Decisions, Decisions

An Employment Case-law Update

By KEVIN V. MALTBY, Esq.

This past year brought about several developments in employment law that have a potential impact on Western Mass. businesses. Employers in Massachusetts must comply with both state and federal law, and the federal courts are empowered to handle claims under federal and Massachusetts law when they are brought together.

Typically, the laws are very similar, so the following case-law examples may be helpful in guiding employers.

In *Ortiz-Rivera v. Astra Zeneca*, a case from the federal court, an employee brought a claim for age discrimination against her employer. She alleged that, at the age of 40 years and 2 months, the employer discriminated against her when it terminated her.

She also alleged that the employer had made several age-related comments to her. First, when the employee informed the supervisor that she was suffering from a medical condition, the supervisor told her to visit a doctor and said, "those things come with age." Second, during a break at a work meeting, a co-worker was selling bikinis. When the employee asked whether there was one for her, the supervisor said she was "too old for one."

Next, when the supervisor met with the employee to discuss improper expense reports, she allegedly told the plaintiff, "you are too old, Doris. You are too old for this. You are too old to be making these mistakes. This is unacceptable." Finally, when management met with the employee to discuss concerns about her performance and dishonesty, they told her she was "… old enough to know what it means to lie and to omit" information.

In light of these facts, the court found that the employee had met her burden of establishing a prima facie case for employment discrimination. However, the court also found that the employer had provided a legitimate, non-discriminatory reason for terminating the employee for dishonesty and related performance-based reasons. With respect to the comments, the court stated that "stray workplace remarks ... normally are insufficient, standing alone, to establish either pretext or the requisite discriminatory animus."

Further, the first two remarks, concerning a medical problem and bikinis, were rude, but not related to the decision to terminate the plaintiff's employment. The court further noted that such 'stray remarks' may be material to whether the employer harbored a pretext, but the importance of the remarks may be diminished significantly if they were not related to the employment decision in question. In this case, the court found that the remarks were immaterial to the employee's job performance.

Discriminatory conduct, however innocently done, is grounds for legal action, and you may find yourself on the losing end of a court battle.

In another federal court case, the First Circuit Court of appeals addressed the issue of the 'interactive process' under the Americans with Disabilities Act (ADA). In *Richardson v. Friendly Ice Cream Corp.*, the employee brought suit against Friendly's under the ADA. The former employee had developed shoulder-impingement syndrome while working as an assistant manager.

She argued that Friendly's had discriminated against her based on a known disability, failed to engage her in an interactive process, and failed to accommodate her because of her disability.

The court reviewed the employee's six-page job description and noted that her job included manual tasks that the employee could not perform with or without reasonable accommodation. The court further went on to examine the interactive process and noted that "an interactive-process claim cannot succeed unless the interaction could have led to the discovery of a reasonable accommodation that would have enabled the plaintiff to perform the essential functions of her position."

In Massachusetts, the Supreme Judicial Court (SJC) visited the Mass. Maternity Leave Act (MMLA) in *Global NAPs Inc. v. Awiszus.* Under the MMLA, an employee is entitled to eight weeks of leave. In this case, the employer promised the employee an additional eight weeks of leave in the event that she gave birth by cesarean section. The employee did ultimately give birth by cesarean section, and the employer terminated her while she was on leave, but after the eight weeks had passed under MMLA.

At trial, the jury found in favor of the employee, awarding her damages of approximately $2.3 million. In post-trial litigation, the jury award was reduced to approximately $1 million. In addition, post-trial litigation led the SJC to analyze MMLA and noted that, while MMLA provides that an employer may provide more than eight weeks of leave, those additional benefits would be separate and apart from MMLA. Therefore, an employee would have to bring an action for breach of contract if the employer failed to provide promised leave in addition to MMLA.

Massachusetts courts also addressed the issue of age discrimination in 2010. In *Petani v. T.J.X. Cos. Inc.*, an employee was fired from her retail job after she signed a confession admitting two fraudulent merchandise returns, causing loss to the employer. The employee attempted to introduce evidence of discriminatory comments having to do with age and handicap. The court held that no jury could find that fraud and dishonesty were pretext for age or handicap discrimination. Furthermore, the court held that the evidence introduced by the employee was inconsistent, constituted hearsay, and therefore could not support pretext or discriminatory motive.

In another interesting case, the Massachusetts Court of Appeals held that an employer can be strictly liable for sexual harassment even if the harasser does not have direct supervisory authority over the terms and conditions of the plaintiff's employment. In *Gonsalves vs. Bristol County Sheriff's Dept.*, the employee was a civilian and the harasser

was a lieutenant in the police department who had no direct supervisory authority over her.

The employee had reported to superiors on numerous occasions that the lieutenant had sexually harassed her. The court held that sexual harassment does not stem from the direct supervisory relationship as much as "the authority conferred upon a supervisor by the employer that makes a supervisor particularly able to force a subordinate to submit to sexual harassment." The court noted that the lieutenant had "command authority" over the civilian despite the fact that he was not her direct supervisor.

While the above cases are good examples of actions that you should beware of as an employer, it is always good practice to discuss any specifics that arise with a qualified employment-law attorney. Discriminatory conduct, however innocently done, is grounds for legal action, and you may find yourself on the losing end of a court battle. This is certainly a case where an ounce of prevention is worth more than a pound of cure. ■

Kevin V. Maltby is an associate with Bacon Wilson, P.C., and a former prosecutor for the Northwestern District Attorney's Office; (413) 781-0560; kmaltby@baconwilson.com; bwlaw.blogs.com/employment_law_bits