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Labor, Employment & Benefits e-News

MAY 30, 2006

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In Massachusetts, Employment Discrimination Claim Survives Death of the Employee

After working for Massachusetts General Hospital for 19 years, Richard Gasior took a medical leave for a heart-related condition. Six months later Gasior was cleared by his physician to return to work, but the Hospital refused to allow him back. Gasior filed a lawsuit claiming disability discrimination under Massachusetts state law; however, a week before the trial began, Gasior passed away. The Hospital then moved to dismiss the case, arguing that the discrimination claim did not survive Gasior's death and that, in any event, a deceased employee was not entitled to recover punitive damages.

In [Gasior v. Massachusetts General Hospital](#) (5/11/06), the Massachusetts Supreme Judicial Court rejected the Hospital's argument and ruled that the anti-discrimination claim survived Gasior's death. Although employment discrimination is not among the actions specifically enumerated by the Massachusetts Survival Statute, the statute also provides that actions that survive by common law survive the death of a party. Noting that common law contract claims

generally survive, and that there is a close relationship between employment claims and contract claims, the court determined that discrimination claims survive the employee's death. In addition, the remedies available under by the anti-discrimination statute, including punitive damages, are not limited by the death of the employee. [\[back\]](#)

An Employee Who Engages in Egregious Misconduct Is Not a "Qualified Handicapped Person" under Massachusetts Law Even if the Conduct is Related to a Mental Disability

Michael Mammone, who suffered from bipolar disorder, was hired by Harvard University's Peabody Museum as a staff assistant. Mammone usually was stationed in the lobby of the museum, where he had significant contact with the public. After a few years, Mammone set up a website criticizing Harvard. During working hours, Mammone distributed flyers advertising his website, and used his personal laptop to update the site. On several occasions, Mammone clapped, sang along, and/or danced to protest songs from his website while he was working in the reception area. Mammone refused to follow his supervisor's instructions not to bring his laptop to work.

On what became his last active day at work, Mammone's supervisor asked to meet with Mammone in a private conference room to discuss his disruptive behavior but Mammone refused. He then refused repeated requests to leave the premises and was eventually arrested for trespass and disorderly conduct. After his arraignment on the same day, and despite being instructed not to return to the University, Mammone returned to the campus where he had a profane confrontation with his supervisor and the human resources administrator. The University sent him notice of termination effective immediately. At the urging of union officials, however, the University agreed to delay Mammone's termination in order to allow Mammone to apply for and receive short-term disability benefits. Mammone's termination was effective the day his short-term benefits expired. Mammone then sued Harvard for disability discrimination, claiming the University had failed to provide him a reasonable accommodation, such as "time off to get better."

In Mammone v. President and Trustees of Harvard College (5/12/06), the Massachusetts Supreme Judicial Court affirmed judgment in favor of Harvard, ruling that a handicapped employee who engages in egregious misconduct sufficiently to the interests of his employer that it would result in the termination of a non-handicapped employee, is not a qualified handicapped person within the meaning of the statute. Therefore, according to the court, Mammone was not entitled to the protection of the state's anti-discrimination statute. [\[back\]](#)

Employee Who Was Dismissed for Gross Misconduct Could Not Substantiate Claims of Sexual Harassment, Retaliation and Violation of COBRA Notice Requirements

Magdalena Pomales was a sales consultant for Celulares Telefónicos, Inc., a mobile phone company in Puerto Rico. As part of her duties, Pomales had to provide customer information to the company's Credit Department. Pursuant to CTI policy, a customer with a poor credit history was required to pay a deposit as calculated by the Credit Department and the sale could be completed only upon receipt of the customer's deposit. Although only Credit Department employees were authorized to set the deposit amount, a malfunction in the company's computer system enabled sales consultants to bypass the credit verification process and manually enter the deposit amount. After receiving a report that Pomales frequently bypassed the credit verification process, CTI conducted an investigation which revealed that Pomales never had submitted customer information to the Credit Department and that she routinely bypassed the process to set

zero as the deposit amount. When asked to provide documentation that she had collected customer deposits, Pomales requested a three-month medical leave of absence.

While Pomales was on leave, CTI decided to terminate her employment and notified her of her discharge when she returned from leave. Pomales then sued CTI, claiming that she had been sexually harassed by a supervisor a few months before the investigation into her policy violations commenced and that she had been terminated because she complained about the harassment, and not because of her policy violations. Pomales also claimed that CTI violated the Consolidated Omnibus Budget Reconciliation Act by failing to provide her with notice of her option to continue her health care coverage. After the trial court granted judgment in favor of CTI, Pomales appealed.

In Pomales v. Celulares Telefónicos, Inc. (5/9/06) the U.S. Court of Appeals for the First Circuit affirmed the trial court's decision. The appellate court concluded that the alleged sexual harassment did not adversely affect the terms and conditions of Pomales' employment and was not sufficiently severe or pervasive to constitute sexual harassment. The appellate court further ruled that the retaliation claim was properly dismissed because there was no evidence that the person who decided to terminate her employment was aware of the sexual harassment complaint or was influenced by anyone with knowledge of the complaint. Finally, the appellate court concluded that CTI did not violate COBRA's notice provisions because, according to the court, the dismissal for gross misconduct justified CTI's decision not to offer the option to continue coverage.

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An Employer May Run Sick Leave Concurrently with the FMLA without Extending the FMLA Leave beyond Twelve Weeks

Robert Slentz, a police officer for Republic, Missouri, injured his shoulder while off duty. Slentz took sick leave and underwent corrective shoulder surgery. After his surgery, he received a letter from the city designating his sick leave as leave under the Family and Medical Leave Act. The city later notified Slentz that his FMLA leave would expire in a few weeks and advised him that he needed to provide a fitness-for-duty certificate before he returned to work. According to city policy, if a fitness-for-duty certificate could not be provided, the employee was expected to resign at the expiration of his FMLA leave. Because Slentz was not cleared to return to work at the end of his FMLA leave, he submitted his resignation. Slentz then sued the city for violating the FMLA, claiming that because he had accrued more than 12 weeks of sick leave, he was entitled to more than just the 12 weeks allowed under the FMLA. Slentz also argued that because one of the notices from the city indicated that the FMLA leave would continue until he was released from medical care, and the city knew that he would be under medical care for several weeks past the FMLA 12-week allotment, the city was precluded from limiting his leave. The trial court disagreed and ruled in favor of the city. Slentz appealed.

In Slentz v. City of Republic (5/12/06), the U.S. Court of Appeals for the Eight Circuit affirmed that the 12 weeks provided by the FMLA established the maximum the law required. According to the appellate court, an employer's decision to require an employee to substitute accrued sick leave for FMLA leave did not impose an obligation on the employer to allow the employee to take a medical leave that exceeded 12 weeks, when, as in this case, the employee had accrued more than 12 weeks of sick leave. The appellate court also ruled that the city had not explicitly guaranteed Slentz a specific amount of leave, but instead, assured him of only the 12 weeks of FMLA leave.

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The Continuing Violation Theory Does Not Apply to Massachusetts Wage Discrimination Claims

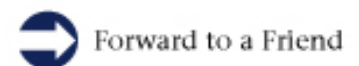
Joanne Silvestris and Valerie Goncalves were both nursing teachers in the allied health division of the Tantasqua Regional High School district. Both had been practicing nurses before becoming teachers. They claimed that at the time of hire they were given less credit for non-teaching work experience than male colleagues, and were placed at lower starting salary levels, thereby requiring them to work longer in order to reach the highest pay scale. Silvestris and Goncalves instituted a wage discrimination action under the Massachusetts Equal Pay Act. After a bench trial resulted in an award to the plaintiffs of over \$219,000, the school district appealed, claiming the action was not timely filed.

In Silvestris v. Tantasqua Regional School District (5/18/06), the Massachusetts Supreme Judicial Court concluded that the statute of limitations began to run when the women knew or had reason to know that they had been harmed. The court rejected the claim that the continuing violation theory, which provides an exception to the statute of limitations. The court explained that, unlike harassment claims, an unequal payment claim does not require the evaluation of ongoing conduct, but can be identified by examining individual paychecks. [\[back\]](#)

Equal Employment Opportunity Commission Issues a New Compliance Manual Section on Race and Color Discrimination

On April 19, 2006, the EEOC published Section 15 to its Compliance Manual, covering discrimination on the basis of race and color. The Section is intended to provide guidance on analyzing charges of race and color discrimination in violation of Title VII. In addition to discussing the importance of a thorough investigation and remedies for violations, the Section also offers examples of best practices for employers in the areas of recruitment, hiring, promotion, harassment prevention and terms and conditions of employment. [\[back\]](#)

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