



ROBINSON
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Court Reduces MCAD Emotional Distress Award Due to Lack of Evidence

Marilyn Lewis had worked for about three years as an Assistant Fiscal Director of the Trustees of Health and Hospitals of the City of Boston. One day, without warning, she was called to the office of the Fiscal Director, who terminated her employment. The termination letter explained that the organization was being restructured and that Lewis was being laid-off. Eight days after her termination, an internal job notice was posted for the new position of Controller for the corporate accounting department. The duties of the new position generally included all of Lewis' former job duties. Lewis was not notified of the new job posting. About three months later, a white male, who Lewis claims did not have as much experience as she did, was hired for the position of Controller. Lewis, who is African-American, sued the organization for race discrimination at the Massachusetts Commission Against Discrimination. The MCAD awarded Lewis back pay and emotional distress damages. Her employer appealed the decision to the state court.

In [Boston Public Health Commission v. Massachusetts Commission Against Discrimination](#) (9/20/06), the court ruled that Lewis had been terminated in violation of the state anti-discrimination statute. The court affirmed the MCAD's back pay award of \$107,551 but vacated the MCAD's emotional distress damage award of \$100,000, determining that Lewis failed to offer enough evidence to justify that award. Although there was evidence that Lewis suffered emotional injuries related to unlawful discrimination, she did not present any evidence as to the length of time that she suffered nor did she offer any medical records supporting her claim of emotional distress. In addition, there was no evidence that she sought counseling or mental health treatment or suffered any physical manifestations of any emotional distress. [\[back\]](#)

FMLA Claim Allowed due to Temporal Proximity of Leave and Termination

After working as a sales manager at Nextel for seven years, Alex Tsakonas' performance began to decline. He achieved only 81% of his sales quota for the year and was denied a salary increase. The next year, he was placed on a performance improvement plan. A short time later, Tsakonas took two weeks of vacation, followed by an absence approved under the Family and Medical Leave Act relating to prostate cancer, which he had been diagnosed with the year before. A week after he returned to work, Nextel terminated his employment for poor performance, specifically his inability to meet his sales quotas. Nextel asserted that it learned of Tsakonas's failure to meet sales goals when he was on his FMLA leave. As a result, rather than terminate him while he was on leave, Nextel chose to wait until Tsakonas had returned to work.

In [Tsakonas v. Nextel Communications, Inc.](#) (8/31/06), the U.S. District Court in New Jersey ruled that the close proximity in time between Tsakonas' return to work from his FMLA leave and Nextel's decision to terminate his employment was sufficient to establish discrimination under the FMLA. In addition, the court noted that Tsakonas had presented evidence that Nextel previously took adverse action against at least two other employees who had taken a medical leave of absence. Further, Tsakonas had provided evidence that other employees at Nextel had stated that taking medical leave at Nextel was "the kiss of death." [\[back\]](#)

Connecticut Supreme Court Recognizes New Tort of Spoliation of Evidence

Leandro Rizzuto suffered injuries when a ladder he was climbing on suddenly collapsed. He filed a lawsuit alleging that the ladder had been manufactured and designed improperly. During the course of the litigation, Rizzuto asked the defendants to preserve the ladder in the same condition as it was on the day of the incident and to allow him and his attorney to inspect it. After issuing a report that the ladder was not defective, the defendants destroyed the ladder before Rizzuto had an opportunity to inspect it. Rizzuto then amended his complaint to add a claim for spoliation of evidence, arguing that the defendants had intentionally destroyed the ladder and, consequently, caused damage to Rizzuto's case.

In [Rizzuto v. Davidson Ladders](#) (10/3/2006), the Connecticut Supreme Court in a split decision recognized the claim of intentional spoliation of evidence as a tort under Connecticut law. These kinds of torts, the court ruled, serve a dual purpose of compensating a plaintiff for a defendant's intentional destruction of important evidence and deterring other litigants from doing the same. The court also set out the requirements for the new tort. To succeed under the new claim, a plaintiff must prove (1) that the defendant knew of a pending or impending civil action involving the plaintiff; (2) that the defendant destroyed evidence; (3) that the defendant's destruction of evidence was in bad faith, that is, with the intent to deprive the plaintiff of his cause of action; (4) that the defendant's destruction of evidence prevented the plaintiff from proving his case; and (5) that the plaintiff sustained damages. [\[back\]](#)

California Employees have a Reasonable Expectation of Privacy in their Offices

Hillsides, Inc. is a California residential facility for abused and neglected children. A computer technician at Hillsides told managers that someone might be accessing pornographic websites at night from certain computers, including one in the office of employees Abigail Hernandez and Maria Jose Lopez. Hillsides decided to install a surveillance camera in the office but did not tell Hernandez or Lopez. The camera was hidden on a bookshelf. Because it was placed there to

monitor activities at night, the women, who worked during the day, were not recorded. Nevertheless, after the women noticed the camera, they sued Hillside for invasion of privacy.

In [Hernandez v. Hillside, Inc.](#) (9/14/06), the California Appeals Court ruled that there was sufficient evidence to establish a potential violation of the right to privacy. The court declared that employees have a reasonable expectation of privacy in their offices. It was reasonable, the court said, for Hernandez and Lopez to expect that images of them in their office with the door closed would not be transmitted to another portion of the building. [\[back\]](#)

Aggression Caused by Panic Attack Is Not Protected by FMLA

Steven Anders was a waste hauler for Waste Management of Wisconsin. He reported for work and received his route assignment but, believing that the route already had been covered, Anders told his supervisor that he felt ill and that he was going home. Anders earlier told a coworker that he intended to "get" his regional manager. After he left that facility, he drove 30 miles to another Waste Management facility. When he arrived, he was met by a manager who told him that leaving work as he had done was unacceptable. After waiting briefly for the regional manager to arrive, Anders began to shake and went outside to his car. He then got on top of his car, pounded his fists into the car, and smashed his cell phone onto the ground. After paramedics were called and company management tried to escort Anders into the building, he clenched his fists, lowered his shoulder into an aggressive stance, and charged at one of the district managers. Because he had a record of disciplinary violations (including another aggressive instance with a supervisor), Anders was fired.

In [Anders v. Waste Management of Wisconsin, Inc.](#) (9/12/06), Anders sued Waste Management, alleging a violation his rights under the Family and Medical Leave Act as a result of his suffering from a panic disorder. The court rejected Anders' claim, stating that although he might have felt unwell when he left work, he did not seek out medical assistance; rather, he drove 30 miles to another office with the intent to assault a supervisor. In addition, the court explained that, while the FMLA allows leave for a serious health condition that renders an employee unable to perform his job functions, Anders could not show that he was unable to work because he had been working consistently up until the time he left his shift. As a result, the court dismissed Anders' FMLA claim. [\[back\]](#)

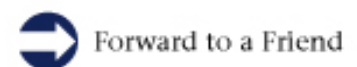
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