job at another school that is unaware of the circumstances – a practice often referred to, for better or worse, as "passing the trash."

Legislation recently enacted in Connecticut is illustrative of this overall trend. Initially, in 2016, Connecticut passed a law that strengthened applicant background check requirements for public schools, including by requiring schools to contact applicants' current and former employers to request their employment history. Subsequently, in the summer of 2017, Connecticut expanded those requirements, through legislation known as Public Act 17-68, to cover independent schools. Public Act 17-68, which took effect on July 1, 2017, also added a number of new requirements for Connecticut independent schools, such as mandatory Department of Children and Families ("DCF") registry and national and state criminal record checks, as well as more robust screening protocols for substitute teachers and contractors, all aimed at promoting student safety and preventing "passing the trash" among Connecticut schools.

The Connecticut law has implications for independent schools across the nation. First, schools in all states, not just Connecticut, should anticipate receiving requests from Connecticut schools concerning the backgrounds of current and former employees. Consequently, all independent schools should prepare guidelines for responding to these requests. Second, the Connecticut law provides a useful set of best practices that any independent school should consider in reviewing and updating its own background check policies and practices.

Connecticut Public Act 17-68

Under the new Connecticut statute, every applicant seeking employment at a Connecticut independent school must do the following:

- Submit to a background check of the DCF abuse and neglect registry before hire.
- State whether the applicant has ever been convicted of a crime or currently has criminal charges pending against him or her. (In this respect, Public Act 17-68 stands as an exception to Connecticut's "ban the box" law, which generally prohibits employers from asking about criminal history on an initial application form.)
- Satisfactorily pass a state and national criminal history records check within 30 days from the date of employment.

These criminal history checks for applicants are a mandatory requirement for all new hires at Connecticut independent schools. Schools are also required to cover all fees associated with the required background checks.

Public Act 17-68 also expanded Connecticut independent schools' obligations in reviewing applicants' references and employment history. For instance, schools must now obtain for each applicant:

- The applicant's employment history (including the name of, and contact information for, each school for which the applicant has worked).
- Written authorization permitting the applicant's former or current employers to disclose information about the applicant's employment history.
- A written statement regarding whether the applicant has been investigated for, disciplined for, or convicted of abuse, neglect, or assault, and whether the applicant has had a professional or occupational license or certificate suspended or revoked for such misconduct.

The Connecticut law also requires schools to contact (via telephone or in writing) an applicant's current and former employers and, using a specific form provided by the state, request the disclosure of certain information. The recipient schools have five business days from receiving the request to respond. While Connecticut does not have jurisdiction over schools beyond its borders, a school must make a "documented good faith effort" to contact the current and former employers listed by the applicant – defined under the statute as at least three telephonic requests made on three separate days.

In addition, Connecticut schools must ask the state Department of Education ("DOE") for information about: (i) the applicant's eligibility for any position requiring a teaching certificate, license, or permit; (ii) any discipline given to the applicant for abuse, neglect, or sexual misconduct; and (iii) any criminal convictions or pending charges against the applicant.

The new Connecticut law also affects a number of employment practices beyond just hiring practices. Most notably, independent schools are now prohibited from entering into any contract, such as a separation agree-

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known limitations. (This includes both physical and mental limitations.) The employer's obligation to provide an accommodation, however, is not absolute. Employers are not required to accommodate employees where an employee's requested accommodation would impose an undue hardship on the employer's business.

Under the ADA, a reasonable accommodation "may include … reassignment to a vacant position …" 42 U.S.C., § 12111(9). As indicated by the word "may," the ADA does not expressly state whether an employer must automatically offer a disabled employee reassignment to a vacant position as a reasonable accommodation, or must simply give the employee an opportunity to apply and compete for the position along with other candidates.

The EEOC's And Courts' Positions

In a 2002 decision, *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 406 (2002), the Supreme Court held that if automatically offering an open, alternative position to a disabled employee would be inconsistent with an employer's established seniority system, the employer "ordinarily" is not required to offer the employee the open position. The Court, however, did not reach the issue of a disabled employee's reassignment rights where no such seniority considerations are involved.

In the absence of clear guidance from Congress or the Supreme Court on this issue, the Equal Employment Opportunity Commission ("EEOC") and federal courts have reached conflicting conclusions.

EEOC.

The EEOC takes the position, in its Enforcement Guidance, that a qualified disabled employee who can no longer perform the essential functions of his or her current position is entitled to be offered a suitable, vacant position. The EEOC stresses that the disabled employee does not have to be the best qualified candidate for the position in order to be entitled to reassignment.

Further, the EEOC interprets the ADA as placing an affirmative obligation on an employer to inform a disabled employee about vacant positions that he or she may be qualified to fill. The EEOC indicates that an employer should ask a disabled employee about his or her qualifications and interests to help identify vacant positions that might be a fit.

Courts of Appeal.

Some federal circuit courts have adopted the EEOC's position that an employer must offer a suitable, vacant position to a qualified disabled employee. For instance, in *Smith v. Midland Brake, Inc.,* 180 F.3d 1154 (10th Cir. 1999), the Tenth Circuit held that "reassignment" under the ADA means more than allowing a disabled employee the same opportunity as anyone else to apply for a vacant position. Rather, if a disabled employee is no longer able to perform the responsibilities of his or her current position, but is qualified for a vacant position, the opportunity for reassignment must be offered to the employee.

Similarly, the D.C. Circuit has held that an employer must do more than simply permit a disabled employee to compete for a job opening with other candidates. See, e.g., *Aka v. Washington Hosp. Ctr.,* 156 F.3d 1284 (D.C. Cir. 1998). Indeed, and in agreement with the EEOC, a D.C. federal district court judge opined that an employer has an affirmative responsibility to search for open positions that would be suitable for a disabled employee. *Alston v. Washington Metro. Area Transit Auth.,* 571 F. Supp. 2d 77 (D.D.C. 2008).

The Seventh Circuit has also followed the EEOC's lead, holding that "the ADA requires employers to appoint disabled employees to vacant positions, provided that such accommodations would not create an undue hardship (or run afoul of a collective bargaining agreement)." *E.E.O.C. v. United Airlines, Inc.,* 693 F.3d 760, 765 (7th Cir. 2012). *See also Brown v. Milwaukee Board of School Directors,* 855 F. 3d 818, 820 (7th Cir. 2017) ("A disabled employee need not be the most qualified applicant for a vacant position, but she must be qualified for it.")

Conversely, other federal circuit courts, including the Eighth and Eleventh Circuits, have held that while an employer *may* simply reassign a disabled employee to a vacant position, the employer is not *required* to do so if there is a better qualified candidate for the position. The Eighth Circuit reached this conclusion in *Huber v. Wal-Mart Stores, Inc.,* 486 F.3d 480, 483 (8th Cir. 2007), holding that "[t]he ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate."

Similarly, the Eleventh Circuit recently held that a hospital was not required to reassign a disabled nurse to another unit without having to compete against other candidates, as this would have violated the hospital's best-qualified applicant policy. *E.E.O.C. v. St. Joseph's Hospital, Inc.,* 842 F.3d 1333, 1346 (11th Cir. 2016). The court stated that "[t]he ADA does not require reassignment without competition …" *Id.* at 1345.

First Circuit.

The First Circuit has not yet directly confronted this issue. However, a footnote in the recent *Audette* decision suggests that if the First Circuit were to visit this specific question, it would rule in favor of mandatory reassignment.

In *Audette,* the First Circuit held that an injured police officer's requested reassignment to a new position was not a reasonable accommodation under the ADA because

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the officer failed to show that any suitable vacancies existed. However, the court stated in a footnote that "accommodating disabled employees who can no longer perform the essential functions of their current job, with or without a reasonable accommodation, by allowing them to transfer to a vacant position whose essential functions they can perform" is "one of the purposes of the ADA." *Audette,* 858 F.3d at 22 n. 10. The court went on to observe that "a number of our sister circuits have held that the ADA *requires* such an interpretation." *Id.* (emphasis added).

Accordingly, while this portion of the *Audette* decision is dictum, employers in Massachusetts and elsewhere in the First Circuit should anticipate that, in an appropriate case, the First Circuit might well conclude that an employer is obligated to allow a disabled employee to transfer to another suitable, vacant position, without having to compete against other candidates.

Implications For Employers

Until the Supreme Court issues a definitive ruling on the issue, employers' obligations under the ADA concerning reassigning disabled employees are likely to remain murky. However, in light of the EEOC's position, the majority trend among the circuit courts, and the First Circuit's dictum in *Audette,* employers would be wise to proceed with caution in refusing a disabled employee an opportunity to transfer into an available, suitable position.

Employers are encouraged to consult experienced employment counsel to assist them in determining whether a disabled employee is qualified for a vacant position, and, if so, whether the employee should be offered the position outright or simply given an opportunity to apply and interview for it.

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New Connecticut Law Illustrates Growing Background Check Obligations For Schools

ment, that would suppress information about an investigation of an employee's suspected abuse, neglect, or sexual misconduct.

Recommendations For Schools

Connecticut independent schools should review Public Act 17-68 thoroughly and, with the assistance of counsel, revise their policies, practices, and forms as necessary to ensure compliance with the various components of the new law.

Furthermore, every independent school should give thoughtful consideration to its own employment background check and vetting practices and how those practices might be strengthened. We suggest that schools take the following steps, with the guidance of counsel:

- Educate themselves as to their legal obligations to report or disclose sexual misconduct, including to state agencies and potential employers. In particular, schools should have clear protocols for addressing reference requests from other schools, including those in states with pass-the-trash mandates.
- Update their employment applications to include questions about past incidents of abuse, neglect, or sexual misconduct, to the extent permitted by applicable background check and ban-the-box laws.
- Ensure that their employment application certifications, separation agreements, reference releases and similar forms give them appropriate discretion in determining whether to report or disclose such information.
- Carefully review and update relevant policies in their employee handbooks, including those relating to interpersonal misconduct, discipline, employment references, and disclosure to future employers.

Schwartz Hannum's team of education lawyers has a wealth of experience advising independent schools in issues relating to background checks, as well as sexual misconduct and other boundary crossing. If you have any questions about these issues or need assistance with any other employment-related matters, please feel free to contact us.

Independent Schools Webinar Schedule

December 11, 2017
Employing Faculty:
Tips, Traps And Best Practices For Faculty Contracts And Offer Letters
3:00 p.m. to 4:30 p.m. (EST)

January 24, 2018
Contracts And Compensation For The Head Of School: Tips, Traps And Best Practices
12:00 p.m. to 1:30 p.m. (EST)

January 26, 2018
Easing The Administrative Burden:
Best Practices For Implementing Electronic Signatures On School Forms
3:00 p.m. to 4:30 p.m. (EST)

February 16, 2018
Getting It Write: Student Handbooks
3:00 p.m. to 4:30 p.m. (EST)

Please see the Firm's website at **www.shpclaw.com** or contact the Firm's Seminar Coordinator, **Kathie Duffy**, at **kduffy@shpclaw.com** or **(978) 623-0900** for more detailed information on these seminars and/or to register for one or more of these programs.

The ADA's "Reassignment" Provision: A Suggestion Or A Requirement?

By Jaimeson E. Porter[1]

Employers are often confronted with scenarios in which a disability prevents an employee from continuing to perform his or her essential job duties, but the employer has another position available that the employee is able and qualified to perform. In these circumstances, is the employer required to offer the employee the new position, or need it merely give the employee an opportunity to interview for the job along with other candidates?

For employers in Massachusetts and elsewhere in the First Circuit, the answer could well be the former. In a recent decision, *Audette v. Town of Plymouth*, 858 F.3d 13 (1st Cir. 2017), the First Circuit suggested – without actually holding – that, in such circumstances, the Americans With Disabilities Act ("ADA") generally requires an employer to give a disabled employee preference over other candidates for a vacant position that the employee is qualified to perform.

Statutory Framework

The ADA protects "qualified individual[s]" from discrimination in employment based on disability. A qualified individual under the ADA is anyone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C., §§ 12111(8), 12112(a).

If a disabled employee meets the definition of a "qualified individual," the employer is required to provide the employee with a reasonable accommodation for his or her

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1. *A previous version of this article appeared in* New England In-House ("NEIH"). *The Firm is grateful to* NEIH *for its support.*

Schwartz Hannum PC Recognized As A **"Best Law Firm"** In **U.S. News-Best Lawyers® 2018 Rankings**

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- Labor Law – Management (Tier 1)
- Employment Law – Management (Tier 3)
- Litigation – Labor & Employment (Tier 3)

Firms included in the ***2018 "Best Law Firms"*** list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise. The 2018 rankings are based on the highest number of participating firms and highest number of client ballots on record.

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Schwartz Hannum PC focuses on labor and employment counsel and litigation, business immigration, and education law. The Firm develops innovative strategies that help prevent and resolve workplace issues skillfully and sensibly. As a management-side firm with a national presence, Schwartz Hannum PC represents hundreds of clients in industries that include financial services, healthcare, hospitality, manufacturing, non-profit, and technology, and handles the full spectrum of issues facing educational institutions. Small organizations and Fortune 100 companies alike rely on Schwartz Hannum PC for thoughtful legal solutions that help achieve their broader goals and objectives.

11 CHESTNUT STREET
ANDOVER, MA 01810
E-MAIL: shpc@shpclaw.com
TEL: 978.623.0900
www.shpclaw.com