OVERVIEW OF SELECTED NOTABLE DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW, 2011 - 2012

South Shore Chamber of Commerce
March 1, 2012

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I. U.S. SUPREME COURT

Wal-Mart v. Dukes, 131 S.Ct. 2541 (2011). *Nationwide class of women cannot be certified as plaintiffs where decisions on their promotions was made by different agents of Respondent, under differing circumstances.*

The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal–Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women.

Wal–Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal–Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers

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have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—e.g., assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's managers after the prescribed objective factors are satisfied.

The plaintiffs claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees.

The U.S. Supreme Court reversed. It held that a class could not be certified because the class lacked commonality- that is, that there were no questions of law or fact common to the class.

> Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for

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a class action; it is a policy against having uniform employment practices.

<u>Staub v. Proctor Hospital</u>, 131 S.Ct. 1186 (2011). *If a decisionmaker takes an adverse employment action against an employee based on the biased report of a supervisor, the decisionmaker/employer is liable if the biased report is a proximate cause of the employment action.*

While employed by Proctor, Staub was a member of the United States Army Reserve, which required him to attend drill one weekend per month and to train full time for two to three weeks a year. Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were hostile to Staub's military obligations. Mulally scheduled Staub for additional shifts without notice so that he would " 'pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.' " She also informed Staub's co-worker, Leslie Sweborg, that Staub's " 'military duty had been a strain on th[e] department,' " and asked Sweborg to help her " 'get rid of him.' " Korenchuk referred to Staub's military obligations as " 'a b[u]nch of smoking and joking and [a] waste of taxpayers['] money.' "He was also aware that Mulally was "'out to get'" Staub.

In January 2004, Mulally issued Staub a "Corrective Action" disciplinary warning for purportedly violating a company rule requiring him

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to stay in his work area whenever he was not working with a patient. The Corrective Action included a directive requiring Staub to report to Mulally or Korenchuk " 'when [he] ha[d] no patients and [the angio] cases [we]re complete[d].' " According to Staub, Mulally's justification for the Corrective Action was false for two reasons: First, the company rule invoked by Mulally did not exist; and second, even if it did, Staub did not violate it.

On April 2, 2004, Angie Day, Staub's co-worker, complained to Linda Buck, Proctor's vice president of human resources, and Garrett McGowan, Proctor's chief operating officer, about Staub's frequent unavailability and abruptness. McGowan directed Korenchuk and Buck to create a plan that would solve Staub's " 'availability' problems." But three weeks later, before they had time to do so, Korenchuk informed Buck that Staub had left his desk without informing a supervisor, in violation of the January Corrective Action. Staub now contends this accusation was false: he had left Korenchuk a voice-mail notification that he was leaving his desk. Buck relied on Korenchuk's accusation, however, and after reviewing Staub's personnel file, she decided to fire him. The termination notice stated that Staub had ignored the directive issued in the January 2004 Corrective Action.

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Staub challenged his firing through Proctor's grievance process, claiming that Mulally had fabricated the allegation underlying the Corrective Action out of hostility toward his military obligations. Buck did not follow up with Mulally about this claim. After discussing the matter with another personnel officer, Buck adhered to her decision.

Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") claiming that his discharge was motivated by hostility to his obligations as a military reservist. His contention was not that Buck had any such hostility but that Mulally and Korenchuk did, and that their actions influenced Buck's ultimate employment decision. A jury found that Staub's "military status was a motivating factor in [Proctor's] decision to discharge him" and awarded $57,640 in damages.

The Seventh Circuit reversed, holding that Proctor was entitled to judgment as a matter of law. 560 F.3d 647. The court observed that Staub had brought a " 'cat's paw' case," meaning that he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision. It explained that under Seventh Circuit precedent, a "cat's paw" case could not succeed unless the nondecisionmaker exercised such " 'singular influence' " over the

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decisionmaker that the decision to terminate was the product of "blind reliance." It then noted that "Buck looked beyond what Mulally and Korenchuk said," relying in part on her conversation with Day and her review of Staub's personnel file. The court "admit[ted] that Buck's investigation could have been more robust," since it "failed to pursue Staub's theory that Mulally fabricated the write-up." But the court said that the "singular influence" rule "does not require the decisionmaker to be a paragon of independence": "It is enough that the decisionmaker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision. Because the undisputed evidence established that Buck was not wholly dependent on the advice of Korenchuk and Mulally, the court held that Proctor was entitled to judgment.

The US Supreme Court reversed and remanded. The Court noted that under USERRA, discrimination must be the "motivating factor" in an adverse employment decision, and that where the decisionmaker makes a decision to fire, partly on the basis of a biased report, it is unlikely that discrimination is a "motivating factor" in the decision. However, the Court refused to adopt a bright line test that an investigation independent of the biased reporter would immunize the employer.

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> We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.

Thompson v. North American Stainless. 131 S.Ct. 863, (2011).
Employee brought Title VII action against employer for retaliation, alleging that he was terminated after his fiancée, who worked for same employer, filed gender discrimination charge with the Equal Employment Opportunity Commission (EEOC).

An employee filed a charge of discrimination against the employer. The employer then allegedly retaliated against the employee by firing the employee's fiancée, who also worked for the employer. Reversing the Circuit court, the US Supreme Court held that such an action, if true, would violate Title VII, and that the fiancée would have a cause of action for retaliation.

Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C. 131 S. Ct. 694, 114 Fair Empl.Prac.Cas. (BNA) 129 (2012).
Supreme Court recognizes the "ministerial exception" to antidiscrimination laws which has been previously recognized by a majority of circuits; while not adopting a specific test the Court takes a broad view of what is "ministerial."

Hosanna–Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church–Missouri Synod. The Synod classifies its school teachers into two categories: "called" and "lay". "Called" teachers are regarded as having been called to their vocation by God. To be eligible

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to be considered “called,” a teacher must complete certain academic requirements, including a course of theological study. Once called, a teacher receives the formal title “Minister of Religion, Commissioned.” “Lay” teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran. Although lay and called teachers at Hosanna–Tabor generally performed the same duties, lay teachers were hired only when called teachers were unavailable.

After Cheryl Perich completed the required training, Hosanna–Tabor asked her to become a called teacher. Perich accepted the call and was designated a commissioned minister. In addition to teaching secular subjects, Perich taught a religion class, led her students in daily prayer and devotional exercises, and took her students to a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Perich developed narcolepsy and began the 2004–2005 school year on disability leave. In January 2005, she notified the school principal that she would be able to report to work in February. The principal responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the school year. The principal also expressed concern that Perich was not yet ready to return to the classroom. The congregation subsequently offered to pay a portion of Perich's health insurance premiums

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in exchange for her resignation as a called teacher. Perich refused to resign. In February, Perich presented herself at the school and refused to leave until she received written documentation that she had reported to work. The principal later called Perich and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights. In a subsequent letter, the chairman of the school board advised Perich that the congregation would consider whether to rescind her call at its next meeting. As grounds for termination, the letter cited Perich's "insubordination and disruptive behavior," as well as the damage she had done to her "working relationship" with the school by "threatening to take legal action." The congregation voted to rescind Perich's call, and Hosanna–Tabor sent her a letter of termination.

Perich filed a charge with the Equal Employment Opportunity Commission ("EEOC"), claiming that her employment had been terminated in violation of the Americans with Disabilities Act (ADA"). The EEOC brought suit against Hosanna–Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. Invoking what is known as the "ministerial exception," Hosanna–Tabor argued that the suit was barred by the First Amendment because the claims concerned the employment relationship between a religious institution and one of its

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ministers. The District Court agreed and granted summary judgment in Hosanna–Tabor's favor. The Sixth Circuit vacated and remanded. It recognized the existence of a ministerial exception rooted in the First Amendment, but concluded that Perich did not qualify as a "minister" under the exception.

The US Supreme Court reversed the Circuit Court. It recognized longstanding precedent that the First Amendment barred any suits, including discrimination suits, by ministers against their churches. This is commonly referred to as the "ministerial exception" to antidiscrimination laws.

> The Court agrees that there is such a ministerial exception. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

The Court concluded that the ministerial exception applied to more than just ministers, or heads of congregations. Here, the church held plaintiff out as a

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minister, and as a called teacher she was intimately involved in conveying the Church's message and carrying out its mission. The Court found unpersuasive the fact that plaintiff spent the majority of her work time teaching nonreligious subjects such as math and science (although she taught religion four days per week, and led students in prayer three times per day). The Court refused to adopt any bright line test for determining whether an employee would be covered by the ministerial exception.

Justice Thomas, in a concurrence, would go even further and would allow churches themselves to decide the scope of the ministerial exception by themselves defining who is or is not a minister. Justices Kagan and Alito would limit the exception to those who "conduct[] worship services or important religious ceremonies or rituals, or serve[] as a messenger or teacher of its faith."

Kasten v. Saint-Gobain Performance Plastics Corp. 131 S.Ct. 1325, 179 L.Ed.2d 379 (2011). *FLSA antiretaliation provision covers oral complaints to the employer about pay practices as well as formal complaints to courts.*

Kasten brought a retaliation suit against his former employer, Saint–Gobain, under the Fair Labor Standards Act of 1938("FLSA"), which provides minimum wage, maximum hour, and overtime pay rules; and which forbids employers "to discharge ... any employee because such

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employee has filed any complaint" alleging a violation of the FLSA In a related case, the District Court had found that Saint–Gobain violated the FLSA Act by placing time clocks in a location that prevented workers from receiving credit for the time they spent donning and doffing work-related protective gear. Kasten claimed that he was discharged because he orally complained to company officials about the time clocks. The District Court granted Saint–Gobain summary judgment, concluding that the FLSA's antiretaliation provision did not cover oral complaints. The Seventh Circuit affirmed.

The U.S. Supreme Court reversed. It held that the FLSA antiretaliation provisions covered oral as well as written complaints.

> Several functional considerations indicate that Congress intended the antiretaliation provision to cover oral, as well as written, "complaint[s]." First, an interpretation that limited the provision's coverage to written complaints would undermine the Act's basic objectives. The Act seeks to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." … It does so in part by setting forth substantive wage, hour, and overtime standards. It relies for enforcement of these standards, not upon "continuing detailed federal supervision or inspection of payrolls," but upon "information and complaints received from employees seeking to vindicate rights claimed to have been denied." …And its antiretaliation

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> provision makes this enforcement scheme effective by preventing "fear of economic retaliation" from inducing workers "quietly to accept substandard conditions."
>
> Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers?

In dissent, Justice Scalia argued that the clear language of the statute shows that only complaints made to official bodies, such as courts or administrative agencies- are protected by the statute, not complaints- in writing or oral- to the employer.

<u>Chamber of Commerce of U.S. v. Whiting</u> 131 S.Ct. 196894 Empl. Prac. Dec. P 44, 188 (2011). *IRCA does not preempt state business licensing laws which indirectly require employers to take anti-illegal immigration measures.*

The Immigration Reform and Control Act ("IRCA") makes it "unlawful for a person or other entity ... to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." Employers that violate that prohibition may be subjected to federal civil and criminal sanctions. IRCA also restricts the ability of States to combat employment of unauthorized workers; the Act expressly preempts "any State or local law imposing civil or criminal

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sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

IRCA also requires employers to take steps to verify an employee's eligibility for employment. In an attempt to improve that verification process by enacting the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress created E–Verify— an internet-based system employers can use to check the work authorization status of employees.

Some states have recently enacted laws attempting to impose sanctions for the employment of unauthorized aliens through, among other things, "licensing and similar laws." Arizona is one of them. The Legal Arizona Workers Act provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. That law also requires that all Arizona employers use E–Verify.

The Chamber of Commerce of the United States and various business and civil rights organizations filed a preenforcement suit against those charged with administering the Arizona law, arguing that the state law's license suspension and revocation provisions were both expressly and impliedly preempted by federal immigration law, and that the mandatory use

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of E–Verify was impliedly preempted. The District Court found that the plain language of IRCA's preemption clause did not invalidate the Arizona law because the law did no more than impose licensing conditions on businesses operating within the State. Nor was the state law preempted with respect to E–Verify, the court concluded, because although Congress had made the program voluntary at the national level, it had expressed no intent to prevent States from mandating participation. The Ninth Circuit affirmed.

The U.S. Supreme Court affirmed. It held that the IRCA neither expressly nor impliedly preempted state attempts through “licensing and similar laws” to require businesses to comply with immigration laws.

II. DISCRIMINATION CASES

A. Gender Discrimination

Chedid v. Children’s Hospital, 2011 WL 2477235 (Middlesex Superior Court 2011). *Employer’s failure to consider employee’s request to move to full time for no valid reason is evidence of pretext; comment that “if you complain, things may become difficult” is enough evidence of retaliation to get to jury.*

The plaintiff, Nancy Chedid, M.D., brought this action against her former employers, Children's Hospital (“the Hospital”) and the Boston Plastic and Oral Surgery Foundation, Inc. (“the Foundation”), and her supervisor, John Meara (collectively “defendants”), alleging, among other things, sex discrimination and unlawful retaliation.

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Dr. Chedid was hired to work at the Hospital in September, 2005. At the time she had not practiced medicine since 2002 and needed to perform surgeries to obtain recertification lest she lose her credentials as a plastic surgeon. Her then-boss told Dr. Chedid that the department was so busy that she could count on the other surgeons having an "overflow," allowing her to begin rebuilding her practice. She started out with eight hours per week. While a draft employment agreement was prepared, neither the plaintiff nor her boss signed it. The draft provided for yearly renewal and like other agreements with the Hospital's doctors included a clause forgiving any revenue deficits for the first year of practice. At the time of Dr. Chedid's hire in 2005, she was the only female plastic surgeon in the Foundation.

On August 1, 2006, John Meara, became Chedid's new boss. Meara's first appointments began on September 18. Dr. Chedid then noticed a sharp drop in the referrals she received, as referrals went to Dr. Meara instead, so that he could build his practice.

Shortly after his arrival at the Foundation, Dr. Meara met with Chedid and discussed his strategic vision. At their first meeting on September 21, 2006, Dr. Chedid stated that she worked a reduced hours position and had family responsibilities. Dr. Meara said that he understood about child care responsibilities and schedule restrictions because his wife was also a

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physician and the primary caretaker of their children. He also stated that his wife had worked almost since their children were born and that she stopped working on a full-time basis in 1999. Dr. Meara testified that certain subspecialities, including dermatology, are more amenable to a part-time arrangement than is plastic surgery. Dr. Meara told Dr. Chedid that the Hospital's CEO wanted to rid the department of plastic surgery of all the "part timers." Among other things, there are fixed costs, such as malpractice insurance, that are uniform for all surgeons, no matter how many hours they work. Dr. Meara also testified to the need for full-time work to meet the professional vision he had for the Foundation.

Dr. Meara explained to the plaintiff that he intended to start hiring full-time surgeons in July, 2007. He also explained that Dr. Chedid's schedule of four hours of clinic time per week was causing coverage issues for the Department. He did not offer a full time position to Dr. Chedid, encourage her to apply for it when he began the process, or tell her that he was about to begin the application process.

In a March 16, 2007 meeting, the HR department informed Dr. Chedid that Meara was willing to allow her to work only through the end of June. HR explained that Meara wanted someone with special pediatric training in the department and that Chedid should obtain special pediatric

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training and reapply in the future. Chedid asked why she had to apply when a different surgeon (a male) had been invited to join the Foundation and another physician (Greene) had been hired with far less experience than she. HR responded that Greene had special pediatric training. However, Chedid also had pediatric training. HR then argued that Meara had the right to decide that he did not want a part time physician. Chedid countered that she had offered to increase her hours and expand her practice. On the spot, she offered to become full time. HR became exasperated and angry at Chedid's offer.

In a letter dated March 23, 2007, Dr. Meara informed Chedid that her employment with the Foundation would end effective June 30 of that year. The letter also stated that, if her profit and loss statement showed a positive balance, "you will be eligible for a discretionary bonus; this bonus will be determined based on the amount of the positive balance, as well as other factors, such as whether the transition proceeds smoothly and in accordance with the professional expectations of the Foundation." On April 6, 2006, Chedid protested that decision since the discussion was not final and she had received no response to her offer of full time employment. Dr. Meara was thus on notice no later than early April, 2007, of her willingness to work full-time. On April 9, 2007, Dr. Meara stated that he had filled a position at

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the Hospital, namely Dr. Green, who had already started work. He claimed that Chedid had not wanted to change her part time status until very recently. He explained that he had not yet decided whether to give the plaintiff a discretionary bonus and that the plaintiff had not responded to his email request that she come speak to him regarding the positive balance on Chedid's account ($12,150.00 as of the date of her termination). Despite that positive balance, Meara claimed that Chedid's arrangement did not benefit the Foundation financially.

On these facts, the trial court largely denied the Defendants' motions for summary judgment.

> In the present case, the parties have analyzed the plaintiff's sex discrimination claim under two separate, generalized categories-disparate treatment and disparate impact. Under the disparate treatment analysis, the plaintiff contends that the defendant treated her unfavorably based on a perceived stereotype that women with children are less capable of being skilled surgeons due to having family obligations. With respect to disparate impact, the plaintiff claims that the defendants' policy of hiring only full-time surgeons has a disparate impact on women with children.
>
> The basic flaw in the defendants' position on both types of claims is their failure to acknowledge all of the evidence, let alone integrate the facts upon which the plaintiff relies into any coherent theory that would justify taking this case from the jury. At this stage, I reject the defendants' repeated assertions that major portions of the plaintiff's case -- often those portions from which a jury

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> might infer discriminatory intent -- are not relevant or are otherwise inadmissible. The defendants have made arguments that a jury may or may not find persuasive. Nothing more.

While the court noted a desire to have a full time staff is a nondiscriminatory rationale for making an employment decision, it found that the Defendant had offered no plausible rationale as to why it continued to refuse Chedid consideration even after she offered to move to full time status. The court also found sufficient evidence of retaliation to go to a jury:

> On the causation question, there is evidence from which a jury could find that the defendants intended to retaliate -- i.e., make things difficult for the plaintiff-- as a result of her asserting sincere perceptions of gender discrimination. Emans, at least, knew of plaintiff's discrimination concerns in October 2006. Meara knew of them by the end of 2006 or early 2007. The plaintiff asserts that, at a meeting on March 2, 2007, with Emans, and the Vice President of Human Resources, Inez Stewart, she complained about Meara acting in a discriminatory and unfair manner by pushing her out of her job. … After the meeting, the plaintiff approached the Chief of Surgery, Dr. Robert Shamberger, to express her concerns about opportunities for women students and residents at the hospital. In response, Dr. Shamberger "questioned [her] qualifications to work at the Foundation and explained to [her] that although [she] might see the issue as gender discrimination, it was not and if [she] persisted in claiming that it was, [her] protests would make things 'difficult' for [her]." … **As statements go, that one, combined with the Hospital acting as predicted, is strong enough to raise a serious question for the jury, even if there were nothing more**.

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B. Gender Discrimination

Tuli v. Brigham & Womens, 656 F.3d 33 (1st Cir. 2011). *Repeated comments and actions over a long period of time presented sufficient evidence for a jury to conclude gender discrimination had occurred; conditional reinstatement of privileges is an adverse employment action.*

In 2002, the Hospital hired Tuli as an associate surgeon in the Department of Neurosurgery, and Day as residency director and vice chairman of the department. In 2002 and 2003, Tuli was made the department's professionalism officer and representative to the Hospital's Quality Assurance and Risk Management Committee ("QARM"), which required her to investigate and in some cases report on other doctors' case complications. In 2004, the departure of two colleagues left Tuli as the sole spine surgeon; she says that, unlike prior male doctors, she was not promoted to the position of Director of Spine.

Most of Tuli's claims stem from her interactions with Day, who became her supervisor when he was promoted to chair the department in 2007. As QARM representative, Tuli was asked to investigate three of Day's cases, which ultimately were reported to the state's Board of Registration in Medicine. Tuli alleged that Day's behavior toward women had been consistently inappropriate and demeaning. Starting in 2005 and

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continuing until 2007, Tuli brought her concerns about Day to Dr. Anthony Whittemore, the chief medical officer of the Hospital.

Tuli's medical staff credentials were due for review by the Hospital's credentials committee in October 2007. Day presented Tuli's case to the committee, stating that she had mood swings, that twenty to thirty members of the operating room staff did not want to work with her, and that she would benefit from anger management training. The committee then conditioned Tuli's reappointment on obtaining an evaluation within four months by an outside agency called Physician Health Services ("PHS") and agreeing to comply with its recommendations.

After concerns were raised about the lack of specificity of Day's presentation, the committee had Whittemore re-present Tuli's case at a December 2007 meeting; Whittemore provided a somewhat more balanced view, but mostly rehashed the issues Day had discussed during the earlier meeting and did not tell the committee of Tuli's prior complaints against Day. The committee affirmed its earlier decision. Near the end of December, Tuli filed the present lawsuit and sought a preliminary injunction to prevent loss of her privileges during the pendency of the case.

Under both federal and state law, Tuli's complaint charged the Hospital and Day with gender discrimination through both disparate

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treatment and a hostile work environment, retaliation, and violation of Massachusetts' Health Care Whistleblower Act. It also charged the Hospital with equal pay violations under both federal and state law and Day with intentional interference with advantageous relations and slander.

Trial resulted in a jury decision favorable to Tuli in most respects, which then led to a permanent injunction. The jury awarded Tuli $600,000 against the Hospital in compensatory damages on the retaliation claim; $1,000,000 in compensatory damages against it on the hostile work environment claim; $20,000 in damages against Day for economic harm on the interference claim; and nominal damages for the whistleblower claim against the Hospital, the slander claim against Day, and non-economic harm from the interference claim against Day. Tuli lost her disparate treatment and unequal pay claims. Both sides appealed from the final judgment.

The First Circuit upheld the jury's verdict. The Court noted the following evidence as sufficient to warrant the verdict:

> 2002–03: Day ignores Tuli at conferences by stating, "[L]et's ask the spine guys, Eric and Marc, what they think," and omitting her despite the fact that she is also a spine surgeon.
>
> 2004: At a graduation dinner and in front of a female resident, Day asks Tuli, "Can you get up on the table to dance so you could show them how to behave."

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2004: In the summer, Tuli attends a bachelorette party for a coworker and sees a blow-up doll with a picture of her face attached to it.

2004: Day makes comments on different occasions: "You're just a little girl, you know, can you do that spine surgery?" "Oh, girls can do spine surgery?" "Are you not strong enough to use the hand instruments?"

2005: In February or March 2005, with his arm on Tuli's back, Kim says, "Why don't we leave this place and go to the Elliott Hospital so I can give you an oral exam"; "I think you're really hot"; and "I imagine you naked."

2005: Early in 2005, Day sits in on Tuli's teaching conference and disagrees with Tuli's lecture. He does this more than once, and Tuli does not believe that he did so during male doctors' teaching conferences.

2005: Residents, who are supervised by Day as residency director, ignore Tuli's pages, fail to assist her on rounds, and fail to show up for clinical duties. In the summer, Tuli notices that she is given less-experienced, junior residents for her cases.

6/05: Tuli becomes aware of a Hospital-affiliated party planned with "strippers and cages and beer kegs." Although it was supposed to celebrate the incoming chief residents, a new female chief resident was excluded. Day approves of the party and of outside funding for it.

2005: In September or October, Day and Tuli meet to clear the air, and Day says, "Our relationship is like that of lovers and you've cheated on me," with his hand on her arm; he also calls her "deranged." When she attempts to shake his hand at the end of the meeting around 10:00 p.m., he gives her a prolonged hug.

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> 11/05: A resident throws Tuli into the scrub sink and then the garbage.
>
> 12/06: Kim states, “Oh, could you wear one of those belly dancing outfits and show us a dance?”
>
> 2007: Kim states that he would “like to have the opportunity to sexually harass” Tuli; Tuli observes him fondling a physician assistant at a department event.
>
> 5/07: Day looks in on Tuli's spine surgery and makes “some comment to the effect of whether [she] was able to do that case because [she] was a girl, are you sure you can do that, you're just a girl, something to that effect.”
>
> 8/07: Day bars Tuli from spine oncology research saying that he had “a guy in mind” for the job.

Without specifying dates, Tuli also reported that Day had given her other prolonged hugs and had held her hand as they walked at work. She also testified that Day had questioned her authority in multiple teaching conferences and had made comments repeatedly about Tuli “being a little girl” and questioning whether she could do a “big operation”; the incidents noted above were particular examples of this recurrent behavior for which she could remember specific dates.

Tuli repeatedly complained about these acts, but the Hospital did nothing to prevent their repetition. The court concluded “That Tuli managed to get her work done despite the harassment does not prevent a jury from finding liability.”

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On the retaliation count, the court concluded that Tuli provided sufficient evidence from which a jury could conclude that the consequences of the obligatory counseling ordered by the Hospital—invasion of privacy, potential stigma, and possible impact on employment and licensing elsewhere—"might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

C. Retaliation

PSY-Ed v. Klein, 459 Mass 697 (2011). *Retaliation provision covers post-employment actions such as lawsuits and references.*

This case involved bitter litigation spanning more than a decade. The opinion by the Supreme Judicial Court ("SJC") in this case centered around whether an employer could be liable for retaliation (under Chapter151B, the Massachusetts antidiscrimination statute) against an employee for actions taken against the employee after the employee terminated employment. The court held that the retaliation statute does cover post-employment actions. Thus it held that the employer's actions in filing breach of contract and other business tort claims against its former employee was retaliation for that employee's prior MCAD claims against the employer.

D. Race Discrimination

Bhatti v. Boston University, 659 F.3d 64 (1st Cir. 2011). *No discrimination where there is mere "uneven communication" about a*

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workplace rule which is immediately clarified when employee questions rule; no retaliation where counseling sessions are not adverse employment action.

Bhatti, an African-American, began working at the Center in January 2003, joining fellow dental hygienists Baldwin, Jensen, and Lidano, all of whom were white. Dr. Eyad Haidar was Director of the Center from the time of Bhatti's hire until July 2006. Reporting to Dr. Haidar was the Center's Manager Jacqueline Needham, who directly supervised the hygienists. In 2004 the Center hired hygienist Charity, who was African-American, bringing the racial balance of the hygienists to three-to-two.

The Center's alleged discrimination against Bhatti began right at the outset of her employment in 2003, as Needham told her she had to perform a half-hour of unpaid setup time every morning in addition to her basic forty-hour workweek. In contrast, Bhatti claims, the three white hygienists were credited for their setup time as a part of their forty-hour weeks. Making matters worse, Bhatti claimed that a so-called unwritten rule allowed her white counterparts to take extended lunch breaks and leave up to 15 minutes early without having to place a written request and without being charged sick or vacation time. But if Bhatti wanted a similar deviation from her scheduled workday —an extended lunch or early departure—she had to

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submit a written request, and Needham would deduct the time from Bhatti's bank of sick or vacation time.

In 2005, Bhatti confronted Needham about the perceived disparities based on the unwritten rule. Needham protested and proclaimed offense, and Dr. Haidar was drawn into the dispute. He clarified that the unwritten rule was just professional courtesy that applied to Bhatti, too, while reserving the right to approve or disapprove any scheduling deviations as might be necessary. Bhatti requested that Dr. Haidar restore to her a backlog of sick and vacation time (or to compensate her for the time) in order to honor the unwritten rule post hoc, but he declined to do so.

After her confrontation with Needham and her followup with Dr. Haidar, Bhatti says, Center management began retaliating against her. Specifically, she began receiving written reprimands for infractions that she says either were minor or did not occur at all.

On September 26, 2005, Bhatti met with Dr. Haidar and two University officials and complained to the University that the Center was subjecting her to racial discrimination. On September 30, Bhatti submitted a formal complaint to the University's Office of Equal Opportunity and Affirmative Action. Finally on November 1, Bhatti filed charges with the

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Massachusetts Commission Against Discrimination (“MCAD”); the University responded in December, denying any discrimination.

In the middle of this, on October 21, 2005, Needham and Dr. Haidar again called a meeting with Bhatti to discuss alleged performance issues. Bhatti disputed each of these issues. And on June 22, 2006, Dr. Haidar reprimanded Bhatti for claimed insubordination when faced with conflicting duties due to a scheduling snafu, Bhatti disputed the claim, noting that despite her initial protest she did see the patient as Dr. Haidar had requested.

In late 2008, Bhatti filed this action alleging discrimination, retaliation, and a hostile work environment in violation of various federal anti-discrimination laws. In April, 2010, the University filed a motion for summary judgment essentially denying any discrimination but acknowledging that Bhatti had worked under less-than-stellar management.

The District Court granted the motion, holding that none of Bhatti's grievances, individually or in the aggregate, rose to the level of an adverse employment action necessary for her to succeed in her suit. The District Court further held that the University had presented evidence establishing that its bad management practices applied across the board to employees of all races and that Bhatti had failed to respond with adequate evidence of actual discriminatory animus.

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The First Circuit affirmed. It held that Bhatti had presented no evidence that there were disparate schedules for hygienists. First, it concluded, that there was no "rule" which forced certain hygienists to work late, or allowed others to leave early, and that there was no evidence that Bhatti was actually denied leaving early when she wanted to leave.

> Once Bhatti learned of the courtesy extended to others, she raised the issue with Dr. Haidar, who immediately clarified that she, too, was entitled to this courtesy. Again, this uneven communication between administration personnel and between administration and staff certainly suggests some dysfunction in the Center's management, but it does not show bias.

Further, the court found that the reprimands Bhatti received were "too tame" to constitute retaliation:

> Specifically, none of the reprimands here can be said to be material because none carried with it any tangible consequences. Rather, each was merely directed at correcting some workplace behavior that management perceived as needing correction; her working conditions were never altered except in the positive direction.

E. Racial Harassment/Hostile Work Environment

Green v. Harvard Vanguard, 79 Mass App Ct 1 (2011). *Oral promises allegedly made as part of a release agreement, which are not kept, may serve to invalidate the agreement.*

Green, an African-American, applied for a position and was hired in June, 2005, by Harvard Vanguard to work as a medical secretary in Harvard

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Vanguard's physical therapy department at its Kenmore Square location. According to Green's affidavit, Mary Beth Walsh, who was to be his supervisor, told him that, although the job formally was for only twenty hours per week, Green would be able to work forty hours per week. Green accepted the position based on that representation.

Green completed not only secretarial tasks in the position but assisted with other needs of the physical therapy department. According to Green's affidavit, Walsh praised Green for his performance and did not criticize him or his work. Walsh, however, only inconsistently provided additional work for Green above the twenty hours required by the job. Without the twenty additional hours per week, Green was unable to earn sufficient income to support himself or his child.

Sometime in August, 2005, Green went to Harvard Vanguard's human resources department, where he spoke with Michelle Guarnieri, who worked in that department. Green informed Guarnieri that Walsh had promised him twenty additional hours of work each week but that she had failed to provide him with that work. Guarnieri indicated that Walsh had neither the authority nor the ability to promise these additional hours. Subsequently, Guarnieri apparently informed Walsh about her conversation with Green.

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According to Green, shortly after he spoke with Guarnieri, near the end of a work day, Walsh walked up to him, stood very close within his personal space, pointed her finger at his face, and yelled at him, saying, "How dare you go to Human Resources and report me." Green responded that all he wanted was a forty hour work week, which is what he was told he would be given when he started working. Walsh responded, "You're not going to get it. Now I don't even want to see you. Who do you think you are? Who do you think they are going to believe, me, a valued employee of over ten years or a dirty fucking nigger?"

The parties agree that Green immediately reported this alleged incident to the human resources department. According to Green, Walsh subsequently issued Green a "letter of concern." This letter outlined alleged deficiencies in job performance that were purported to have occurred prior to the angry interaction between Walsh and Green.

According to Green's testimony, Guarnieri told Green that he would have to avoid Walsh and that Walsh intended to force Green out of Harvard Vanguard. Subsequently, Guarnieri indicated to Green that in order to avoid remaining in Walsh's department, he would have to resign his position. Green testified that he was told that this measure would be temporary and that Harvard Vanguard would rehire him to a future position as soon as one

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became available. Green also testified that Guarnieri told him that he would be paid while he awaited this new position and that he would not lose any compensation or benefits.

Green agreed to this proposal. At Guarnieri's request he signed a letter of resignation. He also signed a “salary continuation agreement,” (“agreement”) which included a release. It provided that for four weeks, or until Green commenced other employment comparable to his position as a medical secretary, Harvard Vanguard would continue to pay Green's salary and would pay for his health insurance. Contrary to Green's testimony, Guarnieri testified in her affidavit that, upon providing Green the agreement, she told him that after his resignation he could apply for jobs at Harvard Vanguard on the same basis as anyone else.

According to Green, while he was still receiving the four weeks' pay referenced in the agreement, Guarnieri called him and offered him a position, for which he had not applied, as a medical assistant in the cardiology department.

Less than two weeks after Green joined the cardiology department, on October 12, 2005, his supervisor, Araya, issued him a “letter of concern.” This letter referred to incidents on October 5 and 6. On the same day in which he received the letter of concern, Green spoke with Guarnieri.

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According to his affidavit, he explained that he did not understand the terminology being used in the cardiology department. She indicated that he would be unable to continue in the new position. When he asked if he could obtain a position in a different department instead, Guarnieri said no. She said, “They don't want you here.”

Guarnieri indicated to Green that he should sign a letter of resignation, apparently so that he would be eligible for severance payments, and Green did so. Guarnieri also told Green that he would have to sign another release in order to obtain severance payments. Green refused to sign any such release. Harvard Vanguard nonetheless did make severance payments to Green.

Green then brought the instant suit, claiming a racially hostile work environment, retaliation, and breach of contract for placing him in a job intending him to fail. The employer claimed – in turn – that the signed release barred any claims.

The court noted that the one incident, standing alone, would be sufficient to constitute a racially, hostile work environment.

> That term inflicts cruel injury by its very utterance. It is degrading, it is humiliating, and it is freighted with a long and shameful history of humiliation, the ugly effects of which continue to haunt us all. The words have no legitimate place in the working environment—indeed,

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> they have no legitimate place—and there is no conceivable justification for their use by a workplace supervisor."

On the issue of the release, the court held that there was a grievance issue of fact as to whether or not the employer intended to give Green a substitute job for which he was not suitable, thus intending him to fail in that position, contrary to the agreement.

F. Discrimination Claims - Arbitration

Joulé v. Simmons, 459 Mass. 88 (2011). *MCAD has independent authority to investigate, hear, and issue orders in MCAD complaint even if underlying complainant signs release and waiver of rights to litigate.*

The plaintiff Joulé Technical Staffing, Inc. ("Joulé"), employed the defendant, Randi Simmons, from 2008 to 2009. Both were parties to an employment agreement containing an arbitration provision that expressly covered claims of employment discrimination. Simmons was terminated in July, 2009. Simmons, who claimed that her termination was based on discrimination and retaliation, did not file a claim for arbitration under the arbitration provision, but did file a complaint of discrimination with the MCAD. In response, Joulé filed in the Superior Court a complaint and a motion to compel arbitration of Simmons's discrimination claim. The MCAD proceeded to investigate the complaint.

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The SJC concluded that pursuant to G.L. c. 151B, § 5, the MCAD may conduct its own, independent proceeding based on Simmons' complaint. As between Joulé and Simmons, however, if the arbitration provision in the agreement is valid (an issue that remained to be resolved by the trial court) Joulé has a right to compel arbitration:

> Even where there is a clear and unmistakable provision in an employment agreement requiring arbitration of discrimination claims, however, it would not affect the MCAD's authority under G.L. c. 151B, § 5. … The MCAD is not a party to the employment agreement at issue here, has not agreed to arbitration of Simmons's MCAD complaint, and cannot be bound by the agreement's arbitration provision. Accordingly, assuming the validity of the agreement's arbitration provision, nothing in it precludes the MCAD from proceeding with its investigation and resolution of Simmons's discrimination complaint—**including, if the evidence warrants, granting relief specific to Simmons.**

G. Disability Discrimination - Arbitration

Soto v. State Industrial, 642 F.3d 67 (1st Cir. 2011) *Continued employment is sufficient consideration for arbitration agreement; any language barrier issues fall on plaintiff to address before signing.*

In 2009, Soto filed an employment discrimination suit in federal court, alleging violations of the Americans with Disabilities Act, and Puerto Rico law. State Industrial moved to dismiss and compel arbitration pursuant to

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the Federal Arbitration Act ("FAA"), on the grounds that the dispute was covered by an arbitration agreement.

Soto argued that the arbitration agreement was unenforceable due to a lack of consideration and consent. The District Court rejected these arguments and dismissed Soto's complaint. The First Circuit affirmed. Plaintiff signed an employment agreement in 2001 (after several years of employment), which contained employment arbitration clauses. The agreement indicated that "I HAVE READ AND I FULLY UNDERSTAND EACH AND EVERY PROVISION OF THE FOREGOING AND DO HEREBY ACCEPT AND AGREE TO THE SAME."

The First Circuit concluded that continued employment is sufficient consideration for an arbitration agreement to be valid, and that in any event, the company's agreement to arbitrate disputes was sufficient consideration for Soto's agreement to do the same. The court further concluded that the implicit threat to her employment if she failed to sign the agreement did not rise to the level of legal coercion nullifying the agreement, and that her lack of fluency in English did not affect her ability to understand the agreement's contents.

> it is a general and well established principle of contract law that "one who is ignorant of the language in which a

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document is written, or who is illiterate," may be bound to a contract by negligently failing to learn its contents.

H. Discrimination – Failure To Exhaust Administrative Remedies

Wong v. Resolve Technology, 2011 WL 3157198 (D. Mass. 2011). *Lawsuit must be within the confines of original administrative charge or it will be dismissed for failure to exhaust administrative remedies.*

Resolve hired Wong as a Business Analyst in February 2007. Approximately seven months later, on September 4, 2007, Resolve terminated Wong's employment.

Several months after her termination, on December 19, 2007, Wong filed a charge with the Massachusetts Commission Against Discrimination ("MCAD") alleging she was discriminated against by Resolve based solely upon "Disability, AIDS perceived."

The MCAD investigated Wong's charge and in its investigative disposition, stated that Wong had alleged "discrimination based upon Disability (AIDS perceived)." The investigative commissioner addressed whether Wong had established a prima facie case of discrimination because she was perceived to have or be at risk of having HIV and on July 31, 2009, dismissed Wong's claim for lack of probable cause. The MCAD further explained that even if Wong had demonstrated a prima facie case of perceived disability discrimination, Resolve had provided legitimate non-

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discriminatory reasons for terminating her employment, namely "erratic and repeated absences as well as her work performance," and that Wong offered no evidence to show that such reasons were merely a pretext for discrimination. Then Wong filed this case. Her complaint alleged that she was wrongly terminated and discriminated against solely because she needed and sought an accommodation from Resolve to seek medical treatment for TMJ and a head injury.

Resolve moved to dismiss the subsequent suit, arguing that Wong had not properly exhausted her administrative remedies because the TMJ was not included in her MCAD complaint. The court agreed.

> As Resolve correctly points out, Wong's disability claim raised in her complaint, based on "TMJ and head injury," was not included in her original MCAD charge. The original charge submitted to the MCAD and transmitted to the EEOC states that Wong alleged discrimination on the basis of perceived HIV or AIDS, not on the basis of Wong's TMJ or head injury….Thus, it cannot be said that Wong's ADA disability claim was within the scope of the agency's investigation of her MCAD charge.

I. Disability – Reasonable Accommodation

<u>Thibeault v. Verizon</u>, 06-BEM-03137 (MCAD 2011). *Employee who rejected numerous attempts to accommodate her injuries and insisted on open ended leave was not "qualified," especially where handicap appeared only after employee was disciplined for romantic relationship with subordinate.*

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Complainant, Michelle Thibeault, worked for Respondent Verizon for approximately nine years.

In July of 2005, Complainant transferred to a position working as a foreman in the field supervising technicians out of the Woburn garage, with a pay increase of approximately $10,000 per year. In this position, Complainant traveled to different worksites and supervised the work of employees who were engaged in the physical work of climbing poles or entering man-holes. Her job was to ensure effective and efficient operations in the field. At the time she had an annual salary and bonuses totaling roughly $100,000.

During her time as a foreman, Complainant began a personal relationship with a male subordinate. Since Complainant was a direct supervisor, her romantic relationship with a subordinate was a violation of Verizon's Code of Conduct. Respondent introduced documentary evidence that Complainant's supervisor Debbie Roche wrote that she had confronted Complainant about the relationship first, on June 29, 2006, after hearing talk around the garage where Complainant worked and reviewing Complainant's and her subordinate's overlapping sick days

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Given Respondent's belief that Complainant was in violation of its Code of Conduct, Thibeault was transferred to the Company's Lowell Dispatch Center.

When Roche informed Complainant that she was being transferred Complainant became furious, stated that Roche was over-reacting and that everyone was not being fair to her. She again denied a romantic relationship with her subordinate and stated that she was being punished based on rumor and innuendo.

Complainant began working at the call center after the July 4th weekend in 2006. From the start, Complainant expressed her displeasure at being assigned there to her direct supervisor and second level manager, Anthony Sisoian.

On September 1, 2006, after working only 29 days at the call center, Complainant claimed her neck froze at work, after turning it the wrong way. She was unable to continue working and a colleague drove her home. Complainant testified that she worked at the call center until September 4, 2006 and on September 5, 2006 she began a leave of absence from work because of her neck pain. Her orthopedist's physical exam noted that Complainant was "neurologically intact" and he made no recommendation that Complainant remain out of work.

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Complainant's claim for disability was not approved beyond October 22, 2006 but she did not return to work. Instead, Complainant remained out of work without authorization while she continued to seek extended medical leave.

On October 26, 2006, Dr. Saperstein drafted a final letter to MetLife stating that he had seen Complainant for neck pain, for which there is “no definite objective deficit,” and he hoped she could return to work on 11/1/06, but she presented at his office “quite upset and depressed, stating she could not sit and work for any period of time.” Complainant admitted that she knew Dr. Saperstein's position was that she could return to work and that he was not going to support her staying out of work beyond November 1, 2006 and that she had no intention of returning to work at that time.

Sisoian sent Complainant a return to work letter requiring that she return to work by December 4, 2006. Nonetheless, Complainant phoned Sisoian the next day and remained adamant in her refusal to return to work ostensibly because of neck pain and informed him that she had 19 FMLA days remaining.

On December 19, 2006, Sisoian sent Complainant a third and final return-to-work letter instructing her to return to work on December 21, 2006. MetLife phoned Complainant again on December 19, 2006 to re-iterate that

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her claim was denied and to remind her of her right to appeal. Complainant did not appeal MetLife's denial of her disability benefits, and she did not return to work on December 21, 2006. Sisoian spoke to Complainant that day and she told him she was not returning but that when she felt ready to return she would like Workforce Intervention, which assists managers at Verizon to fashion reasonable accommodations to allow employees to return to work after MetLife approves a medical restriction. Complainant told Sisoian that she would seek restricted duty when she returned because she could not work full time. Complainant again reiterated her request for Departmental Leave. Sisoian told Complainant that she was ineligible for Workforce Intervention at that time because MetLife had not approved any restriction and that her Departmental Leave request would not be granted due to business needs.

As a result of Complainant's refusal to return to work, John Sordillo sent her a job abandonment letter on December 21, 2006. Complainant then filed a “refusal to accommodate” handicap discrimination claim with the MCAD. The MCAD dismissed the claim, finding that (a) Complainant failed to show that either her headaches or her neck and back pain constituted a protected handicap and (b) that she had failed to cooperate in the interactive reasonable accommodation process with Verizon.

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While these reports indicate that Complainant was complaining of recurring headaches, and reported some throbbing and some pressure, they do not describe her headaches as severe or debilitating. In short, they lack objective support for Complainant's claim that the headaches were debilitating or that she was unable to work because of them. Furthermore, neither of the reports indicates that Complainant was restricted from performing normal daily activities.

Complainant must establish that her migraine headaches rendered her substantially impaired in one or more major life activities. … Such a determination depends on the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment. Complainant's only evidence that her headaches were so debilitating so as to impair her in the performance of daily activities was her own testimony, which I determined to be exaggerated and not credible.

Since Complainant continued to assert that she was unable and unwilling to return to work after a leave of absence approaching close to four months, and was seeking an additional one to three months of leave time, it is in fact her position that she was unable to perform the essential functions of her job at the call center for the entire time frame at issue. Indeed, she continued to insist that she could not do the job at the call center. Moreover, Complainant rejected out of hand every conceivable accommodation that Verizon offered her, including ergonomic furniture, a sit-stand work station, the ability to stand and walk around during work hours, and the possibility of part time work or a reduced work load, insisting that only an extended leave of absence could accommodate her disability.

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J. Discrimination – Disability/Retaliation

<u>McNamara v. GHC</u>, 07 BEM 01302 (2011 MCAD). *Complainant's self-imposed non-medical limitations on accepting alternative employment prohibited her from arguing she was denied accommodation; temp agency which was unaware of regular employer's job action could not be liable for retaliation as it did not even know of underlying claim.*

Complainant wears a prosthetic right eye. She also suffers from a variety of health issues including colitis, heartburn, depression, a cataract in her left eye, and flat feet.

In January of 2003, Complainant submitted her resume to Bulfinch. Complainant had positive evaluations from previous work at the Beth Israel Deaconess Medical Center. A Bullfinch recruiter interviewed Complainant, tested her, and signed her on as a member of the Bulfinch pool of temporary employees. Complainant's eye condition was accommodated while she was on temporary assignments by the provision of a large computer screen and a glare monitor. Complainant received positive evaluations in her temporary assignments. In March of 2004, Complainant accepted a permanent position as a PSC II in MGH's Orthopedic Oncology Department earning $23.00 per hour.

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As a PSC II in the Orthopedic Oncology Department under Dr. Hornicek, Complainant reported initially to "Lauren" and after November of 2004, to Julie Brenman, the Department's administrative manager.

Around February of 2006, Complainant began to experience job-related stress which caused her to have visual problems and pains in her arm and hand. Complainant described her mental and emotional state at that time as "awful," with issues involving her eye, emotional stress, and pain in her arms. Complainant testified that she told the hospital's human resource representative Marc Fournier, that she felt pulled in different directions and that it was causing her severe medical issues in her eye. Dr. Michael Jenike, Complainant's psychiatrist since 1981, testified at the public hearing that Complainant became severely disabled and unable to work as of January 15, 2006. Complainant took a medical leave of absence commencing on February 2, 2006.

Complainant, through counsel, charged Respondent with disability discrimination in correspondence of March 1, 2006. The parties reached an "Agreement" on March 27, 2006. The Agreement states that Complainant resigned from her position effective March 10, 2006, that she would receive severance pay, that MGH would not contest Complainant's application for unemployment benefits, that MGH HR representative Marc Fournier would

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provide a letter of recommendation to prospective employers, that Complainant could, in the future, re-apply for employment with MGH and its affiliates including temporary employment, and that Complainant agreed to release MGH from any and all claims arising out of her employment by MGH and its termination including disability and age discrimination claims. The Agreement did not contain a promise of re-employment in the future.

After Complainant made attempts to get rehired at MGH and at Bulfinch, she sued, claiming the parties retaliated against her for her previous suit.

In April of 2006, she reapplied her employment, but made clear at the time that she did not wish to have interaction with patients, wanted to avoid processing patient co-pays, needed time off for every Tuesday afternoon for a standing appointment, needed additional time off for various medical appointments on an as-needed basis, sought to limit her work week to thirty hours or less, stated that it would be difficult for her to come to commute to work in the rain, snow, or dark, said that she couldn't lift more than 10 to 15 pounds, and described herself as lacking proficiency in transcription and scheduling software such as IDX.

The MCAD dismissed her claims. The hearing officer held that

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> in the face of these intransigent conditions, Bulfinch's PSC Recruiter Jennifer Walker and Manager Susan Horan reasonably determined that Complainant was not a qualified handicapped applicant capable of performing the essential functions of a PSC position with or without reasonable accommodations…
>
> Since Complainant's specifications would have imposed an undue hardship on Respondent, there came a point when continuing the dialogue proved fruitless.

The officer likewise dismissed the retaliation claim against Bulfinch. She reasoned that since Bulfinch did not know of the previous lawsuit against MGH, it could not have acted with retaliatory animus:

> Nonetheless, Complainant's prima facie case fails to establish a causal connection between that protected activity and her failure to be hired as a Bulfinch temp in 2006 because the credible evidence in the record establishes that neither Susan Horan nor Jennifer Walker were aware of Complainant's prior protected activity. Complainant's Agreement with MGH does not require notice to Bulfinch Temporary Services nor was there a business reason for it to have been informed of the Agreement.

K. Discrimination – Reasonable Accommodation

Dickinson v. UMass Memorial, 07 BEM 01924 (2011)

Complainant began employment with Respondent on or about December 5, 2005 as a division administrator in the Division of Gastroenterology of the Department of Medicine. As a division administrator, Complainant was responsible for the financial, operational,

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and general business functions of the division, including responsibility for developing annual business plans, producing management information reports, overseeing billing activities, and supervising personnel. Complainant did not self-identify as an individual with a learning disability when hired and did not make any request for accommodations upon hire. Complainant's direct supervisor was Robert Elston-Pollock, a senior administrator in the Medicine Department.

Prior to disclosing a disability and requesting accommodations, Complainant received memos from staff criticizing his work. Senior accountant Lynda Holmes expressed concern about Complainant's lack of understanding of "the basics." Complainant was counseled about his hours.

On October 13, 2006, the day after Complainant received counseling, he met with Human Resources Generalist Sampson and provided her with a copy of a January 22, 2001 letter which diagnosed him as having attention deficit disorder and dyslexia. Complainant informed Sampson that he needed assistance in his job as a result of learning disabilities. Respondent asked Complainant for an updated assessment since the letter of diagnosis was five years old.

In November of 2006, Respondent received an updated assessment pertaining to Complainant's alleged learning deficits from psychiatrist Dr.

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Charles W. Carl, Jr. Dr. Carl concurred with Complainant's previous diagnosis of attention deficit disorder and dyslexia. Dr. Carl recommended the following accommodations: additional training, a large screen display calculator, a narrative or outline explaining complex spreadsheets, a reduction in noise and other distractions in Complainant's work environment, and weekly supervisory feedback to help him prioritize and clarify tasks and evaluate his job performance. On December 7, 2006, Respondent agreed to the recommendations suggested by Dr. Carl with the exception of providing multiple explanations for assigned work.

During February of 2007, Respondent received complaints concerning Complainant's behavior towards subordinates. The investigation revealed that Complainant told his subordinates that he had fired employees in the past and would have no problem doing so again, made subordinates feel threatened and intimidated, made negative comments to subordinates when stopping by their offices, created a negative atmosphere in which subordinates were afraid to speak up, and created an environment that resulted in subordinates seeking job opportunities elsewhere.

On May 9, 2007, Complainant filed an MCAD complaint based on Respondent's alleged failure to reasonably accommodate his learning

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disabilities and on retaliation for requesting accommodations. The MCAD determined that the complaint lacked probable cause.

In the spring and summer of 2007, the Department of Medicine reorganized. Complainant applied for the position of division manager. He was evaluated as not meeting the qualifications for the position based on his "lack of experience, difficulty managing faculty compensation plans and his still to be developed interpersonal skills." Elston-Pollock recommended Complainant for the position of division supervisor. Complainant transitioned into a division supervisor position in the summer of 2007. The position of division supervisor contained some of the same responsibilities as those of his former position of division administrator.

Later, her supervisor confirmed that he had become frustrated about errors in Complainant's work product, and had told Complainant to shut the door so that people wouldn't hear him shouting, but he denied retaliating against Complainant.

On July 24, 2007, Elston-Pollock, Sampson, and the other employee met with Complainant to discuss Complainant's job performance. Complainant was informed that he would receive an initial written performance warning. In the warning, Elston-Pollock cited Complainant's

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errors and suggests steps which Complainant should take to overcome his "performance gaps."

Complainant filed a second complaint with the MCAD on August 3 & 6, 2007. The August 3, 2007 complaint: 1) alleged profanity and other mistreatment by her supervisor, 2) asserted that her supervisor accused him of using his disability "as an excuse," 3) claimed that accommodations were being denied to him, and 4) stated that his initial written warning was retaliatory. The August 6, 2007 amendment to the second MCAD complaint alleged that the "Final Written Warning & Disciplinary Suspension" constituted an additional form of retaliation.

The MCAD hearing officer concluded that Complainant failed to meet his burden of proving retaliation.

> While Complainant's protected activity and the adverse employment actions directed against him are intertwined in a temporal sense, the evidence does not establish that the protected activity led to or caused the adverse action. Complainant was subjected to adverse employment action before as well as after he engaged in protected activity. For instance, on October 12, 2006, Elston-Pollock informed Complainant that his participation in a Las Vegas conference was being cancelled because of unsatisfactory job performance. This action took place prior to Complainant notifying Respondent of his learning disabilities and his need for accommodations. The conclusion I draw from this sequence of events is that Complainant sought to deflect criticism away from his problematic job performance by relying on a five-

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> year old diagnosis of learning disabilities which he had never previously mentioned to his employer.

The MCAD also found that Respondent's yelling at him was due to general poor management, not specific retaliatory animus:

> Complainant's attempt to establish a prima facie case of retaliation is also undermined by the fact that Elston-Pollock appears to have been insensitive in his treatment of other employees as well as Complainant. Complainant admitted that Elston-Pollock was an "equal opportunity jerk" and generally treated his subordinates poorly. When viewed in this context, Elston-Pollock's alleged comments to Complainant that: 1) "you're using your disability as an excuse," 2) "I don't have to be nice to you" and 3) "what the F--- is the matter with you?" are not evidence of retaliation but of general boorishness.

The hearing officer held that even if a prima facie case of retaliation were established, Respondent met its burden at stage two by articulating legitimate, nondiscriminatory reasons for its actions supported by credible evidence, to wit: Complainant's inadequate job performance and behavioral problems.

L. Discrimination - Age

Lawrence v. Beaulieu Grp., 2011 Wl 2847833 (D. Mass. 2011). *Poor performance is a legitimate, nondiscriminatory reason for termination.*

Lawrence was hired in 1995 by Beaulieu Group, a carpet manufacturer headquartered in Dalton, Georgia, as a territory manager

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("TM") to work in the company's sales division in the Greater Boston area. At the time of his hire, Lawrence was 64 years old. He was assigned to sales in Region 1, which encompassed Maine, Massachusetts, Rhode Island, Upstate New York, Vermont, New Hampshire and parts of Connecticut. His primary responsibility consisted of marketing and selling carpet.

Beaulieu Group decided to restructure its sales organization in 2006 and 2007. It discontinued a national account program and reduced its labor force in late 2007. As part of that reduction in force, Lawrence was terminated on December 4, 2007. He was 77 years old at the time, and claimed that his termination was due to his age in violation of both his contract and state anti-discrimination laws. Beaulieu Group insists that he was an at-will employee terminated due to poor performance.

The court dismissed his claims, finding that he failed to rebut the employer's legitimate, nondiscriminatory reasons for his dismissal:

> Plaintiff cannot satisfy his prima facie burden. It is agreed that he was of the requisite age and that he was terminated. However, defendant has adduced evidence that his performance was at or near the bottom compared with Beaulieu Group's other employees. Indeed, plaintiff's performance in 2007 was the lowest among territory managers in the Boston area in categories such as total annual sales volume, sales compared to budget, and sales volume compared to prior years. He was also at or near the bottom in new accounts added and ability to grow volume in tough business conditions. Plaintiff

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> has offered nothing to contradict these assertions of low performance.

The court also found persuasive the employer's evidence that the RIF more negatively affected younger than older employees:

> The mere fact that Beaulieu Group retained younger TMs from the Boston area does not support an inference of discrimination. Nationally, Beaulieu Group eliminated 15 employees, all TMs. While plaintiff was the oldest terminated TM, employees under 40 years old represented the age group most affected by the reduction in force. They comprised only 28% of the entire workforce but were 40% of the TMs selected for the reduction in force.

M. Religious Discrimination

Suhrawardy v. Kelly Honda, 2011 WL 5822244 (MCAD).
Employer's refusal to allow employee to wear religious headgear constitutes failure to accommodate.

Complainant alleged that Respondents unlawfully discriminated against him on account of his race, religion and national origin, refused to accommodate his religious beliefs, and terminated his employment in retaliation for his protesting their directive to remove his hijab.

Complainant was a Muslim. In March 2006, Complainant applied for a sales position at Kelly Honda, a brand new dealership. After interviewing with Tarasuik and Solone, he was hired and began working at Kelly Honda on March 15, 2006. Tarasuik stated that Complainant was a desirable job

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candidate because of his prior experience selling Hondas and knowledge of the various Honda models.

Sales representatives were permitted to wear hats only outdoors when engaged in snow removal or during inclement weather. Complainant testified that he wore pants, a shirt and tie and a suit coat to work and was never told there was a dress code.

Complainant occasionally wore a small cap, or hijab, that is slightly larger than a yarmulke. He testified that wearing the hijab is preferred, but not required of his religion and is a common tradition in his culture. He stated that by wearing the hijab, he is emulating the Prophet. He wears the hijab more often in the winter because it keeps his head warm.

Tarasuik testified that after taking customers for test-drives, Complainant often failed to return cars to the parking lot. On a busy Saturday, Complainant left several cars out, cluttering up the dealership and causing complaints from other sales representatives. Tarasuik stated that when he instructed Complainant to return cars after test-drives, Complainant "barked" at him, as he did whenever Tarasuik asked him to perform a task. Complainant denied that Tarasuik complained to him about not returning cars to the parking lot.

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On Sunday, March 26, 2006, wore his hijab. Complainant testified that when Tarasuik told him he could not wear the hijab, he challenged Tarasuik's directive, explaining that it was his religious right to wear the hijab. The next day, Complainant was called into management's offices and terminated. He filed an MCAD complaint.

The hearing officer concluded that Complainant's opposition to his supervisors' directive to remove his head covering and his insistence that he had a right to religious freedom that included the right to wear the head covering constituted protected activity, and that the employer retaliated against that activity by terminating his employment.

The officer also concluded that Respondents' articulated reasons regarding Complainant's performance were a pretext for unlawful retaliation as Respondents' testimony in this regard was patently contradictory. While Respondents' witnesses pointed to Complainant's failure to return cars to their proper location and to his arguing with managers about policies as performance issues, the same witnesses stated that Complainant was similar to other new employee in this regard and that such conduct did not merit termination. The officer also held that the employer's "no-hat" policy was overbroad, and violated 151B:

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> In this case, Respondents' articulated dress code as it was enforced against Complainant, excludes all employees from wearing hats. Such a policy which is neutral on its face would compel employees whose sincerely held religious belief requires them to wear a head covering to choose between their religion and their job. Under such circumstances, the rigid enforcement of such a policy would conflict with M.G.L.c.151B4 (1A) which requires employers to reasonably accommodate employees' sincerely held religious beliefs and practices.

N. Retaliation

St. Marie v. ISO New England, 2011 WL 5117162 (MCAD)

Complainant had both filed complaints and been a witness in other complaints alleging age discrimination over a long period of time. Those complaints were largely settled when Complainant was terminated in late 2003.

The critical event leading to St. Marie's termination occurred on December 1, 2003, at 6:21 p.m., while he was working as Shift Supervisor on the 7:00 a.m. to 7:00 p.m. shift. At this time, Cape Cod and southeastern Massachusetts suffered an electrical outage causing a blackout lasting approximately two hours and affecting 300,000 homes. In the wake of the blackout, ISO's Senior Vice President/Chief Operating Officer, Stephen Whitley, made the decision to terminate Complainant's employment.

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Whitley testified that his reasons for terminating St. Marie were based upon St. Marie's (1) failure to exercise leadership in the Control Room during the power outage; (2) departure from the Control Room at 6:00 p.m. on December 1, 2003 to attend to routine matters; (3) insistence on blaming the Transmission Stability Operating Guide (for one of the electricity transmission lines) rather than accepting responsibility for the outage; and (4) two prior performance issues that took place between 2000 and 2001.

The MCAD affirmed the hearing officer's decision that the employer's reason for the discharge was a pretext for discrimination, finding that others who were at least as responsible for the blackout were only minimally disciplined:

> The Hearing Officer gave due consideration to the fact that other employees who worked in the Control Room and had responsibility for the outage on December 1, 2003, including St. Marie's supervisor received little to no discipline for their roles in the incident and decided that this also supported the inference of causation. None of these employees had a history of protracted litigation with ISO over issues of discrimination. While acknowledging that the differences in rank and duties could arguably justify disparate levels of discipline, the Hearing Officer concluded that they did not justify the "enormous disparity which exists in this case."

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O. National Origin

<u>Croken v. Hagopian</u>, 05-BEM-03408 (MCAD 2011). *Manager who was fired for refusing to fire a Mexican employee was fired in violation of antiretaliation provision.*

Croken was employed as the General Manager of the Newbury Guest House and the Harborside Inn, from mid-February 2005 through November 21, 2005 when he was terminated by Nubar Hagopian.

Croken testified that in addition to calling a co-worker, Tamayo, a "wetback," on other occasions, Hagopian had made derogatory and offensive comments about other minority groups. Hagopian told Croken that women should not be given managerial responsibilities because they are too emotional and "emotionally incapable." He also stated that women should not be promoted in the work place, and that they belonged at home raising children, and were put on the planet to please men. Hagopian made repeated comments about the breasts and legs of two female employees and encouraged them to wear tight clothing.

After an African American employee left the Hotels sometime around April of 2005, Hagopian told Croken not to hire any more African Americans because they are lazy, and instructed Croken to hire more Europeans. Croken testified that he found these comments to be very offensive. At one point Croken reported them to Karen Cherelli, who until

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April of 2005 was the Human Resource manager, and her response was, “That's the way he is.”

Hagopian instructed Croken to initiate a workplace investigation into Tomayo, an employee of Mexican descent, alleging various misconduct by Tomayo. Croken formed that the charges against Tamayo were false. Earlier he had advised Tamayo of his rights and that he could file at the MCAD. When Croken informed Hagopian of the outcome of his investigation Hagopian asked him to resign. Croken refused to resign his position. Croken filed a retaliation complaint at the MCAD, and the employer countered that poor performance was the cause of his termination. The MCAD rejected that theory:

> Hagopian asserted that “poor performance” was the reason for Croken's termination. However financial reports indicate that both hotels improved significantly under Croken's management. Financial statements show the net income for the Newbury Guest House grew by over $16,000 for the eight months after Croken became General Manager. The year to date net income for the Newbury Guest house for 2004 and 2005 showed an increase of almost $160,000 in net income under Croken's management. Likewise the net income for the Harborside Inn for October 2004 as compared to October 2005, showed an increase of over $21,000. The years to date income figures show an increase in net income of over $97,000 under Croken's management. These numbers are an indication that under Croken's management the financial condition of both hotels had significantly improved.

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The hearing officer found that Croken was entitled to $195,489 for back pay, and also entitled to $80,000 in emotional distress.

P. Sexual Harassment

Barnes v. Sleek, 06-BEM-01275 (2011 MCAD). *Manager fired after complaining of sexually charged atmosphere is fired in retaliation.*

Complainant was general manager at a health spa which included aesthetician services. He testified that the aestheticians who performed hair removal procedures made numerous comments about their clients in his presence that he found inappropriate. On one occasion, an aesthetician told co-workers in Complainant's presence that a male client had an erection during the procedure and she zapped him in the scrotum with a laser. The other aestheticians laughed and joked about the incident. On another occasion, in the presence of Complainant and co-workers, an aesthetician remarked about a female client, “That was the hairiest beaver I have ever seen,” and the others laughed. On another occasion, an aesthetician remarked, “That was the hairiest ass I've ever seen in my life.”

According to Complainant, aestheticians made similar comments regarding their clients several times a day. Complainant did not ask the employees to refrain from such comments and he did not complain to HR

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director Michaels about them, because he was new, had not yet assumed managerial functions, and did not feel it was his place.

On July 26, 2005, Complainant was handing out flyers at the mall entrance to Medspa. It had been a slow sales day, and when a sale was finally made, an employee turned in excitement to the store's continually operating web camera, lifted her shirt and said into the camera, "Andrew, I hope you're watching this." Complainant presumed she was referring to the company's owner, Andrew Rudnick. Upon observing her antics, one aesthetician screamed and others laughed. Complainant testified that from his vantage point he could see the employee's entire back. Complainant said he was "shocked," by this incident, felt "extremely uncomfortable," and "could not believe what had happened." He testified that her conduct was the "last straw," and that he found the workplace atmosphere "unprofessional" and "way too sexual."

Sometime later that evening, Complainant telephoned Leah Leahy, a manager, and told her about the comments made during the week and "flashing" the camera. He told Leahy that he felt uncomfortable and could not work in such an environment. Leahy told him she was sorry he had been put in that situation, that she would deal with the matter immediately, and that they would be in touch the next day.

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The following day, July 27, 2005, some two hours after Complainant reported to the work at the Burlington location, Leahy arrived, called him into an office and terminated his employment. According to Complainant, Leahy told him, "We thought you would be better at sales," and when he asked Leahy if that was the real reason, she responded it was.

The MCAD hearing officer found that the atmosphere in the office constituted sexual harassment, and that the timing between the employee's complaint and his discharge compelled the conclusion that he was fired in retaliation for his complaint. The officer awarded $41,000 in lost wages, $150,000 in emotional distress, and a $50,000 civil penalty.

III. OTHER EMPLOYMENT CASES

A. Wrongful Discharge-Release

Plante v. Hinckley Allen & Snyder, 28 Mass. l Rptr 263 (2011).
Discrimination releases and waivers may be voidable if complainant is under mental incapacity at time of release.

Hinckley Allen hired Plante to work as a senior associate in its litigation group in November 2004. In March 2005, four Hinckley Allen partners asked Plante to look at images that had been downloaded from a client's computers during a discovery production to determine whether the images were pornographic. If Plante found them to be pornographic, then he

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was instructed to determine what steps the firm should take. Plante informed the partners that the images were pornography and that the firm was required to report the images to the relevant authorities. Hinckley Allen retained the images until May 2005, when Hinckley Allen partners asked Plante to arrange for the images' complete erasure. Nonetheless, Plante continued encouraging the partners to report the images fearing that the delay constituted an additional criminal violation. Plante claims that he was "highly stressed by the conflict between the partners' request and [his] reticence regarding their request."

On November 9, 2005, Plante had lunch with Dr. Robert Smith at the latter's invitation. He informed Plante that various partners at the firm had wanted the two to meet. Plante perceived their lunch to be a psychological assessment, and Dr. Smith eventually admitted that its purpose was to assess Plante's mental health.

On January 20, 2006, Attorney William Grimm, a Hinckley Allen partner, informed Plante that the firm was terminating his employment. Plante requested a sick leave, which Grimm denied. Plante claims that he was stunned by the termination. After escorting Plante back to his office that day, Grimm observed him crying when talking to a friend over the telephone.

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After Plante left Hinckley Allen, Grimm spoke with Plante and offered a separation agreement. Consequently, Grimm forwarded a proposed separation agreement and release to Plante asking him to execute and return it if the agreement was satisfactory. The letter did not impose any deadline. On February 7, 2006, Plante signed the agreement. The next day Grimm signed it on behalf of Hinckley Allen and returned it, along with a check for unused vacation time, to Plante. The agreement also provided for four months' severance pay.

On February 9, Plante went to the emergency unit at Massachusetts General Hospital. That day, after a psychiatric evaluation, he was transferred to the acute psychiatric ward of MGH for in-patient treatment. For the following twelve days, Plante was treated in the acute psychiatric ward for depression, suicidal and homicidal ideation, impulse control disorder, personality disorder, paranoid personality traits, idiopathic hypersomnia, and medication-induced tremor.

From June 16, 2006 to December 22, 2006, at the request of his then-attorney, Plante underwent psychodiagnostic evaluation by Eric L. Brown, Psy.D. Dr. Brown concluded that, at the time of his termination and subsequent signing of the agreement, Plante “could not intelligently evaluate [the agreement's] merits due to his unraveling mental status and acute

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psychological instability." Plante later sued, claiming that he was terminated due to his disability (and other claims).

Hinckley Allen moved for summary judgment to establish that the separation agreement and release signed by Plante was effective and barred his wrongful termination claim. Plante offered three defenses against the agreement's enforceability: (1) that he signed it under duress, (2) that O'Donnell exerted undue influence on Plante in encouraging his agreement, and (3) that it is void on public policy grounds.

The court granted the summary judgment in part and denied in part. The court concluded that no evidence supported Plante's claim of duress. Further, no evidence supported any argument of undue influence by the Hinkley partners. However, the court allowed Plante's claims that the release should be overturned because of his mental state at the time he signed the agreement to proceed.

> Even if this court considered that expert more credible and better credentialed, Dr. Brown's affidavit and report are sufficient to raise a genuine issue of material fact as to whether the contract is voidable due to Plante's incapacitation. It is this evidence alone preventing this court from ordering complete summary judgment in Hinckley Allen's favor.

The court allowed to go to trial Hinkley's counterclaims that Plante breached his employment contract with the firm by disclosing client

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confidences (the pornography issue) to a newspaper and also that he misrepresented the reasons why he left a previous firm.

B. Other Employment Cases - Massachusetts Wage Act

DiScipio v. Anacorp, 2011 WL 2746292 (D.Mass. 2011).
Arbitration agreement is enforceable to stop a legal claim for wages under the Massachusetts Wage Act, if the agreement contains certain safeguards.

Anacorp employed DiScipio, a resident of Massachusetts, as a Senior Vice President and General Manager of Global MVS Operations in Newton, Massachusetts pursuant to a written employment agreement ("the employment agreement"). On or about December 18, 2010, Anacomp sold its Global MVS Operations Division, and subsequently terminated plaintiff's employment in connection with the change in control of Anacomp. Following his termination, the plaintiff contends that Anacomp violated the Massachusetts Wage Act, and breached the employment agreement by failing to pay $1,182,074.66 in previously earned and/or accrued base salary, incentive compensation, vacation pay, and severance pay. In addition, under Mass. Gen. L.c.149, DiScipio sought $3,905,953 .98 in treble damages for unpaid incentive compensation, vacation, and severance pay.

The employment agreement contained including an arbitration clause which provided, in relevant part, as follows:

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> 15. Agreement to Arbitrate. Employee and the Company agree to arbitrate any controversy, claim or dispute between them arising out of or in any way related to this Agreement, their employment relationship, and any disputes upon termination of employment ... to the fullest extent permitted by law. This method of resolving disputes shall be the sole and exclusive remedy of the parties. Accordingly, the parties understand that, except as provided below or as otherwise required by law, they are giving up their rights to have their disputes decided in a court of law and, if applicable, by a jury, and instead agree that their disputes shall be decided by arbitration.

According to the terms of the employment agreement, the company was to pay the costs of the arbitration proceeding while each of the parties was to pay the costs of preparing their own case as well as their own attorneys' fees. The employment agreement also provided "that the arbitrator may, in his or her discretion, award reasonable attorneys' fees and costs to the prevailing party."

The employer sought to compel arbitration of, among other claims, the employee's Massachusetts wage act claims. In holding that the claims were subject to arbitration the District Court noted:

> There is no doubt "that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." … Indeed, the Supreme Court requires the enforcement of arbitration agreements that do not undermine the relevant statutory scheme. …. As has been repeatedly explained, " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive

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> rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum.' "

The fact that arbitration would sharply limit plaintiff's discovery options was found not to itself make arbitration unconscionable. The arbitration provision allowed some limited discovery, and also gave plaintiff an opportunity to receive attorney's fees if he were successful, thus tipping in favor of enforceability.

The court also dismissed plaintiff's action for severance pay, holding such pay not recoverable under the Wage Act.

C. Other Employment Cases - Defamation- Respondent Superior

Feehily v. Muzi Motors, 79 Mass. App. Ct. 1116 (2011).
Defamation is outside a manager's responsibility and therefore employer not liable for it under theory of respondeat superior.

Feehily sold automobiles for Muzi, a Ford dealership, between 2001 and 2005. Between 2004 and 2005, Gasson was his immediate supervisor. In March, 2007, a former Muzi employee, Ed Welch, filed a workers' compensation claim alleging that abuse by Gasson caused Welch psychiatric problems rendering him unable to work. Welch named Feehily as a witness to Gasson's conduct, and Feehily cooperated with the subsequent investigation.

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In June, 2007, Feehily interviewed for a desirable sales position at a new Lexus dealership. That dealership agreed to hire Feehily. About one week later, Feehily received word from two other former Muzi employees that Gasson had called two dealerships, including the Lexus dealership, and falsely accused Feehily of faking injuries and bringing a series of unmeritorious workers' compensation claims against former employers. Because of these accusations, the Lexus dealership did not hire Feehily.

During July, 2007, Gasson, through an intermediary, threatened to continue maligning Feehily to prospective employers during Feehily's involvement in Welch's workers' compensation case. Gasson also made an oblique threat to harm Feehily's son. Feehily relayed these threats, as well as Gasson's prior accusations, to Muzi's management.

In October, 2007, Feehily sued, alleging a G.L. c. 93A violation, intentional interference with advantageous business relations, defamation, and intentional infliction of emotional distress against both Gasson and Muzi. The trial court dismissed the claims against Muzi. On appeal, the SJC upheld the dismissal, holding that since the manager was not authorized to provide references he was acting outside the scope of employment and thus Muzi was not responsible for his actions:

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> "An employer may be held vicariously liable for the intentional tort of an agent if the tortious act or acts were committed within the scope of employment. [C]onduct of an agent is within the scope of employment [1] if it is of the kind he is employed to perform ...; [2] if it occurs substantially within the authorized time and space limits ...; and [3] if it is motivated, at least in part, by a purpose to serve the employer...
>
> The handbook also demonstrates that Muzi prohibited releasing an employee's personal information without both the employee's consent and authorization of Muzi's CEO. Feehily pointed to no specific evidence creating a disputed issue on this point. Feehily accordingly could not prove that Gasson's conduct was of the kind he was hired to perform.

The court found that Muzi did not ratify the manager's actions:

> Upon learning that Gasson may have been deterring prospective employers from hiring Feehily, Muzi's management promptly addressed these actions with Gasson, who denied that the conduct occurred. Feehily made no claim that Gasson's conduct continued after Muzi's management intervened. This record therefore creates no genuine issue of fact as to whether Muzi ratified Gasson's conduct.

D. Other Employment Case - Whistleblower

Boisvert v. Genzyme, 29 Mass. L. Rptr 89 (Worcester 2011). *Public policy exception to at will status prevents discharge of any employee because they report potentially illegal conduct.*

From 2008 until his termination, Boisvert raised concerns to various Genzyme officers and the U.S. Food and Drug Administration ("FDA") regarding the poor condition of the production facilities and equipment at the

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Framingham site, and its effect on the safety of consumers using the products being manufactured there. In light of these concerns, Boisvert refused to certify Genzyme documents which falsely stated that he had performed or witnessed the performance of favorable inspections of the production facilities. Boisvert alleged that, as a result of his actions, he was discriminated against and harassed during his employment at Genzyme and was eventually terminated. He filed suit, arguing a violation of Massachusetts' Whistleblower law, SOX claims, and wrongful discharge in violation of public policy.

The court dismissed the SOX and Whistleblower claims, finding the employee failed to exhaust administrative remedies on the SOX claims and that the whistleblower statute applies only to public employers. However, the court allowed the public policy claims to go to trial:

> Boisvert's allegations, if accepted as true, raise a credible claim against the company for wrongful discharge in violation of public policy. An at-will employee may not be terminated for reporting conditions that the employee reasonably and in good faith believes to violate public safety laws and present a danger to public safety. … A jury could find that Boisvert reasonably believed the poor conditions at the Framingham plant posed a threat to public safety

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IV. LABOR LAW

A. Confidentiality Agreements

<u>NLRB v. Northeastern Land Services</u>, 645 F. 3d 475 (1st Cir. 2011). *Bright line rule that confidentiality agreements violate the Act is OK; conduct may "chill" employees in violation of the Act even if no evidence shows employees were actually chilled.*

NLS is a temporary employment agency located in Rhode Island, that supplies workers to clients in the natural gas and telecommunications industries, but pays its workers directly. Dupuy was employed twice by NLS as a right-of-way agent for the acquisition of land rights by clients, from February to November 2000, and from July to October 2001. Dupuy obtained the 2001 placement by contacting Rick Lopez, a project manager for NLS client El Paso Energy, who had once worked with Dupuy at NLS. Lopez directed Dupuy to contact NLS, which soon placed him with El Paso at its Dracut Expansion Project in Massachusetts.

Before both of Dupuy's placements by NLS, NLS required Dupuy to sign a temporary employment contract which said, in relevant part:

> Employee ... understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.

Dupuy complained to NLS about repeated delays in receiving his paycheck. He was particularly concerned because he had to pay for

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expenses such as his hotel bills up front and later seek reimbursement. After Dupuy tried to negotiate with NLS, and even threatened to quit, Jesse Green, Executive Vice President and Chief Operating Officer of NLS, agreed to call Lopez to see if El Paso would either pay for Dupuy's hotel bill or provide a larger per diem than NLS had offered to help with Dupuy's cash flow problems. Although NLS ultimately billed most of Dupuy's expenses to El Paso, NLS was responsible for reimbursing Dupuy. Green told Dupuy that Lopez would not agree to any alternative arrangements.

On October 11, 2001, Jesse Green spoke with Dupuy on the phone. Green told Dupuy that NLS had tried to accommodate his requests, but that it seemed that NLS could never make Dupuy happy and, as a result, NLS thought it was best to terminate his employment, as Dupuy had "not lived up to [his] end of the bargain with [NLS]."

Green later testified that his statement regarding Dupuy's "failure to live up to his end of the bargain" was a reference to Dupuy's failure to comply with the confidentiality provision in the temporary employment agreement that required him not to disclose the terms of his employment to outside parties. Green, who had drafted the confidentiality provision, further testified that in making the determination that Dupuy had violated the confidentiality provision by contacting El Paso directly, Green thought it

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was “inappropriate” for Dupuy to “approach a client with [his] ... problems [about salary], [because] then we're not providing the services that we contracted to provide.”

Dupuy filed an unfair labor practice charge with the National Labor Relations Board (“Board”) on October 24, 2001. A Complaint issued January 16, 2002, alleging that NLS violated section 8(a)(1) of the NLRA by maintaining and enforcing an unlawful confidentiality clause in its employment contract that discouraged employees from engaging in protected concerted activities, and by terminating Dupuy's employment on October 11 for violating the terms of that clause.

On September 28, 2010, the Board determined that the confidentiality provision was unlawful because employees reasonably would construe it to prohibit activity protected by Section 7. As it explained, “the [confidentiality] provision, by its clear terms, precludes employees from discussing compensation and other terms of employment with ‘other parties.’ Employees would reasonably understand that language as prohibiting discussions of their compensation with union representatives.”

NLS argued that since there was no actual chilling in this case that no violation occurred. NLS then argued that the Board should have engaged in a balancing test; balancing the employee’s rights to discuss terms of

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employment against the employer's need to keep salary information confidential. NLS contended the Board failed to consider the legitimate justification it had for the confidentiality provision: labor costs were a key component of its bids to clients, and NLS did not want its employees jeopardizing its bids. The Circuit Court analyzed and deferred to Board precedent that a violation can occur if employees may reasonably be chilled in discussing terms and conditions of employment, even if they are not actually chilled. Further, the Circuit Court concluded that the Board was not required to engage in a balancing test and was allowed to adopt a bright line rule prohibiting confidentiality agreements.

B. Successorship /Preemption

Rhode Island Hosp. Assn. v. Providence, 2011 WL 6004385 (1st Cir. 2011). *City ordinance requiring employer to retain predecessor employees upon change of ownership is not preempted by NLRA.*

A Providence city ordinance required that:

> [I]n the event of a change in the identity of the employer at a hospitality business, the new employer (whether the hospitality business owner or its manager) shall retain for at least three (3) months after the commencement of operation of the hospitality business under the new hospitality business employer, those employees who were employed for at least two (2) months preceding the date on which the previous hospitality business employer's status as employer terminated.

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A hotel group and a hotel association sought to invalidate the ordinance, arguing that whether a successor owner retains employees is a matter to be negotiated in a CBA between employer and union, and thus cannot be regulated by city ordinance- in other words, that the NLRA preempts the enforcement of such an ordinance. Affirming the judgment of the District Court, the First Circuit held that the ordinance was not preempted.

First, the employers argued that the ordinance was preempted by the *Machinists* line of cases, because of the possibility that a successor employer would be mandated to recognize a union should it be compelled to take on the previous employer's employees under the ordinance. The court dismissed that argument, reasoning that for purposes of successor liability an employer would not be considered to have voluntarily retained union employees if the employees were retained to satisfy the ordinance.

The court also found that the ordinance was not preempted by the *Garmon* doctrine. Although retention of employees may be a mandatory subject of bargaining, "it is clear that states can, and do, regulate numerous subjects that the NLRB has held to be mandatory subjects of bargaining."

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C. Privacy

Haggins v. Verizon, 648 F.3d 50 (1st Cir. 2011). *Right to privacy claims preempted by CBA.*

Between November 2008 and February 2009, Verizon New England, Inc. (VNE) began requiring its field technicians to carry company-issued cell phones during work. The cell phones contain a global positioning system (GPS), which allows VNE to determine the location of each field technician through a monitoring service known as Field Force Manager.

Plaintiffs were VNE field technicians who are represented by a union, the International Brotherhood of Electrical Workers, Local 2324 ("Union"), which has a collective bargaining agreement (CBA) with VNE. The plaintiffs asserted that by requiring them to carry these phones, VNE violated (1) their privacy rights under Article 14 of the Declaration of Rights in the Massachusetts Constitution and Mass. Gen. Laws ch. 214, § 1B, and (2) their state-law rights as alleged third-party beneficiaries of a contract between VNE and Verizon Wireless, which they say required VNE to receive consent from its employees when it instituted the phone policy.

The court held that the privacy claims were preempted under §301, of the Labor Management Relations Act ("LMRA") but did not address whether the third-party beneficiary claim was preempted. It then granted

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summary judgment for VNE on the merits. The First Circuit affirmed the dismissal of the claims. The First Circuit discussed preemption:

> This doctrine "applies most readily to state-law contract claims purporting to enforce CBAs covered by section 301," id., but it "extends beyond this point to other claims ... whose enforcement interferes with federal labor law and policy," id. at 54.
> Such interference exists if the state-law claims "require construing the collective-bargaining agreement." … This court has made clear that § 301 preempts a state- *55 law claim when "the asserted state-law claim plausibly can be said to depend upon the meaning of one or more provisions within the collective bargaining agreement."

The court noted that in order to both analyze the employee's privacy interest, as well as the employer's interest, it would have to analyze the rights of the parties under the CBA.

> The dimensions of the employee's "cognizable expectation of privacy," we held, "depend to a great extent upon the concessions the union made regarding working conditions during collective bargaining." The breadth of the Management Rights clause did not alter our conclusion that it was relevant in determining whether the plaintiffs had stated a valid privacy claim... The same is true here.

The court then dismissed the third party beneficiary claim, holding that plaintiffs had produced no evidence that they were the intended beneficiaries of any agreement between the employer and the cell phone company.

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D. Arbitration

D.R. Horton, 357 NLRB No. 184 (2012).

Respondent D. R. Horton, Inc. was a home builder with operations in more than 20 states. In January 2006, the Respondent, on a corporate-wide basis, began to require each new and current employee to execute a "Mutual Arbitration Agreement" ("MAA") as a condition of employment. The MAA provides in relevant part:

> "that all disputes and claims relating to the employee's employment with Respondent (with exceptions not pertinent here) will be determined exclusively by final and binding arbitration;
> that the arbitrator "may hear only Employee's individual claims," "will not have the authority to consolidate the claims of other employees," and "does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding"; and
> that the signatory employee waives "the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company" and "the right to resolve employment-related disputes in a proceeding before a judge or jury."

An employee signed the MAA, and later was represented by an attorney in a FLSA suit. After the company asserted the arbitration agreement as a defense to the suit, the employee filed a charge with the NLRB.

The complaint alleged that the Respondent violated Section 8(a)(4) and (1) by maintaining arbitration agreements requiring employees, as a condition of employment, "to submit all employment related disputes and

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claims to arbitration …, thus interfering with employee access to the [NLRB].”

The Board, ruled:

> The Board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation….In the decades that followed, the Board has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7. Collective pursuit of a workplace grievance in arbitration is equally protected by the NLRA.

The Board went on to hold that their decision did not conflict with the Federal Arbitration Act. The Board found that the FAA upholds the validity of arbitration agreements only where those agreements allow litigants an effective opportunity to vindicate his statutory rights. The Board found that by forcing employees to forego their right to collectively litigate, the arbitration agreement did not allow litigants all the opportunities afforded them under the NLRA. The Board noted a limit to its decision:

> For example, an agreement requiring arbitration of any individual employment-related claims, but not precluding a judicial forum for class or collective claims, would not violate the NLRA, because it would not bar concerted activity.

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V. FAMILY MEDICAL LEAVE ACT

A. Unprotected Leave

Baham v. McLane Foodservice, 431 Fed. Appx. 345 (5th Cir. 2011). Employee is not on protected FMLA leave if he uses time for issues unrelated to the FML*A event*.

Baham requested vacation leave for March 17 through March 28, 2008. During that vacation, Baham's daughter fell and suffered serious head trauma. Baham contacted his supervisor Restrepo and told him about his daughter's injury. Restrepo told Baham to "take all of the time he needed" and forwarded him the necessary FMLA paperwork. Baham completed the FMLA forms requesting leave from March 20 through May 5, 2008 and faxed them to McLane's benefits administrator, Lisa Scudiero.

Scudiero subsequently notified Baham that his FMLA paperwork was incomplete. In response, Baham sent Scudiero additional medical records, but nothing indicating the duration of his daughter's treatment, which was one of the missing pieces of information Scudiero had requested. On April 12, 2008, however, Baham returned to home alone. Baham did not report to work until May 5, 2008 and did not contact McLane at any time between April 12 and May 5 to inform McLane that he had returned from Florida.

Baham testified in his deposition that he returned to Texas because he had received calls from the neighborhood association complaining of his

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untended yard. He also stated that the house needed to be cleaned, and that he needed to add padding to the sharp edges in the home to protect his daughter upon her return. He claimed that he remained in constant contact by telephone with his wife and daughter during the time he was alone in Texas. Baham was alone in Texas from April 12 until April 29, 2008, when his wife and daughter returned to Texas.

Upon returning to work on May 5, Restrepo and McLane's Director of Human Resources informed Baham that his FMLA paperwork was incomplete and asked him to gather the needed information. Later that day, Baham left the McLane premises, leaving his keys and identification card with a security guard. McLane interpreted his departure as a resignation, and sent a letter two days later terminating his employment. Baham disputed that he intended to resign.

Baham filed suit, claiming that McLane terminated him in violation of the FMLA. McLane moved for summary judgment, contending that because Baham did not return to work when he returned to Texas, he could not show that he suffered an adverse employment action and could not show a causal connection between the exercise of his FMLA rights and an adverse employment action.

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The District Court observed that in order to establish the first prong of such a case—that the plaintiff engaged in activity protected under the FMLA—Baham was required to show that he was entitled to FMLA leave throughout the entire period in question.

Noting that the parties agreed that Baham was an eligible employee under the FMLA, that McLane is an employer covered by the FMLA, and that Baham's daughter suffered from a “serious medical condition,” the Court then considered whether Baham was “needed to care for” his daughter during the two weeks he returned to Texas. The Court decided that he was not, concluding that “he was not needed to care for his daughter because ... she would be appropriately cared for by [Baham's] wife and wife's parents in his absence.” Further, the Court observed that “care” under the FMLA requires actual care in close and continuing proximity with the sick family member. Even if padding the house provided Baham's daughter with a benefit, that benefit was only incidental. Thus, the Court concluded that Baham had failed to establish he was entitled to FMLA leave between April 12 and April 29, 2008, and that he therefore could not establish a retaliation claim for engaging in activity protected by the FMLA.

The Fifth Circuit upheld the District Court decision:

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> Here, the record shows that Baham was not with his daughter during the disputed period. Indeed, he was in another state for more than two weeks. Moreover, the work that he was doing while away-including mowing the lawn and cleaning his house, in addition to preparing the house by padding the furniture, does not qualify as care under the FMLA.

B. FMLA Interaction with Employer Policy

<u>Pellegrino v. CWA</u>, 2011 WL 1930607 (W.D. Pa. 2011). *Employee can be fired for violating a separate paid leave policy even where employee does not violate FMLA policy.*

Pellegrino was a member of OPEIU, the union representing clerical employees of CWA and was subject to the OPEIU collective bargaining agreement. On August 7, 2006, CWA promulgated a new Employment Policy Manual to all CWA employees, including Pellegrino, via email.

The Employment Policy Manual included a Sickness and Absenteeism policy. Section I of this policy provides wage replacement for eligible employees on medical leave subject to certain restrictions. These restrictions include CWA's right to require that an employee submit to a medical examination by a CWA-designated physician at any time and provide additional information related to the reason for leave in order to ensure that the purposes of CWA's paid sick leave policy are being met. The Policy also provided that "Employees accepting wage replacement are also

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required to remain in the immediate vicinity of their homes during the period of their sick leave."

In 2008, Pellegrino informed CWA's Assistant Human Resources Administrator, Marilyn Klinger that she needed to undergo a hysterectomy. CWA responded by sending Pellegrino a letter describing her rights and obligations related to unpaid leave under the FMLA. This letter noted that the process of medical certification for FMLA leave was separate from the process involved in being eligible for wage replacement under CWA's sick leave policy, but that Pellegrino was eligible for the FMLA leave and would be required to substitute paid leave under CWA's sick leave policy for the period of time she qualified for those benefits.

CWA approved Pellegrino's FMLA leave. Pellegrino scheduled her hysterectomy surgery for October 2, 2008 and both her unpaid FMLA leave and her sick leave pay began that day.

On October 16, 2008, Pellegrino traveled to Cancun, Mexico where she stayed until October 23, 2008. There is no evidence that Pellegrino informed CWA that she would be out of the country for a week, or that Pellegrino requested vacation time for the trip or permission to travel. After her return, CWA became aware that Pellegrino traveled to Cancun during her leave.

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CWA then sent a letter to Pellegrino later that day notifying her that CWA had decided that traveling to Cancun, Mexico while out on FMLA and disability leave was a violation of CWA's leave policies and work rules and that Pellegrino's employment was terminated. Pellegrino sued, claiming that the termination violated her FMLA rights.

The District Court held that terminating an employee for violating a separate (but related) policy did not violate FMLA:

> Further, the FMLA does not shield an employee from termination if the employee was allegedly involved in misconduct related to the use of the FMLA leave. In fact, the Court of Appeals for the Third Circuit has made it clear that FMLA entitlements in no way prevent an employer from instituting policies to prevent the abuse of FMLA leave, so long as these policies do not conflict with or diminish the rights provided by the FMLA… In making this ruling the court stated, "[T]here is no right in the FMLA to be 'left alone.' Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave ...". Id.
>
> ... Pellegrino's assertion would only be material to this analysis if CWA had terminated her specifically and only because of her abuse of FMLA leave. But CWA's termination decision included its concern that Pellegrino had violated a separate policy by taking a trip while accepting sick leave pay.

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VI. FAIR LABOR STANDARD ACT ("FLSA")

A. Commuting Time and Recordkeeping

Kuebel v. Black and Decker, 643 F. 3d 352 (2d Cir. 2011). *Fact that employee worked from a home office at hours for his own convenience did not convert his commuting time into compensable time; fact that employee did not maintain records of OT work does not defeat his claim to overtime.*

Kuebel sued on behalf of himself and other similarly situated current and former B & D employees, under the Fair Labor Standards Act ("FLSA") and the New York Labor Law. Kuebel asserted that B & D owed him compensation for (1) all of the time he spent commuting between home and the job site (the "commute time" claims), and (2) overtime hours that he allegedly worked but did not record (the "off-the-clock" claims).

Kuebel performed several tasks at his home office. These activities included reading and responding to company emails, checking voicemail, printing and reviewing sales reports, organizing "point-of-purchase" materials (e.g., fact tags for B & D products), making display signs, taking online training courses, and loading and unloading his car. B & D expected these "administrative" duties to take a Retail Specialist on average thirty minutes per day. Kuebel, however, testified that it took him thirty minutes to an hour to complete these at-home activities—fifteen to thirty minutes in the morning, before driving to his first Home Depot store of the day, and

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fifteen to thirty minutes in the evening, after returning home from his last store. B & D asserts that Kuebel was not required to perform all of these activities at home, or at any particular time of day. However, B & D does instruct Retail Specialists to record the time they spend working at home, and its policy is to pay them for that time.

B & D implemented a policy of paying Retail Specialists for time spent driving to their first Home Depot store of the day and for time spent driving home from the last store of the day, to the extent that travel time represented travel in excess of sixty miles for either leg. Some managers, including Kuebel's, instructed their Retail Specialists that commute time to and from home was compensable to the extent it was for travel in excess of sixty minutes in duration, rather than sixty miles in length. Kuebel was compensated in accordance with that policy. For example, if he drove 2.5 hours from home to his assigned store in the morning, and 2.5 hours from that store back home at the end of the day, he was paid for three of those five hours of commuting time.

Kuebel alleged that it was not possible to complete all of his duties in forty hours per week and that, as a result, he frequently worked overtime. However, he did not record any overtime on his timesheets, and thus was not paid for his alleged overtime. Kuebel asserted that he falsified his

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timesheets because his supervisors instructed him not to record more than forty hours per week.

The Court held that (1) as a general matter, B & D's practice of compensating commute time only in excess of one hour complied with the FLSA; (2) the administrative duties performed by Kuebel at home did not render the entirety of his commute time compensable because they were not “integral and indispensable” to his “principal” job activities, and thus did not extend his workday to include his morning and evening commutes; and that no evidence supported his claims to falsified overtime.

On the commute time claims the Circuit Court affirmed the dismissal. Even if Kuebel's at-home activities were integral and indispensable to his principal activities,” they do not render the entirety of his commute time compensable under the FLSA,” according to the court.

Pursuant to the DOL's “continuous workday rule, ... the ‘workday’ is generally defined as ‘the period between the commencement and completion on the same workday of an employee's principal activity or activities.’”

The Court wrote:

> The fact that Kuebel performs some administrative tasks at home, on his own schedule, does not make his commute time compensable any more than it makes his sleep time or his dinner time compensable.

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> The record indicates only that it might have been necessary to perform certain activities in the morning, or in the evening. It does not indicate that Kuebel was required to perform them immediately before leaving home, or immediately after returning home. Indeed, there is nothing in the record to suggest that a Retail Specialist could not, for example, wake up early, check his email, synch his PDA, print a sales report, and then go to the gym, or take his kids to school, before driving to his first Home Depot store of the day; nor was Kuebel prevented from leaving his last store of the day and going straight to a restaurant for dinner, or waiting until late at night to synch his PDA (as electronic records show he sometimes did). That Kuebel may have frequently chosen to perform his at-home activities immediately before and after his commutes does not mean that B & D must pay him for the first hour of those drives—time that was not part of his continuous workday and that was, in the end, "ordinary home to work travel" outside the coverage of the FLSA.

However, the Court reversed the District Court's dismissal of the overtime recordkeeping claims, holding that if plaintiff's claims were true, they could constitute a FLSA violation.

> In other words, once an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation simply because the employee failed to properly record or claim his overtime hours…
> At least where the employee's falsifications were carried out at the instruction of the employer or the employer's agents, the employer cannot be exonerated by the fact that the employee physically entered the erroneous hours into the timesheets. As the District Court emphasized, Kuebel admits that it was he who falsified his timesheets, notwithstanding B & D's official policy requiring accurate recordkeeping. But his testimony—which must

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> be credited at the summary judgment stage—was that he did so because his managers instructed him not to record more than forty hours per week.

B. Offer of Settlement

Simmons v. United Mortgage, 634 F. 3d 754 (4th Cir. 2011). *An employer's offer to settle a FLSA matter containing numerous caveats does not satisfy Rule 68 or the standard for mootness.*

Employees of a mortgage company sued under the FLSA, claiming that they had been improperly classified as exempt administrative employees when in fact they should have been eligible for overtime pay.

An exchange of e-mails between opposing counsel then took place over the next couple of weeks. The e-mails show that the Defendants requested a settlement demand from the Plaintiffs and the Plaintiffs agreed to work on preparing such a demand.

Counsel for the Defendants sent (via electronic mail, United States mail, and facsimile) a letter dated May 16, 2008, to counsel for the Plaintiffs. In the first sentence, counsel for the Defendants stated that he was "writ[ing] for the purpose of resolving this case for all parties." In the second sentence, he reported that his clients had authorized him, "without admitting legal liability or fault, to offer each opt-in plaintiff full relief in this case."

> This offer of full relief moots this case since there no longer remains any active case or controversy between the parties. This offer remains open for five days after

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> receipt on May 23, 2008. Thereafter, if this offer is not accepted, I will file a motion to dismiss the case as moot.

Defendants then moved to dismiss the entire case for lack of subject matter jurisdiction. According to the Defendants, the Court no longer possessed subject matter jurisdiction, because they "ha[d] offered to satisfy Plaintiffs' claims in their entirety," leaving no "live case or controversy requiring litigation."

The Court granted Defendants' motion to dismiss the Plaintiffs' FLSA claims. The Court determined that "Defendants['] offer of judgment to all Plaintiffs and would-be opt-in Plaintiffs was for full relief, including attorney's fees and taxable costs, and thus the case was moot.

The Circuit Court overturned the dismissal, holding that the terms of the settlement offer neither rendered the case moot nor constituted a Rule 68 offer of judgment.

First, the May 16, 2008 letter provided for a five day window to accept the Defendants' offer rather than a ten day window as provided by the applicable version of Rule 68. Second, rather than making an unconditional offer of judgment on specified terms, the letter conditioned the offer upon the Plaintiffs submitting affidavits stating "the dates on which overtime was worked, the total hours they worked each week of their employment up to

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the date of their termination, the total amount of back pay they claim is owed to them, and a statement explaining how the calculation of overtime amounts claimed was done.". Third, rather than offer to have judgment entered against them as the District Court had found, the plain language of the letter offered only that the Defendants would "enter a settlement agreement specifying that all claims will be waived and released....". Fourth, in contrast to the public nature of an unsealed judgment entered pursuant to Rule 68, the May 16, 2008 letter required the Plaintiffs to keep the fact of settlement and the terms of the settlement confidential.

The court then addressed the Constitutional issue of mootness:

> While we agree with the Plaintiffs that the May 16, 2008 letter, as clarified by the May 29, 2008 letter, did not constitute a Rule 68 offer of judgment, such agreement does not mean an automatic win for the Plaintiffs. This is because the doctrine of mootness is constitutional in nature, and therefore, not constrained by the formalities of Rule 68. Nonetheless, for several reasons, we hold the Defendants' settlement offer, as set forth in the May 16, 2008 letter and as clarified by the May 29, 2008 letter, did not render moot the Plaintiffs' FLSA claims for overtime wages. The first reason is that the offer for "full relief in this case" did not offer for judgment to be entered against the Defendants, but rather only offered for the parties to enter into a settlement agreement. Had the Plaintiffs been allowed to litigate fully *765 their FLSA claims and had they fully prevailed on such claims, the District Court would have entered a judgment against the Defendants for full relief with respect to those claims. From the view of the Plaintiffs, a judgment in

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their favor is far preferable to a contractual promise by the Defendants in a settlement agreement to pay the same amount.

C. Outside Salesman Exemption

Christopher v. Smithkline Beecham, 635 F. 3d 383 (9th Cir. 2011). *Although pharmaceutical representatives do not strictly "sell" drugs to physicians, their job is clearly selling for purposes of qualifying for the outside sales exemption.*

Plaintiffs were employed as Pharmaceutical Sales Representatives ("PSRs") for Glaxo. Glaxo classified Plaintiffs as "outside salesmen"—a legal designation that exempted the employee from the FLSA's overtime-pay requirement. Plaintiffs' suit challenged Glaxo's classification and sought back pay. The District Court granted summary judgment to Glaxo. The Ninth Circuit affirmed.

Glaxo employed PSRs to make "calls" on physicians to encourage them to prescribe Glaxo products. On calls, PSRs typically present physicians with a variety of information about Glaxo products, provide product samples, and attempt to convince the physicians to prescribe Glaxo products, when medically appropriate, over competitor products. PSRs also try to build business relationships with physicians, respond to their concerns, and recruit them to attend Glaxo-organized dinners and conventions.

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Plaintiffs received two types of pay - salary and incentive-based compensation. Incentive-based compensation is paid if Glaxo's market share for a particular product increases in a PSR's territory, sales volume for a product increases, sales revenue increases, or the dose volume increases. Glaxo aims to have a PSR's total compensation be approximately 75% salary and 25% incentive compensation.

In granting Glaxo's motion for summary judgment, the District Court addressed only the outside sales exemption and held that PSRs "unmistakably fit within the terms and spirit of the exemption." The court observed that PSRs "are not hourly workers, but instead earn salaries well above minimum wage—up to $100,000 a year," and that they receive bonuses in lieu of overtime as "an incentive to increase their efforts." The District Court continued, "A PSR's ultimate goal is to close an encounter with a physician by obtaining a nonbinding commitment from the physician to prescribe the PSR's assigned product. In this highly regulated industry, that is the most a PSR can achieve."

On appeal, the Circuit Court disregarded the DOL's interpretation of the outside salesperson exemption and upheld the dismissal.

> We conclude that we owe no deference to the Secretary's current interpretation of the regulations, and, in any event, we respectfully disagree with that interpretation.

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> …As it has done here, the DOL took the position that "when an employee promotes to a physician a pharmaceutical that may thereafter be purchased by a patient from a pharmacy ... the employee does not in any sense make the sale."
>
> …Plaintiffs' contention that they do not "sell" to doctors ignores the structure and realities of the heavily regulated pharmaceutical industry. It is undisputed that federal law prohibits pharmaceutical manufacturers from directly selling prescription medications to patients. Plaintiffs suggest that despite being hired for their sales experience, being trained in sales methods, encouraging physicians to prescribe their products, and receiving commission-based compensation tied to sales, their job cannot "in some sense" be called selling. This view ignores the reality of the nature of the work of detailers, as it has been carried out for decades. Plaintiffs' argument also fails to account for the fact that the relevant "purchasers" in the pharmaceutical industry, and the appropriate foci of our inquiry, are not the end-users of the drug but, rather, the prescribing physicians whom they importune frequently….The primary duty of a PSR is not promoting Glaxo's products in general or schooling physicians in drug development. These are but preliminary steps toward the end goal of causing a particular doctor to commit to prescribing more of the particular drugs in the PSR's drug bag. Without this commitment and the concomitant increase in prescriptions, or drug volume, or market share—i.e. without more sales—the PSR would not receive his or her commission salary and could soon find himself or herself unemployed.

D. Learned Professional Exemption

Solis v. Washington, 656 F. 3d 1079 (9th Cir. 2011). *Caseworkers at social service agency are not learned professionals because their educational requirements are not specific enough.*

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The Secretary of Labor filed a complaint against the State of Washington, Department of Social and Health Services ("DSHS"), alleging that DSHS failed to pay overtime compensation to certain social workers in violation of the FLSA The District Court granted summary judgment in favor of DSHS, concluding that the social workers come within the "learned professional" exemption to the FLSA's overtime pay requirements. The Secretary appealed, and the Circuit Court sided with the Secretary in reversing. The Circuit Court wrote that:

> To avail itself of the "learned professional" exemption, an employer must show that a position requires advanced knowledge customarily acquired by a prolonged course of specialized intellectual instruction. Because the social worker positions at issue here require only a degree in one of several diverse academic disciplines or sufficient coursework in any of those disciplines, we conclude that DSHS has not met its burden of showing that its social worker positions "plainly and unmistakably" meet the regulatory requirement.

Under DOL regulations, the term "employee employed in a bona fide professional capacity" means an employee whose primary duties require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." The section entitled "Learned Professionals" provides that:

> (a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of

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> work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:
> (1) The employee must perform work requiring advanced knowledge;
> (2) The advanced knowledge must be in a field of science or learning; and
> (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

In a 2005 opinion letter, the DOL addressed the application of the "learned professional" exemption to a different group of social workers and caseworkers. The letter distinguished social worker positions that required "a master's degree in social work, drug and alcohol, education, counseling, psychology, or criminal justice," from caseworker positions that required only "a bachelor's degree in social sciences." ("2005 Letter"). The DOL concluded that the criteria for the social worker position "require[d] advanced knowledge in a 'field of science or learning,' " and that such workers would qualify for the exemption as long as they "work[ed] in the field of their degree." On the other hand, the caseworker position did not qualify for the exemption because "[t]he course of study for a bachelor's degree in 'social sciences' does not constitute the 'specialized' academic training necessary to qualify an occupation for the learned professional exemption."

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The court found this case to be close in facts to the facts of that opinion letter.

> An educational requirement that may be satisfied by degrees in fields as diverse as anthropology, education, criminal justice, and gerontology does not call for a "course of specialized intellectual instruction."

E. Administrative Exemption - Police and First Responders

Mullins v. City of New York, 653 F. 3d 104 (2d Cir. 2011). *Sergeants are not exempt executive employees; the DOL's interpretation of such is entitled to deference and retroactive application.*

In this longstanding FLSA litigation, the Circuit Court was called on to determine whether the trial court erred by not affording deference to the DOL's "first responder" regulations.

> In our limited role, we conclude that the DOL's interpretation is not "plainly erroneous or inconsistent" with the pertinent FLSA regulations and thus is entitled to controlling deference. Applying that interpretation to the facts of this case, we conclude that the primary duty of sergeants is not "management" and therefore plaintiffs do not qualify for the "bona fide executive" exemption from the FLSA's overtime pay requirements. Accordingly, we reverse the District Court's judgment and remand the case to the District Court with instructions to enter judgment in favor of plaintiffs and for further proceedings not inconsistent with this opinion.

The instant case involved police sergeants. While their specific duties vary according to unit, sergeants are generally involved in activities that

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include pursuing, restraining, and apprehending suspects. Sergeants interview witnesses, suspects, victims, and vehicle operators. They are dispatched to all arrests in their unit and must respond when directly dispatched. Sergeants are responsible for verifying whether probable cause to arrest a suspect exists. They also verify the target location for search warrants and determine whether a warrant is appropriate based on their judgment and evaluation as to the existence of probable cause. Sergeants secure and determine the size and scope of a crime scene prior to the arrival of the Crime Scene Unit. Sergeants also make the determination as to whether a show-up or line-up identification procedure may be conducted under the circumstances.

The District Court's opinion denying the officer's request for overtime began its analysis by acknowledging that the DOL had promulgated a new regulation, effective August 23, 2004, that entitles "first responders" to "overtime pay even if they direct the work of other police officers because their primary duty is not management....". The District Court HAD concluded, however, that the DOL had "no intention" in promulgating this regulation "of departing from [ ] established case law," and therefore proceeded to apply the general primary duties test to the test sergeants to determine whether their primary duty was management.

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The Circuit Court first concluded that the regulations relating to the administrative exemption, primarily the first responder regulation, were ambiguous.

> Since the regulation is ambiguous, we turn to the Secretary's interpretation of it in her amicus brief. The Secretary's interpretation is entitled to controlling deference, even if articulated in an amicus brief, unless it is " 'plainly erroneous or inconsistent with the regulation[s]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.' "

Once the court concluded that the first responder regulation was entitled to deference, it quickly dispatched of the case:

> The Secretary's controlling interpretation of the first responder regulation dictates the conclusion that plaintiffs' primary duty is not management. The undisputed record on summary judgment demonstrates that plaintiffs in this case clearly perform the type of work enumerated in the first responder regulation. The District Court concluded that sergeants regularly conduct investigations and inspections for violations of law by "verifying whether probable cause to arrest a suspect exists, determining whether a show-up identification procedure is justified, [and] making tactical decisions such as when to retreat from a crime scene." Mullins, 523 F.Supp.2d at 358 (footnotes omitted). Duties that are specific to sergeants and not handled by subordinate police officers similarly relate to their law enforcement tasks: "Sergeants are dispatched and required to respond when situations involving emotionally disturbed individuals arise, as police officers are not permitted to take such people into custody. In handling suspects, sergeants are authorized to use certain restraining devices

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> that are not available to police officers [including] tasers, water cannons, and restraining tape." Id. (footnote omitted). Since plaintiffs "perform law enforcement duties alongside patrol officers in the field," id. at 357 (footnote omitted), and "generally spend much of their time in the field with their subordinates," id. at 358 (footnote omitted), the first responder regulation, 29 C.F.R. § 541.3(b), applies to the analysis of whether they may be deemed "exempt" executives under the FLSA.

F. Administrative Exemption

Verkuilen v. Mediabank, 646 F. 3d 979 (7th Cir. 2011). *Account Manager was exempt administrative employee.*

The plaintiff was an account manager MediaBank that provides computer software to advertising agencies; she acted as a bridge between the software developers and the customers, helping to determine the customers' needs, then relaying those needs to the developers and so assisting in the customization of the software, and finally helping the customers use the customized software. The District Court rejected her overtime claim on summary judgment.

On appeal, the Circuit Court summarily upheld the District Court's judgment that plaintiff was an exempt administrative employee, finding that her work was directly related to the general business operations of her employer.

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Still it is apparent that our plaintiff is a picture perfect example of a worker for whom the Act's overtime provision is not intended.

The manager of a customer's account has to learn about the customer's business and help MediaBank's software engineers determine how its software can be adapted to the customer's needs.

The account manager is not a salesman for Best Buy or a technician sitting at a phone bank fielding random calls from her employer's customers—instead she's on the customer's speed dial during the testing and operation of the customer's MediaBank software. As the intermediary between employees of advertising agencies struggling to master complex software and the software developers at MediaBank, she has to spend much of her time on customers' premises training staff in the use of the software, answering questions when she can and when she can't taking them back to MediaBank's software developers, and then explaining their answers to the customer and showing the customer how to implement the answers in its MediaBank software. Identifying customers' needs, translating them into specifications to be implemented by the developers, assisting the customers in implementing the solutions—in the words of MediaBank's chief operating officer, account managers are expected to "go out, understand [the customers' requirements], build specifications and understand the competency level of our customers. Then they will build functional and technical specifications and turn it over to ... developers who will then build the software, ... checking in with the account manager, making sure what they are building is ultimately what the customer wanted."

Thus the plaintiff's primary duty was directly related to the general business operations both of her employer and (as in a consulting role) of the employer's customers.

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G. Executive Exemption

<u>In re Family Dollar FLSA Litigation</u>, 637 F. 3d 508 (4th 2011). *Store manager is "always" managing, even when she is pushing a broom; thus primary duty is store management and thus an exempt function.*

Grace was a store manager at Family Dollar. While Family Dollar treated Grace as an executive exempt from overtime pay requirements she argued that she was not subject to this exemption because she devoted the vast majority of her time to nonexecutive tasks and therefore should be paid wages on the basis of a 40–hour work week plus overtime. She sought relief on behalf of herself and other employees similarly situated.

Even though the record showed that a store manager was required to perform the full range of tasks necessary for the successful operation of a store, including nonexecutive tasks, she nonetheless remained the highest level Family Dollar employee at the store, and her income depended on the success of her performance and the profits of the store. After applying the statutory and regulatory factors the Circuit Court concluded that she was exempt and therefore not entitled to overtime pay. Accordingly, it affirmed the judgment of the District Court.

The store manager supervises one or more hourly assistant managers and multiple hourly employees, who work as clerks. Each store manager

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sets his or her own hours of employment and is authorized to make decisions that affect the profitability of the store. Each store, which can vary in size from 3,700 square feet to 12,300 square feet, is a profit center, and the store manager receives a bonus that is directly related to the profitability of the store.

Family Dollar's store managers open and close stores; train, supervise, discipline, and evaluate employees; order inventory; handle relations with customers, both to assure their satisfaction and also to monitor their conduct to prevent theft; operate the stores against a quarterly budget; handle the money received by the store, make deposits, and complete the paperwork related to sales and receipts. The store managers also devote a large percentage of their time to nonexecutive tasks, such as unloading freight, stocking shelves, running cash registers, and cleaning up.

Grace contended that while she was a manager, most of her time, and thus her primary duty, was in nonmanagerial tasks. The court, however, concluded that Grace was always performing managerial tasks, even when she was sweeping the store:

> In this case, Grace was in charge of a separate retail store, seeking to make it profitable. While she catalogs the non-managerial jobs that she had to do, claiming that they occupied most of her time, she does so without recognizing that during 100% of the time, even while

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> doing those jobs, she was also the person responsible for running the store. Indeed, there was no one else to do so, and it cannot be rationally assumed, nor does the record support a claim, that the store went without management 99% of the time. Grace also fails to acknowledge the importance of performing non-managerial tasks in a manner that could make the store profitable, the goal of her managerial responsibility. ….Whether she was collecting cash, filling out paperwork, sweeping the floor, stocking shelves, hearing the complaint of a customer, working with employees on their schedules, or running a cash register, she was fulfilling her task of running the store. There was no one else at the site to direct these actions.

VII. BENEFITS

A. Breach of Contract - Stock Options

Goldstein v. Evantra, 79 Mass. App. Ct. 1117 (2011)

In a summary, unpublished decision, the Massachusetts Appeals Court held that where neither a consulting agreement nor a stock option certificate required the employer to notify the employee of the expiration of a stock option, the employer could not be liable for breach of contract in failing to notify the employee of the stock option expiration. Likewise, the court rejected covenant of fair dealing claims on the same facts.

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Bevington v. Comverse Technology, 796 F. Supp. 2d 257 (D. Mass. 2011). *Employer adequately conveyed concerns about stock option to employee; release was knowing and intelligent.*

Plaintiff received stock option grants from Comverse between 1996 and 2001. Each stock option agreement contained a 10–year expiration date from the date of the grant and provided that the stock options could only be exercised while the participant was employed by Comverse or within three months after the date he or she ceased to be a Comverse employee. The stock options fully vested four years after the date of the grant.

On April 17 and 24, 2006, Comverse employees were informed by email that the Securities and Exchange Commission ("S.E.C.") had suspended Comverse's right to deal in or redeem its stock options due to a finding that Comverse's financial statements were unreliable. The second email included a "Question and Answer" page addressing the consequences of the suspension of stock option exercises which informed employees that any extension of the stock option exercise period may not extend beyond ten years from the original date of grant of the options.

On June 19, 2007, Bevington was informed that his employment at Comverse was being terminated effective June 22, 2007. That day, Human Resources presented him with a separation package which included a pamphlet explaining that, while he would have 30 days after the prohibition

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on stock option exceptions was lifted in which to exercise his options, any extension of the stock option exercise period would not extend beyond 10 years from the original date of the grants of his stock options. Finally, the package included a document entitled "Agreement and Full and Final Release" ("Release") which Bevington signed on June 25, 2007.

The effective date of the agreement was July 3, 2007. The Release specifically released Comverse from any claims for breach of contract, fraud, misrepresentation and promissory estoppel. In consideration for signing the Release, Bevington was paid $55,000, or 26 weeks of his full base salary.

Five months after his termination, on November 21, 2007, Bevington emailed Comverse to ask what would happen if stock trading did not resume before his options expired. Stock trading had not yet resumed. The Associate General Counsel for Comverse responded that Comverse was unable to unilaterally extend the expiration date of granted options ... [and that] ... the issue will not be considered until after the expiration date.

Due to his inability to exercise his stock options, plaintiff filed this action.

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The Court held that the Release was enforceable, and barred plaintiff's claims because it was a knowing and voluntary release of liability for which plaintiff was adequately compensated.

> First, plaintiff was certainly capable of understanding the nature of the Release. He is an educated individual who holds a graduate degree in engineering and was a professional employee earning approximately $110,000 annually…Second, the Release specifically and very clearly addressed Bevington's rights with respect to his stock options and expressly releases Comverse from, inter alia, claims for breach of contract, fraud and misrepresentation.

Bevington had 45 days to analyze the Release before signing it and seven days to revoke the Release after signing it. Bevington waited six days to sign the Release because he "wanted to make sure that he was covering all of his bases." He acknowledged that he carefully read the Release more than once before signing it and understood everything, including that his stock options would expire ten years after they were granted with no extension.

Finally, Comverse paid Bevington $55,000 in consideration for the Release. Comverse claimed that amount is approximately five times the value of Bevington's expired stock options. The court noted "That is certainly adequate compensation for a release of this kind."

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