ROBINSON & COLE LLP
Labor, Employment & Benefits

MCAD Announces Major Changes to Enforcement Division and Case Processing Methods

The Massachusetts Commission Against Discrimination issued a Standing Order (6/3/04) announcing major changes to reduce case processing time. Effective July 1, 2004, the MCAD is eliminating the Pro Se and Attorney Assisted Units. Instead, the Enforcement Division will be composed of teams of investigators and enforcement advisors. All cases will be processed using the same procedures:

- After a complaint is filed, the Commission will request a Position Statement;
- Complainant will be offered an opportunity to respond to the Position Statement;
- Commission may conduct an Investigative Conference (if necessary);
- Commission may request additional information; and
- Commission will issue an investigative disposition.

The parties need not exchange correspondence, information or documents other than the complaint and the position statement. The parties will no longer be allowed to conduct pre-determination discovery, nor will they be required to submit Memoranda of Fact and Law, although they may be required to brief specific issues. The new procedures apply to all cases filed on or after June 3, 2004. For pending cases, the new procedures apply to cases in which no discovery order has been issued. Pending cases in which a discovery order was issued will be processed used the prior procedures.

Firefighter's Title VII Claim based on Sex Stereotyping and Transsexualism Is Reinstated

Jimmie Smith had been a firefighter with the Salem, Ohio Fire Department for seven years when he was diagnosed with Gender Identity Disorder. After his diagnosis, and as part of his treatment, Smith (who was born biologically male) began expressing a more feminine appearance. Co-workers questioned Smith about his appearance, remarking that he did not look masculine. Smith informed his immediate supervisor of his GID diagnosis and treatment, including the likelihood that he would be transformed into a woman. His supervisor notified the Chief of the Fire Department, who then met with the City's Law Director supposedly to use Smith's transsexualism to end his employment. Within a week, the Fire Chief suspended Smith for an infraction of an unenacted municipal policy. Smith filed a lawsuit in federal court, alleging sex discrimination and retaliation in violation of Title VII. The trial court dismissed the claims on the grounds that Title VII does not protect transsexuals. On appeal, in Smith v. City of Salem, Ohio (6/1/04), the U.S. Court of Appeals for the Sixth Circuit reinstated Smith's claims. The appeals court decided that Smith had properly alleged a discrimination claim under Title VII for sex stereotyping and transsexualism. In its decision, the appeals court relied on Price Waterhouse v. Hopkins, the 1989 U.S. Supreme Court case that recognized sex stereotyping of women as a violation of Title VII. Noting that a transsexual fails to act like or identify with the gender norms of his sex, the appeals court ruled that "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."

Possible or Probable Disability Does Not Trigger ADA Protection Unless Employee Is Mistakenly Regarded as Disabled

Thomas Larimer had been an IBM salesman for less than a year when his wife gave birth prematurely to twin girls. The girls required intensive medical care at birth and were hospitalized for two months at a cost of almost $200,000. The medical expenses were covered by IBM's health plan. Larimer was fired shortly after his daughters came home from the hospital. He then sued IBM claiming he was discharged in violation of the Americans with Disabilities Act because his daughters were disabled.

In Larimer v. International Business Machines Corporation (6/3/04), the U.S. Court of Appeals for the Seventh Circuit rejected Larimer's claims. Although the ADA prohibits discrimination against an employee who has a relationship or association with an individual with a known disability, Larimer did not establish that his daughters were either disabled or regarded by IBM as disabled. While there was a probability that his daughters may develop physical or mental impairments as they grow up, as of the time of litigation, the children appeared healthy and normal.

Service Advisor at Car Dealership Is Exempt from FLSA Overtime Requirements

Theadore Walton was employed as a full-time service advisor for Cavalier Ford, an automobile dealership. As a service advisor, Walton communicated with customers regarding their repair and maintenance needs, wrote repair orders, followed-up on repairs, and prepared work orders. After Walton's employment with the dealership ended, he filed a lawsuit claiming he was entitled to overtime pay under the Fair Labor Standards Act. Walton relied heavily on U.S. Department of Labor regulations stating that the overtime exemption for salesmen working in automobile dealerships excluded service managers, service advisors, or service salesmen. In Walton v. Greenbrier Ford, Inc. (5/28/04), the U.S. Court of Appeals for the Fourth Circuit, however, ruled that Walton was exempt from overtime under the plain language of the FLSA, explicitly rejecting the Department of Labor's interpretative regulations covering the scope of the exemption available for salesmen working for automobile dealerships.

Mail Problems at Employer Constituted Excusable Neglect for Failure to Timely Appeal OSHA Citations

In two separate cases the U.S. Court of Appeals for the Third Circuit ruled that employers were entitled to relief for "excusable neglect" for their failure to appeal timely OSHA citations on account of internal mail problems. The first case, George Harms Construction Co., Inc. v. Chao (6/9/04), involved an office manager who had signed for the certified letter containing the citations but could not recall whether she had appropriately routed the document. Upon receiving OSHA's notice of delinquency, the company president (who had not received the citations) contacted OSHA and filed a late notice of appeal. In the second case, Avon Contractors, Inc., v. Chao (6/9/04), the employer claimed that a disgruntled receptionist (who had since quit) had destroyed or lost the citations. The Avon office manager contacted OSHA to inquire about the citations and learned that the fifteen-day period to appeal had lapsed a month earlier. Avon filed a late appeal. OSHA moved to dismiss the late challenges to the citations. OSHA's motion was granted and the companies appealed. The court of appeals rejected OSHA's argument that the OSHA review commission had no jurisdiction to grant relief under the "excusable neglect" standard. The appeals court decided that in both cases the loss of the citations was an unforeseeable human error beyond the employer's control. The appeals court then vacated the review commission's final order and remanded the cases for a hearing on the merits of the citations.

At-Will Employment Does Not Allow Unilateral Reduction of Commission Payments for Past Sales

Anthony Pontecorvo worked at Motorola selling cellular telephones and service plans. At the time of hire, he signed an acknowledgement within his employment application that, if he were hired, his employment would be at-will. He also received a handbook that contained Motorola's at-will employment policy. Pontecorvo was paid a base salary and commissions based on his sales. In addition, he was paid residual commissions based on his customers' telephone usage after the sale. Later, he also was paid commissions on key account sales, which were sales made to large companies. The documentation provided to Pontecorvo explaining the commission programs stated that Motorola reserved the right to change or discontinue the commission programs at any time. Motorola terminated Pontecorvo's employment as part of the elimination of his entire division of almost 200 employees. Pontecorvo sued Motorola for unpaid commissions, arguing that, notwithstanding his at-will status, Motorola did not have the right to deny him commissions already earned before it changed the commission programs. Motorola filed a motion for summary judgment, asserting that it had the right under its at-will policy to unilaterally change the commission programs. In Pontecorvo v. M Pontecorvo v. Motorola Incorporated (8/19/04) the court denied Motorola's motion, reasoning that, although in an at-will employment relationship the employer may change the terms of employment at any time, it cannot unilaterally change the amount of compensation payable for work already rendered by the employee.

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