Recent Cases and Developments In Labor and Employment Law

Prepared for the 2015 Massachusetts Municipal Association Annual Meeting

MASSACHUSETTS CIVIL SERVICE COMMISSION

1. **DeJesus v. City of Lowell (October 16, 2014)**
   Termination-Probationary Period

The Commission held that a firefighter's attendance at a twelve-week-long academy training did not toll the statutory 1-year probationary period, and was thus a tenured civil service employee at the time of his termination. The Appellant was therefore entitled to the protections guaranteed by G.L. c. 31, §41, including an appointing authority hearing *prior* to termination. The City was ordered to restore the Appellant to his previous position without loss of pay or benefits.

2. **Rosicky v. Town of Brookline (January 1, 2014)**
   Bypass

The Commission allowed Appellant's bypass appeal, finding that the Respondent did not meet its burden of establishing reasonable justification for bypassing the Appellant for original appointment to the position of permanent firefighter. Here, the Respondent based its decision to bypass the Appellant entirely on psychiatric reports, which indicated that the Appellant was at a high risk for certain behaviors, such as alcohol abuse, questionable judgment and aggression, but did not indicate that the Appellant had a condition that precluded him from performing the functions of a firefighter, as required by the HRD Medical Standards.

3. **Bistany v. Civil Service Commission and City of Lawrence**
   Case No. 2013-00726A (Mass. Super., Feb. 6, 2014)
   Termination

The Superior Court denied the Plaintiff's motion for judgment on the pleadings and affirmed the Commission's finding that there was just cause for termination where the Plaintiff failed to cooperate and follow reasonable orders to obtain an MRI from her superior officer, which was rationally related to determining whether the employee was fit to return to work. The Court stated that while the City did not have the authority to dictate the Plaintiff's medical care, it did have the right to reasonably require certain information necessary to enable it to evaluate her future employment status in order to properly manage its personnel and budget.

DEPARTMENT OF LABOR RELATIONS

1. **City of Somerville, et al. and SEIU Local 615**
   (Case No. MUP-11-6202) (June 27, 2014)
   Health Insurance

The Board held that Respondents unilaterally changed the future retiree health insurance benefits of current employees without satisfying their statutory bargaining obligations. The City argued that supplemental Medicare contributions for municipal retirees did not constitute a mandatory subject of bargaining and that, pursuant to G.L. c. 32B, §11C, the City's obligation to negotiate the terms of supplemental Medicare coverage with insurance companies precluded collective bargaining over such plans. The City further contended that because Section 11C is not among the statutes enumerated in G.L. c. 150E, §7(d) as being superseded by terms contained in a collective bargaining agreement, the City's obligation under Section 11C must prevail over any bargaining obligations established by G.L. c. 150E. The Board rejected these arguments on the grounds that "Chapter 32B does not [s]pecify that the Town cannot bargain collectively about the terms of a health insurance plan, nor does the insurance statute specify exactly what plan of insurance must be offered by the Town. Therefore, a collectively bargained agreement specifying the terms of the insurance coverage need not conflict with the insurance statute." In sum, the Board affirmed that the future retiree health insurance benefits of current employees are a mandatory subject of bargaining.

2. **City of Lynn and AFSCME Council 93**
   (Case No. MUP-12-1897) (June 13, 2014)
   Change of Work Location

The DLR found that the City violated Chapter 150E by failing to bargain in good faith with the Union prior to the School Committee's decision to change a Computer Operator's work location. The Committee argued that it never changed the work location for the computer operator because it was a new position, and, therefore, could not be said to constitute a change. However, the Hearing Officer found that the Committee instituted a new practice when it required a newly-hired computer operator to work in both the Personnel Office and the Data Center and failed to provide the Union with an opportunity to bargain over the new work assignment.

3. **Board of Trustees of the University of Massachusetts and AFSCME, Council 93**
   (Case No. SUP-10-5601) (June 27, 2014)
   Weingarten Rights/Remedy

The Board held that the University committed an independent violation of Section 10(a)(1) when it denied a bargaining unit member's request for union representation at a meeting that was investigatory in nature and which the bargaining unit member reasonably believed might result in discipline. During the meeting in question, the employee engaged in "verbally abusive and disrespectful" behavior. The Board was not persuaded by University's argument that the employer's notice to the employee of their so-called Weingarten rights should turn on the supervisor's purpose for the meeting rather than the employee's reasonable belief regarding the purpose

of the meeting. The Board held that the appropriate remedy in these circumstances included reinstatement of the employee and to make her whole for all losses suffered as a result of the termination.

4. **Town of Stoneham and Stoneham Police Association**
   (Case No. MUP-12-2430) (July 18, 2014)
   Transfer of Duties

The Town failed to satisfy its bargaining obligations when it implemented a decision to transfer pre-arrival medical advice duties from Desk Officers to non-unit Action Ambulance personnel without providing the Union with prior notice and an opportunity to bargain. While the Hearing Officer determined that although the Town had an inherent managerial prerogative to set public safety priorities, a public employer's ability to act unilaterally regarding certain subjects or decisions does not relieve that employer of all attendant bargaining obligations. So while the decision to transfer pre-arrival medical advice duties to non-unit personnel was outside the scope of bargaining, G.L. c.150E nonetheless required that the Town give the Union notice and an opportunity to bargain over the impacts of that decision on employees' terms and conditions of employment. The Hearing Officer further held that post-implementation bargaining did not satisfy the statutory requirements.

5. **City of Springfield and AFSCME Council 93**
   (Case No. MUP-12-2466) (November 25, 2014)
   Installation of GPS Tracking Devices

The Hearing Officer held that the City violated its Chapter 150E bargaining obligations by installing tracking devices in vehicles driven by City employees and recording the employees' location, idle time, distance driven, number of stops and speeding events in those vehicles without first giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to install the tracking devices and record relative data. The City further violated the Law by refusing to bargain in good faith with the Union after it requested to meet with the City to bargain over the decision to install tracking devices. The Hearing Officer found that the City never previously monitored real-time data from the vehicles, never required employees to electronically report their whereabouts while traveling in employer vehicles and determined that the installation of GPS tracking devices did not occur in a fixed and open location where employees could see the devices, but instead were placed surreptitiously, without notifying employees, such that its actions changed the standards for measuring employee performance.

DISCRIMINATION/MCAD

1. **Dunnv. Trustees of Boston Univ.**
   761 F.3d 63 (1st Cir. 2014)
   Discrimination (Age)

The First Circuit affirmed the District Court's grant of summary judgment in favor of the defendant where the plaintiff alleged that the university discharged him because of his age in violation of the Massachusetts Fair Employment Practices Act (Chapter 151B). The court held that the university had legitimate non-discriminatory reasons for eliminating the plaintiff's job and replacing him with a younger co-worker, and the mere fact that an

18-year difference existed between the plaintiff and his replacement was not sufficient to establish a prima facie case of discrimination.

2. **EEOC v. Kohl's Dep't Stores, Inc.**
   2014 WL 7235050 (1st Cir. Dec. 19, 2014)
   Discrimination (Disability)

Here, an employee, who suffered from diabetes, resigned from her employment after her request for a regular work schedule was refused. The employee claimed that working "erratic" hours aggravated her diabetes and endangered her health. The EEOC brought suit against her employer on her behalf for allegedly refusing to provide the employee with reasonable accommodations in violation of the ADA and, as a result of failing to comply with the ADA, constructive discharge. The First Circuit held that because the employer made multiple offers to the employee after her resignation to discuss alternative reasonable accommodations, the employee had neither a claim for ADA discrimination nor a claim for constructive discharge. The First Circuit found that "when an employer initiates an interactive dialogue in good faith with an employee for the purpose of discussing potential reasonable accommodations for the employee's disability, the employee must engage in a good-faith effort to work out potential solutions with the employer prior to seeking judicial redress."

3. **Kiely v. Teradyne, Inc.**
   85 Mass. App. Ct. 431 (2014), review denied, 469 Mass. 1108
   Discrimination/Attorney's Fees

An employee brought suit against the employer alleging gender discrimination and retaliation. The Appeals Court affirmed the Superior Court's judgment, notwithstanding the verdict, in favor of the employer on the discrimination claim and for the employee on the retaliation claim. The Court concluded that a finding of retaliation alone, without any compensatory or punitive damages, cannot support an award of attorney's fees under G.L. c. 151B, §9.

4. **MCAD and Joseph Santagate v. FGS, LLC**
   36 MDLR 23 (2014)
   Disability/Termination

The Hearing Officer found that the Respondent engaged in unlawful discrimination on the basis of handicap in violation of G.L. c. 151B, §4(16) by failing to reasonably accommodate the Complainant when it refused to extend his leave of absence and terminated his employment. The Complainant suffered from a blood disorder that caused clotting and blockages in his vascular system and was granted a medical leave of absence for surgery and recovery, during which he used his sick and vacation time, as well as short and long-term disability benefits. The Complainant's employment was then terminated after twelve weeks of leave, despite medical evidence that he would have been able to physically perform his job without restrictions two to four weeks later. The Hearing Officer held that a few additional weeks of leave was not an unreasonable accommodation under G.L. c. 151B and awarded the Complainant damages for emotional distress and lost wages.

5. **MCAD and Robert Lazaris v. Human Resources Division**
   36 MDLR 29 (2014)
   Discrimination (Handicap)

This case involved charges against the Massachusetts Human Resources Division ("HRD") for handicap discrimination and aiding and abetting discrimination by approving the City of Lynn's reasons for bypassing the Complainant for the position of firefighter. The Hearing Officer found that the Fire Department acquired medical information improperly by asking about and considering the Complainant's mental health history and prescription medications during his interview process. The Hearing Officer concluded that because the Respondent HRD knew or should have known that these facts were improperly acquired, the Respondent aided and abetted the Department in violation of G.L. c. 151B, §4(5). However, the Commission did not award any compensable damages.

WAGE ACT

1. **Fernandes v. Attleboro Housing Authority**
   470 Mass. 117 (2014)
   Wage Act/Retaliation

The SJC held that reinstatement is not an available remedy for violations under the Massachusetts Wage Act. The plaintiff was employed by the Attleboro Housing Authority (AHA) as a maintenance mechanic until his termination. He subsequently commenced an action against the AHA, alleging nonpayment of wages and retaliatory termination in violation of G.L. c. 149, §§148 and 148A. They jury found in his favor. On appeal the plaintiff sought reinstatement of employment with full seniority. The SJC explained that while an aggrieved party may bring a civil action for "for injunctive relief, damages, and any lost wages and other benefits," pursuant to G.L. C. 149, §150, "injunctive relief" does not encompass the remedy of reinstatement, "particularly where the availability of such a remedy under other statutory provisions has been expressly articulated by the Legislature."

G.L. c. 32 (RETIREMENT BENEFITS)

1. **Garney v. Massachusetts Teachers' Retirement System**
   469 Mass. 384 (2014)
   Pension-Forfeiture

A former teacher sought review of decision of Massachusetts Teachers' Retirement System Board finding that he had forfeited his retirement benefits due to his convictions for possession and purchase of child pornography. The Supreme Judicial Court held that former teacher's convictions for purchase and possession of child pornography did not warrant forfeiture of his retirement benefits. The Court explained the intent of the pension forfeiture statute, G.L. c. 32, §15B, is to address criminal activity connected with a public position. It further noted that because the statute is penal in nature, the courts must draw its limits narrowly, so as not to exceed the scope or reach of the penalty as contemplated by the Legislature.

NATIONAL LABOR RELATIONS BOARD (NLRB)

1. **Purple Communications, Inc. v. Communications Workers of America**
   361 NLRB No. 126 (2014)
   Non-Work Use of Email

The National Labor Relations Board (NLRB) held that employees have a statutory right to use their employer's email systems for purposes of engaging in "protected, concerted activity" as well as union organizing efforts. The NLRB stated that "employee use of email for statutorily protected communication on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." This decision overruled the NLRB's 2007 decision in Register Guard, in which the Board found that email systems were the employer's property and as such, employees had no statutory right to use them for non-business purposes related to communication with outside parties, i.e. unions. Still, the decision only applies to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide access otherwise. Additionally, the Board stated that an employer may still have a total ban on non-work use of email, including union activities, by demonstrating that special circumstances make the ban necessary to maintain production or discipline, but failed to provide any guidance as to what might constitute "special circumstances." The NLRB advised that even "absent justification for a total ban, [an] employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline." (Note: while public employers are not subject to the NLRB's jurisdiction, the Massachusetts Department of Labor Relations often looks to Board decisions for guidance on emerging areas of the law).

If you have questions about any of these cases, please contact any member of our Labor and Employment Practice Group at 617-556-0007.