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FIRM NEWS

We are pleased to announce that Anne T. Mitchell has joined Sanzone & McCarthy, LLP. Anne has more than ten years of experience in employment litigation, advice and counseling. She previously practiced in the Labor and Employment Group at Testa, Hurwitz and Thibeault, LLP and, prior to Testa, at Warner & Stackpole, LLP. Anne received her law degree from the Boston University School of Law, where she was the Executive Editor of American Journal of Law and Medicine, and her undergraduate degree from the College of the Holy Cross. We are thrilled that Anne has joined our team and thank her for her significant contributions to this newsletter.

Employee Who Engages In "Egregious Conduct" Caused by a Disability Is Not a "Qualified Handicapped Person"

The Supreme Judicial Court recently clarified an employer's obligations under state law when confronted with an employee's "egregious conduct," which results directly from the employee's disability. In *Mammone v. President and Fellows of Harvard College*, an employee with a bipolar disorder brought a disability discrimination action against his employer after he was terminated for misconduct. The SJC held that a handicapped employee who engages in egregious misconduct, "sufficiently inimical to the interests of his employer that it would result in the termination of a non-handicapped employee," is not a qualified handicapped person under the state's disability statutes, and, therefore, is not entitled to the protection of those statutes.

Plaintiff Michael Mammone had worked as a staff assistant at Harvard's Peabody Museum since 1996, and he suffered from bipolar disorder. There was no evidence that this disease, which could manifest itself in periods of mania (paranoia, agitation, hyperactivity and irrationality) and depression, ever negatively affected his ability to perform his job prior to 1992. In August 1992, however, when he began criticizing Harvard's pay scale and the union through a website he created, Mammone experienced a manic episode and he engaged in workplace misconduct that eventually resulted in his termination. Among other

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Employer Liable Under USERRA In Failure To Hire Case

In a case of first impression, the Federal District Court of Massachusetts established that, in accordance with USERRA, employers cannot make discriminatory hiring decisions based on an applicant's military service, even if such service results in delaying the start date and training of the prospective employee.

The U.S. District Court recently held the City of Somerville liable for violating USERRA when the City failed to hire the plaintiff, Thomas McLain, as a police officer solely because his active service in the U.S. Army made him unavailable until two months or so after the date set for police academy training. The parties did not dispute that the plaintiff would have been hired had he been available for the training academy on October 1, 2001, and that he was not available on that date because of his active service in the Army. The issue before the Court was whether USERRA prevents discrimination in initial hiring on the basis of unavailability due to active service in the military.

As explained by the Court, by USERRA's plain terms, the City's failure to hire McLain violated the statute since "Somerville, a covered employer, denied initial employment to McLain, a member of the Army, because of McLain's obligation to perform service

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Egregious Conduct *continued from previous page*

things, Mammone started bringing his laptop to work and updating his website, he handed out flyers promoting the website, and engaged his co-workers in "loud and animated" conversations. While stationed at the receptionist desk of the museum, Mammone also played protest songs from his website while he sang, clapped and danced. After being hospitalized for examination and returning to work, Mammone's misconduct and outbursts continued in disregard of both an oral and written warning. His attitude became "belligerent," which affected the museum staff and visitors and he refused to meet with his supervisor who he also publicly called "evil." When his conduct became so intolerable, and he refused to leave the museum upon request, he was arrested and told not to return to the museum. Shortly thereafter, Mammone returned to the museum and threatened two supervisors, calling them "whack bitches." Mammone's employment was immediately terminated, but his termination was later postponed so he could apply for and receive disability benefits. His termination became effective when his disability benefits ceased.

Mammone sued Harvard for disability discrimination, alleging he was terminated as a result of his bipolar disorder. The Superior Court granted Harvard's motion for summary judgment, concluding that Mammone could not reasonably expect to prove that he was a "qualified handicapped person." The lower court utilized a two-part test to determine when an employer may lawfully terminate a handicapped employee:

1. Whether the employer terminates the employee promptly after the misconduct, demonstrating a subjective belief that no person who engages in such misconduct could remain employed; and
2. Whether the conduct is so egregious that no employer should reasonably be required to retain such an employee.

The SJC affirmed this decision. On appeal, Mammone argued that the Garrity case, relied on by the lower court, should be strictly limited to cases involving misconduct resulting from drug or alcohol dependence. The SJC disagreed and explained that it did not discern any legislative intent to create a distinction that would provide different protections against discrimination to persons suffering from one form of handicap (alcoholism) than provided to persons suffering from other disabilities. The Court also explained that the focus should be on the degree of egregiousness of the misconduct for which the employee was terminated, not the type of underlying disorder that caused his conduct. In this case, the Court affirmed that summary judgment was appropriate because Mammone had no reasonable expectation of proving that he was a qualified handicapped person on this set of facts.

This decision provides guidance to employers who are faced with the difficult issue of accommodating versus disciplining employees whose handicap causes intolerable conduct in the workplace. ❖

Employers May Be Liable for Harassment by Employees of a Third-Party

In *Modern Continental v. Massachusetts Commission Against Discrimination*, the Supreme Judicial Court held that an employer can be liable for sexual harassment by third parties, but that the employer may avoid such liability by taking prompt and appropriate remedial action "reasonably calculated" to stop the sexually harassing conduct.

In *Modern*, a female employee who worked on the Big Dig project in Boston filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging sexual harassment against her employer, Modern Continental. Modern Continental conducted an investigation and learned that the alleged conduct was committed by employees of Mohawk Construction, one of Modern's subcontractors. Through its investigation, Modern identified one of the harassers, requested that this harasser be removed from the site, and when that request was refused, made arrangements to separate the female employee from the harasser. Modern also took other steps, including sexual harassment training and adding security, to prevent any further harassment by any of its employees or the subcontractor's employees. Despite these measures, Modern was not entirely successful in stopping or preventing further harassment. The plaintiff eventually resigned and filed a claim with the MCAD.

Modern argued, as a matter of law, that it could not be held liable for the conduct of its subcontractor's employees over whom it did not have control. The MCAD disagreed and found Modern liable for sexual harassment based on its failure to protect its employee from the sexual harassment. Modern appealed. *(cont. next page)*

Failure To Hire Case *continued from page 1*

in [the U.S. Army] in the fall of 2001." The plain language of the statute prohibits discrimination "based not only on a person's status as a member of the uniformed services, but also on the service member's 'obligation to perform service,'" and the plaintiff was obligated to perform such military service on that date.

[E]mployers cannot make discriminatory hiring decisions based on an applicant's military service, even if such service results in delaying the start date and training of the prospective employee.

The Court also flatly rejected the City's contention that the relevant antidiscrimination sections of the statute only apply to reservists and guardsmen or to active duty personnel who have completed their term of service. The Court found that the statute defines people performing service in the "uniformed services" broadly to include all active duty, training and National Guard duty personnel. The Court also did not accept Somerville's "undue hardship" argument since this exception was not applicable, and even if relevant, Somerville offered no evidence that this limited exception would apply to the circumstances of this case. Finally, in the absence of any statute of limitations on USERRA claims, the City of Somerville argued that the plaintiff's lawsuit was barred by the equitable doctrine of laches. The Court disagreed and held that the three-year delay in commencing this action was not unreasonable and that the City did not suffer any prejudice as a result of the delay. ❖

Employers May Be Liable *continued from previous page*

On appeal, the SJC rejected Modern's argument that it could never be liable for the conduct of independent third-parties. However, the Court, in relying on the MCAD guidelines, found that an employer will not be strictly liable for the conduct of non-employees. The SJC explained that the "MCAD's decision imposing liability on Modern erroneously held Modern to the equivalent of strict liability" because its response was not entirely successful and because there might have been additional steps it could have taken. Instead, as the Court explained, the standard is one of reasonableness: "[i]t imposes a duty to take prompt action reasonably calculated to end the harassment and reasonably likely to prevent conduct from recurring." The Court carefully pointed out that the employer is not required to implement the remedy requested or demanded by the victim, nor would it depend on whether, with hindsight, there may have been better or more effective measures. In this case, the Court found that Modern took prompt action that was reasonably calculated to stop the sexual harassment by the subcontractor's employees.

This case reaffirms that an employer may be liable for the harassing conduct of a third-party. It also highlights the importance of taking "prompt, effective, and reasonable remedial actions" upon receiving a complaint of harassment to avoid being held liable for such conduct. ❖

Final USERRA Regulations Define Employers' Obligations

On January 18, 2006, the U.S. Department of Labor's ("DOL") final regulations interpreting the Uniformed Services Employment and Reemployment Act ("USERRA") became effective. In general, USERRA protects the rights of employees who voluntarily or involuntarily take leave for military service by: (1) prohibiting employment discrimination against those in military service; (2) granting certain reemployment rights to those absent because of such service; and (3) preserving employment benefits while on service leave. Employees are protected under USERRA regardless of the size of the employer, how long the employee has been employed, or whether the employee is probationary, permanent, part-time or full-time. The DOL also published a revised notice employers must post (and are recommended to provide to new hires) regarding an employee's rights, benefits and obligations under USERRA. Employers may obtain a copy of a sample posting on the web at www.dol.gove/vets/programs/userra/USERRA_Private.pdf.

The final regulations provide guidance on several provisions of an employer's obligations under USERRA, including the following.

Use of Accrued Leave

While on military leave, an employer cannot require an employee to use accrued leave, but an employee can choose to use such paid vacation time or leave.

Reemployment Rules

Upon return from military leave, the amount of time an employee has to report back to work depends on the time spent on military leave. For service of less than 31 days, the *(cont. next page)*

USERRA regulations *continued from previous page*

service member must return at the beginning of the next regularly scheduled work period on the first full day after release from service, taking into account safe travel home and an eight hour rest period. For service of more than 30 days, but less than 181 days, the employee must seek reemployment within 14 days of release from service. For service of more than 180 days, an employee has 90 days. With certain exceptions, the cumulative length of time that an employee may be absent from work for military leave and retain reemployment rights under USERRA is five years.

The Escalator Principle

The "Escalator Principle," which requires employers to return an employee to a position he or she reasonably would have attained had he or she not been absent for military service, particularly has been confusing for employers. Upon considering several factors, the employer may determine the reemployment position to be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions. USERRA also requires that reasonable efforts (such as training or retraining) be made to enable returning service members to help them qualify for the escalator position.

The employer also must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. With respect to rates of pay, the regulations state:

> [W]hen considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the employee missed a merit pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the employee missed during service is based on a skills test or examination, then the employer should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases.

Healthcare and Benefit Plan Rights

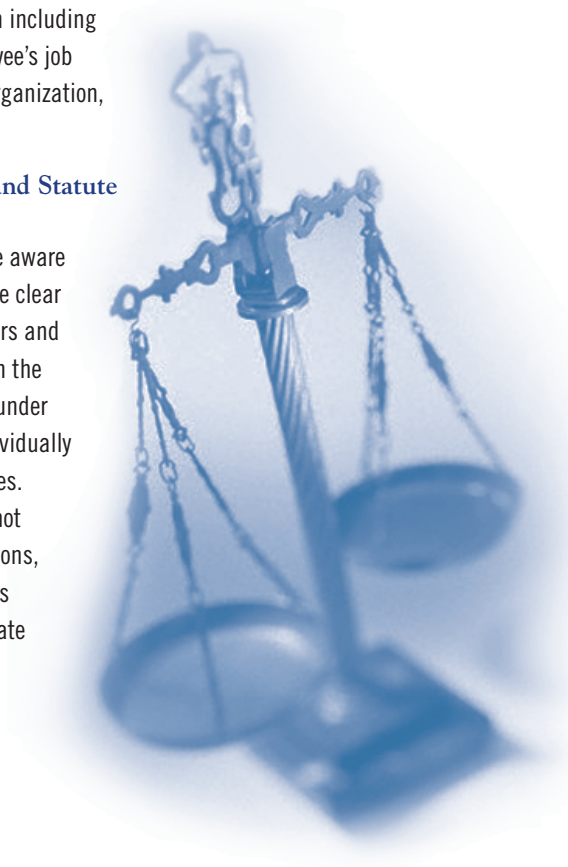
An employee on a military leave for more than thirty days may elect to continue health coverage for up to 24 months, but the employee may be required to pay up to 102% of the premium. For leaves less than 30 days, the employer must provide health care coverage as if the employee were still working. Upon reemployment, the employee and eligible dependents must be reinstated in the employer's health plan without a waiting period or exclusion, and the employee need not elect to continue health coverage during the period of military service to be entitled to reinstatement to the employer's health plan. USERRA also clarifies pension plans coverage by identifying the pension plans covered as well outlining who is responsible for funding any plan obligation for the employee's pension benefits. In general, the regulations require that for determining the amount of contributions or deferrals to a pension plan, the employee must be treated as though he or she had remained continuously employed for pension purposes.

Protection Against Discharge

Returning service members who were on leave for more than 30 days cannot be discharged from reemployment except for "just cause," for a period of six months or one year, depending on the length of military leave. The regulations provide that "the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge," or was the result of some other legitimate, nondiscriminatory reason including elimination of the employee's job position, a corporate reorganization, or a company layoff.

Individual Liability and Statute of Limitations

Employers also should be aware that the regulations make clear that individual supervisors and managers are included in the definition of "employer" under USERRA and may be individually liable in appropriate cases. Moreover, USERRA does not have a statute of limitations, and it expressly precludes the application of any State statute of limitations. ❖



DOL Opinion Letters Provide Guidance to Employers on FLSA Issues

Although the final regulations for the "white collar" overtime pay exemptions under the Fair Labor Standards Act ("FLSA") took effect last year, employers still have many questions on the proper classification of exempt employees and the rules, if not followed, that can cause an employee to lose exempt status. Over the past year, the DOL has issued several opinion letters on questions raised about the application of FLSA. Although these opinions are fact-specific, they often help provide guidance to employers on the overtime pay exemptions and several other FLSA issues. The following are a few summaries of opinion letters recently published.

Does a Staffing Manager Qualify for the Administrative Exemption Under the FLSA?

According to the DOL, a staffing manager of a temporary placement service whose duties included managing the office, recruiting, assigning and supervising the workers for placement, and exercising full authority to discipline, fire or promote workers, qualified for the administrative exemption. The DOL found both that the staffing manager's responsibilities, which are completed with little supervision, were "directly related to the management or general business operations of the employer's customers," and that the manager exercised sufficient discretion and independent judgment with respect to matters of significance.

Can An Employer Dock Salary of Exempt Employees for Weather-Related Absences?

The DOL explained in its opinion letter that employers may make full-day salary deductions from an exempt employee if the workplace remains open during inclement weather conditions and the employee chooses not to report to work (assuming the employee has not otherwise been told not to report to work). The employer may treat such an absence for "personal reasons." The employer may require such an employee to use accrued leave (e.g., vacation day), and if the employee has no accrued benefits, such employee does not have to be paid for the full day missed from work and can be treated as taking leave without pay. Similarly, an employer also can require exempt employees to use accrued leave even if the office is closed due to weather related conditions or other disasters. The DOL explicitly stated, however, that "the employer must pay the employee's full salary even if: (1) the employer does not have a bona fide benefits plan; (2) the employee has not accrued benefits in the leave bank; (3) the employee has limited accrued leave benefits and reducing that accrued leave will result in a negative balance; or (4) the employee already has a negative balance in the accrued leave bank."

Can An Employer, Through a Written Policy, Require Exempt Employees to Work 45 or 50 Hours a Week And/Or Require Such Employees to Make Up Work Time Lost Due To Personal Absences Of Less Than A Day?

After reviewing the minimum hours and make-up time policy in question, the DOL explained that the employer's policy provided that consistent failure to observe these policy requirements would result in discipline up to and including termination and would not result in the docking of the employee's salary. As such, the DOL held that so long as the employer does not dock an employee for failure to meet such requirements, a policy requiring minimum hours and make-up time for exempt employees would not result in a loss of the exemption. The DOL also pointed out, however, that the employee's failure to meet these policies requirements "does not constitute a violation of a 'workplace conduct rule' for which an employer may impose a disciplinary suspension for one or more full days" pursuant to the new regulations.

What is the Proper Computation of Overtime under the FLSA When Non-Exempt Employees Are Promised Retention Benefits (Including a Stay Bonus)?

The DOL stated that the stay bonus was a nondiscretionary bonus that must be included when computing the employee's regular rate of pay for purposes of calculating overtime pay. Under the regulations, "[b]onuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay." In calculating the regular rate of pay, the bonus amount must be "apportioned back over the workweeks of the period during which it may be said to have been earned." This would, in turn, result in an adjustment of the regular rate and the payment of additional overtime to the employee in accordance with the adjusted regular rate of pay. ❖

A Progressive Discipline Policy May Alter "At-Will" Employment Despite Disclaimers in Handbook

Employers should reconsider the use of progressive discipline policies, as these policies can and often do grant employees much greater rights than those of "at-will" employees.

In the case of *Ortega v. Wakefield*, an employer was bound by its progressive discipline policy, despite conspicuous disclaimers in its handbook that (1) it was not an expressed or implied contract and (2) the employer reserved the right to change or eliminate its policies and procedures as necessary. In denying the employer's motion for summary judgment, the court ruled that the inclusion of boilerplate disclaimers in employee handbooks does not allow an employer to ignore its own policies. This case follows the 2001 Massachusetts Appeals Court decision in *Ferguson v. Host International, Inc.*, which also held that despite specific disclaimers in the company handbook that it was not a contract, a court could enforce the progressive discipline policy as a contract to the extent that the handbook instilled a reasonable belief in the employee that the company would adhere to the policies therein.

Ortega was an at-will employee of Wakefield for 22 years, and prior to this incident, never had any performance issues. In 2001, the Company provided Ortega with a copy of the employee handbook, and Ortega signed an acknowledgement that he read and understood the employer's policies. Included in the handbook was a detailed, 3-step progressive discipline policy. The handbook also stated that "[t]he policies and procedures that are contained in this manual are not terms and conditions of your employment nor a contract, and the manual itself is not a contract or an offer to enter a contract." The handbook also explicitly stated that the Company has the right to terminate any employee at any time with or without notice or cause.

One year later, Ortega was three days late returning to work after a family vacation to the Dominican Republic, claiming that the delay was the result of missing his flight and not being able to get on any other flights. Wakefield immediately fired Ortega for "being dishonest to his employer," because the employer determined that Ortega could have taken an earlier flight back.

The progressive discipline policy provided advance notice to employees of performance issues with an opportunity to cure, and it outlined certain procedures to be followed by the employer including verbal warning, a written warning, a 3-day suspension and then termination. Notably absent from the policy were any circumstances when an employer might depart from the policy and its procedures and terminate an employee immediately.

The court determined that Wakefield did not follow its own policy and that, regardless of the express disclaimers in the manual, Ortega reasonably could have relied on the employee manual and its policies as a condition of his continuing employment.

The Ferguson and Ortega cases demonstrate that employers should be wary about including progressive discipline policies in their handbooks, as these policies will often alter an employee's at-will status with the company. If a progressive discipline policy is included in a company's handbook, it needs to be drafted carefully to preserve an employer's discretion and ability to discipline and/or terminate employees outside the confines of the progressive discipline policy. ❖

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