SANZONE & MCCARTHY, LLP

# THE EMPLOYMENT LAW UPDATE

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## Employer Not Required to Accommodate A Request to Work From Home Where Employee Could Not Perform the Essential Functions of the Job From a Remote Location

In *Mulloy v. Acushnet Co.*, the U.S. Court of Appeals for the First Circuit affirmed summary judgment for the defendant employer, holding that the plaintiff, who requested to work from home, failed to prove that he was capable of performing the essential functions of the job from a remote location. In making this determination, the Court considered a number of factors, including, the nature of the job, the individual's work history and his disability. While working from home or at a remote location may sometimes be deemed to be a reasonable accommodation, the Court said, an employee seeking such an accommodation must demonstrate that he or she can perform the essential functions of the job when working remotely.

The plaintiff, Michael Mulloy, was an electrical engineer for Acushnet, a manufacturer of golf products. Mulloy was responsible for overseeing one of the company's plants, and his job duties included designing programs for machines, purchasing and supervising the installation of machine controls, evaluating machine capabilities, identifying mechanical and electrical changes, training and supporting maintenance personnel, troubleshooting electrical and electronic controls and supporting electrical safety programs. He worked from a cubicle approximately 6 hours a day and spent an average of 2 hours each day on the plant floor. After working at Acushnet for a year, Mulloy began to experience throat and chest tightness and other symptoms that were determined to be a result of exposure to certain chemical processes at the plant ("occupational asthma"). After trying to limit his exposure

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## At-Will Employee Not Entitled to Future Sales Commissions After Being Laid Off

The Massachusetts Appeals Court has ruled that "cost-cutting" is a legitimate business reason on which to base a termination for "good cause." In doing so, the Court has provided guidance on the definition of "good cause" and narrowed the scope of an at-will employee's claim for breach of the implied covenant of good faith and fair dealing. So long as an at-will employee is terminated with good cause and the employer has acted in good faith, an employee will not be able to recover anticipated future compensation, based on past services, which an employee may have lost as a result of being discharged.

In York, the defendant Scudder terminated the plaintiff York, an at-will employee, along with thirty-five other employees as part of a sales group restructuring – a Company-wide cost-cutting initiative. The Company also closed requisitions for fifty-nine open

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**Work From Home** *continued from previous page*

to these chemicals without success, his doctor recommended that he stay out of the buildings where the chemicals were used. Acushnet moved Mulloy to its headquarters, which was fifteen miles from the plant. Thereafter, the Company determined that Mulloy could not perform the essential functions of his electrical engineer position unless he was physically present at the plant, and as a result, the Company terminated his employment.

Mulloy filed an action under the Americans with Disabilities Act ("ADA") and M.G.L. c. 151B alleging that Acushnet discriminated against him on the basis of his disability. The District Court granted summary judgment to Acushnet finding that Mulloy (1) could not establish that he was disabled since he was not substantially limited in a major life activity; and (2) was unable to perform the essential functions of his job with or without a reasonable accommodation. The First Circuit Court of Appeals did not address the first issue - whether or not Mulloy was disabled - since the second element of his ADA claim, whether he was a qualified individual capable of performing the essential functions of his job with or without a reasonable accommodation, provided a sufficient basis for its decision. As such, the Court assumed, without deciding, that Mulloy was disabled under the ADA.

*[R]esponding to a request for an accommodation to work remotely requires a very fact-specific inquiry.*

In analyzing the issue, the Court determined that the remote location claim should be treated as a question of "essential function" and not "reasonable accommodation." The parties agreed as to what constituted the essential functions of Mulloy's position (i.e., designing and programming, troubleshooting, and training, supervising and supporting personnel), but the key issue was whether physical presence was required to perform these functions and was therefore, by itself, an essential job function. The Court reviewed the evidence presented, including testimony regarding the employer's judgment about whether physical presence was an essential function along with the job description and experience of past and current incumbents of the position. Based upon "voluminous evidence" presented, the Court upheld the District Court's finding that physical presence was an essential function of his job. As a result, the Court explained, the proposed accommodation of working at-home is unreasonable since it seeks to eliminate an essential function of the position.

This case should be considered in conjunction with the 2005 decision of the Massachusetts Appeals Court in Smith v. Bell Atlantic. In that case, the Court held that the daily presence in the office was not an essential function of the position and an employer may be required to provide adequate technological support for an employee working remotely from home. These cases demonstrate that responding to a request for an accommodation to work remotely requires a very fact-specific inquiry. Central to the analysis will be whether the employee works independently or is closely supervised, whether they regularly interact with personnel or equipment/machinery on the premises, and whether past or present incumbents of the position or similar positions have been allowed to work remotely. ❖

## Employer Did Not Violate FMLA by Prorating Annual Bonus Based on Lack of Production Resulting from FMLA Leave

In a case of first impression by any federal appellate court, the Third Circuit Court of Appeals held that an employer who prorates a "production bonus" based on hours worked for employees who are or were on leave did not violate the Family and Medical Leave Act ("FMLA"). This case provides guidance on how employers may legally prorate bonuses of employees who take FMLA leave. As this case exemplifies, an employer's right to prorate a bonus for an employee who takes FMLA leave will depend on whether the bonus program implemented by the employer is based upon a "production bonus."

In *Sommer v. Vanguard Group*, an employee, Sommer, took eight weeks of short-term disability leave under FMLA. As a result of this absence, Vanguard prorated Sommer's bonus payments under two of the Company's bonus plans, including the Partnership Plan (the "Plan"), the only plan at issue in this case. The Plan, which was created to reward employees for Vanguard's growth and financial success, distributed bonuses annually based upon, among other things, the Company's operating performance, its competitors' operating performance, and the investment performance of the Vanguard funds. In addition to the plan's qualifications (e.g., being employed on the last day of the calendar year), the amount an employee received under the Plan depended upon three criteria: (1) job level, (2) length of service, and (3) hours worked. In defining "hours worked," the Plan provided that vacation and sick leave were considered hours worked, but retirement, short and long-term disability,

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***At-Will Employee Not Entitled to Future Sales Commission*** *continued from page 1*

positions. At the time of his termination, York alleged that he was owed incentive compensation of over $400,000 for sales he made. York filed suit against Scudder to recover the incentive compensation owed to him, alleging, among other claims, breach of the implied covenant of good faith and fair dealing. The Superior Court issued summary judgment for Scudder and York appealed.

The Appeals Court explained that even in an at-will employment arrangement, there exists an implied covenant of good faith and fair dealing. The Court thereafter outlined the circumstances when an at-will employee may be able to recover anticipated compensation for past services. First, if an at-will employee has been terminated in bad faith (e.g., the employer has acted to deprive an employee of a commission due and to benefit financially at the employee's expense), the employee will be able to recover compensation for work performed. Second, if an at-will employee is discharged without "good cause," but the employer has not acted in bad faith, the employer will be liable under the obligation of fair dealing "for the loss of compensation that is clearly related to an employee's past service." Conversely, if an employer terminates an at-will employee with good cause and without bad faith, the employee will not be able to recover for lost compensation.

In Massachusetts, a termination for "good cause" is defined as:

> the existence of either (1) a reasonable basis for employer dissatisfaction with a new employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct, or other culpable or inappropriate behavior, or (2) grounds for discharge reasonably related, in the employer's honest judgment, to the needs of its business. Discharge for a good cause is to be contrasted with discharge on unreasonable grounds or arbitrarily, capriciously, or in bad faith.

In the context of this case, Scudder's termination of York and other employees as a cost-cutting initiative was a legitimate business reason on which to base a termination for cause. Indeed, York admitted at his deposition that he had no basis to contend that Scudder terminated him for the purpose of depriving him of his sales incentive compensation. While the Court acknowledged that the question of whether a termination was for good cause generally is a fact question for the jury, on the record of this case, there was no evidence upon which a jury could infer that York's termination was not for grounds reasonably related, in the employer's honest judgment, to the needs of its business.

In clarifying what circumstances may constitute "good cause," the Court has provided employers with "flexibility in the face of changing circumstances" and in the "face of uncertainties in the business world" to implement reductions-in-force that are legitimately based on cost-cutting initiatives.

Prior to implementing a layoff, an employer should seek counsel to evaluate all of the potential legal issues, including a potential claim for a breach of the implied covenant of good faith and fair dealing, attendant with a reduction in force. ❖

## Final Regulations Under the New Massachusetts Health Care Reform Law Delayed

In April 2006, the Massachusetts Division of Health Care Finance & Policy ("DHCFP") proposed regulations in accordance with the "Act Providing Access to Affordable, Quality, Accountable Health Care" signed by Governor Mitt Romney on April 12, 2006 (the "Health Care Reform Law"). The proposed regulations set an employer's specific contribution, recordkeeping and nondiscrimination obligations under the new law, and instituted a "free rider surcharge" on companies whose employees and dependents receive health services through the uncompensated care pool (state-funded health costs). The regulations were set to become final October 1, 2006.

On September 8, 2006, the DHCFP issued a press release indicating that it had approved a final regulation that establishes a clear standard for determining whether employers are making "fair and reasonable" contributions to their employees' health insurance plans. However, the release indicated that the DHCFP postponed adopting regulations that define the free rider surcharge on companies whose employees and dependents receive health services through the uncompensated care pool. The agency is holding these regulations pending an imminent decision by the legislature on a change to the effective date. DHCFP also is temporarily withdrawing a proposal for the third regulation on the health insurance responsibility disclosure ("HIRD Form"), which requires employers to file information about the health insurance status of each of its employees. As a result, employers must await the final regulations to ascertain its specific responsibilities under this new law.

Upon the publication of the final regulations, we will issue a client alert outlining all of the employer mandates under the Health Care Reform Law. ❖

# Superior Court Judge Holds That Accrued But Unused Vacation Pay Not Wages Under the Massachusetts Wage Payment Statute Based on the Terms of Written Agreement

A Superior Court judge recently granted summary judgment to the Massachusetts Bay Transportation Authority ("MBTA") holding that the plaintiff employees who did not receive their vacation pay pursuant to the terms of a collective bargaining agreement -- which provided that vacation payments are not "due" to employees who are terminated for cause, nor to those who resign in lieu termination -- did not state a claim under M.G. L. c. 149, § 148 (the "Wage Payment Statute"). This decision represents a potential shift in the traditional interpretation of the Wage Payment Statute, which previously has been read to require employers to pay accrued ("earned") vacation under all circumstances, since accrued vacation has been interpreted to be a wage "earned" under the statute.

In *Local 569, Amalgamated Transit Union v. Massachusetts Bay Transportation Authority*, C.A. No. 04-2434-A (Superior Ct., Aug. 16, 2006)(Troy, J.), the plaintiffs, a union local and two former union-represented employees, alleged that the MBTA violated the Wage Payment Statute for failing to pay out certain accrued but unused vacation pay, and the matter was certified as a class action. By agreement, the matter was presented to an arbitrator with the stipulation that each party could present to the court for de novo review an interpretation by the arbitrator of the meaning and application of the Wage Payment Statute. The arbitrator concluded that the MBTA's practices and policies concerning vacation pay did not violate the Wage Payment Statute. The arbitrator determined that (1) the Wage Payment Statute requires that vacation pay is to be paid to employees only if such payments are "due an employee under an oral or written agreement," and (2) the long-standing intent of the parties was that vacation payments were not "due" to employees who were terminated for cause, nor to those who resigned in lieu of termination.

On review, the Court pointed out that an employee's right to receive vacation pay arises from the "private employment agreement" one has with his employer. While the Court noted the importance the legislature placed on when wages are due an employee, the legislative history revealed that the final bill added the modifying language "under an agreement oral or written" after the phrase "wages shall include any holiday or vacation payments due an employee."

The plaintiffs, relying on a determination by the Attorney General's office, argued that vacation pay was due them as past wages earned that vested when they rendered their services to the MBTA, and that the Agreement guaranteed the employees payment for earned vacation which is not granted, but "earned." The plaintiffs also argued that the MTBA's agreement should be construed as a "special contract" (an attempt to circumvent its obligation to pay earned wages), which is barred by the Wage Payment Statute. The Court rejected the plaintiffs' arguments.

In its analysis, the Court reasoned that since the Wage Payment Statute only gives the plaintiffs the right to collect vacation pay as wages from the defendant pursuant to an oral or written agreement, the arbitrator's conclusion that the agreement did not support the plaintiff's contention that vacation was due to them was correct. Specifically, these employees fell into the exclusion in the agreement of those who were terminated for cause or those who resigned in lieu of termination and, therefore, were not entitled to vacation pay pursuant to the plain meaning of the agreement.

The Court also explained that plaintiffs' reliance on the Attorney General's determination was erroneous, since the vacation pay at issue in the agreement was not contingent upon whether or not the employees' services were already rendered. As explained by the Court, had the legislature intended all vacation pay be "due" an employee regardless of the surrounding circumstances, it would have passed the Wage Payment Statute without the modifying language "under an agreement oral or written." Finally, the Court concluded, without much discussion, that this was not a "special contract," but rather an agreement between the parties, and the MBTA should get the benefit of the bargain specifically excluding these employees from receiving accrued vacation.

While this decision appears to provide employers in a union context with the ability to contract away the obligation to pay accrued vacation, employers should proceed with caution before making changes to their existing vacation policies. As an initial matter, the Massachusetts Attorney General's office, which enforces the Wage Payment Statute, may very well take a different view than Judge Troy. Based upon the AG's 1999 advisory on vacation pay policies, this would seem appear likely. Moreover, this is a Superior Court decision subject to review by the appellate courts. And since this case involved a union, this decision may have limited application in a non-union work environment. We will follow this case and update you on any appellate developments.❖

***FMLA*** *continued from page 2*

worker's compensation, FMLA leave, personal leave, and unpaid court leave were not to be considered hours worked. The Plan also included a Q&A section which set forth the formula of how prorated bonuses are calculated and further explained that such forms of FMLA type leave are not considered time worked for calculating the bonus.

In its analysis, the Court relied on the regulations and opinion letters issued by the Department of Labor interpreting two types of bonus programs – an "absence of occurrence bonus" (e.g., a safety or perfect attendance bonus which does not require performance by the employee) and a "production bonus" (e.g., a bonus based on exceeding production or other goals which require performance by the employee).

The precept that we derive from the regulations and DOL opinion letters is that although an employer may not reduce an absence of occurrence bonus paid to an FMLA leave taker if the employee was otherwise qualified but-for the taking of the FMLA leave, that employer may prorate any production bonuses to be paid to an FMLA leave taker by the amount of any lost production (be it hours or another quantifiable measure of productivity) caused by the FMLA leave. This rule is an appropriate application of the admonition found at 29 U.S.C. § 2614(a)(3) that, while on FMLA leave, an employee is not entitled to the accrual of any right of employment, but is entitled to those rights of employment "to which the employee would have been entitled had the employee not taken the leave."

The Court determined that the employer's bonus program under the Plan provided incentive to employees for meeting an annual goal for hours worked and was a production bonus that properly could be prorated.

This decision offers guidance to employers on the circumstances when a bonus can be prorated appropriately – namely, for production-based bonuses. As the Court explained, it is "often difficult to sift through the jargon-laden terms of a company's bonus program documents to ascertain the goal actually being rewarded." As such, employers structuring their bonus programs to permit reductions when an employee takes a leave of absence, must carefully draft such programs to clearly articulate the production goal(s) being awarded as well as the types of leave that will result in a reduction of a production bonus. Employers with existing written bonus programs should consider reviewing and revising such programs to ensure the intent of a production-based bonus is unambiguous. ❖

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