OVERVIEW OF NOTABLE DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW, 2010 – 2011

Presented by Katherine A. Hesse

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OVERVIEW OF NOTABLE DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW, 2010 – 2011

Presented by Katherine A. Hesse[1]

I. SUPREME COURT REVIEW

A. QUOTE OF THE YEAR: "PEOPLE MAKE MISTAKES, EVEN ADMINISTRATORS OF ERISA PLANS"

Conkright v. Frommert, 130 S. Ct. 1640, 2010 WL 1558979, (April 21, 2010). *A "single honest mistake" does not justify application of a non-deferential standard of review.*

Xerox Corporation's pension plan used a "phantom account offset" to calculate the benefits of employees who were later rehired by Xerox after they had previously received lump-sum distributions of their pension benefits. The method calculated the hypothetical growth of the employees' past distributions if the money remained in Xerox's investment funds, and reduced the benefits accordingly. This group of employees filed suit against Xerox, alleging that this "phantom account offset" violated ERISA. The U.S. District Court for the Western District of New York granted summary judgment to the Plan and applied a deferential standard of review to the Plan's interpretation. On appeal, the Second Circuit vacated and remanded the decision holding that Xerox's

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[1] The presenter would like to thank Clifford Rhodes, Robin Hegerich and Law Clerk, Kier Wachterhauser, for preparing this summary.

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decision was unreasonable as it violated ERISA's anti-cutback provision by illegally reducing the pension benefits of workers rehired prior to 1998 by imposing the phantom account offset to reduce the workers' benefits, and that it had not provided adequate notice to the employees that the phantom method would be used to calculate their benefits.

On remand, the district court did not apply a deferential standard and did not accept Xerox's interpretation. The court instead utilized the employees' proposed approach, which did not account for the time value of the money. The Second Circuit affirmed the district court's ruling not to apply a deferential standard.

On appeal, the Supreme Court addressed two issues in its decision: (1) whether a court must defer to a plan administrator's interpretation of the plan, and (2) whether the Court of Appeals properly granted deference to the District Court on the merits. The Court began its decision by stating that "[p]eople make mistakes. Even administrators of ERISA plans." The Court then stated that in the ERISA context, a "single honest mistake" in interpreting an ERISA plan does not justify stripping the Plan administrator of deferential review in judicial proceedings. It added that it was wrong for the lower courts to take away the deference that should have been paid to Xerox's plan administrator. According to the Court, the Second Circuit's decision crafted an exception to <u>Firestone</u>

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deference by finding that courts do not have to apply a deferential standard of review "where the administrator ha[s] previously construed the same plan terms" and a court has found that such a construction violates ERISA.

The Court rejected the "one-strike-and-you're-out" approach because there was nothing in Firestone that created the exception adopted by the Second Circuit. The Court noted that the Supreme Court recently refused to create such an exception to deference owed to plan administrators in Metropolitan Life Insurance Co. v. Glenn, 128 S. Ct. 2343 (2008). The Court in Glenn, recognized that dual-role plan administrators operate under a conflict of interest, but that the conflict of interest does not strip administrators of deferential review. Specifically, the Court stated that "if, as we held in Glenn, a systemic conflict of interest does not strip a plan administrator of deference, ... it is difficult to see why a single honest mistake would require a different result."

The Court also held that there was nothing in trust law that requires such an exception to Firestone deference. The Court acknowledged that ERISA cases are "guided by principles of trust law" but that it "does not tell the entire story." The Court then went on to say that the guiding principles behind ERISA would require courts to give deferential review to plan administrators that make mistakes.

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The Court stated that "deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review."

The Court rejected the employees' argument that applying "deference would encourage plan administrators to adopt unreasonable interpretations of plans in the first instance" as they would receive a second chance to interpret the plan if their first interpretation was rejected. The Court called this argument "overblown" and stated that administrators could be stripped of deference if they are incompetent or do not exercise their discretion honestly and fairly. It further reasoned that "applying a deferential standard of review does not mean that the plan administrator will prevail on the merits. It means only that the plan administrator's interpretation of the plan 'will not be disturbed if reasonable."

B. ATTORNEY'S FEES – PREVAILING PARTY - SUCCESS ON THE MERITS

Hardt v. Reliance Std. Life Ins. Co., 130 S. Ct. 2149**,** 2010 U.S. LEXIS 4164, 49 EBC 2001 (4th Cir.) (May 24, 2010)**.** *ERISA plaintiff could not recover attorney fees even if she were not a "prevailing party" because she achieved some degree of success on the merits.*

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In 2000, while working as an executive assistant to the president of the employer, petitioner Bridget Hardt began experiencing neck and shoulder pain. Her doctors eventually diagnosed her with carpal tunnel syndrome. When surgeries on both her wrists failed to alleviate her pain, Hardt stopped working in January 2003.

In August 2003, Hardt sought long-term disability benefits from Dan River's Group Long-Term Disability Insurance Program Plan (Plan). Dan River administers the Plan, which is subject to ERISA, but Reliance decides whether a claimant qualifies for benefits under the Plan and underwrites any benefits awarded. Reliance provisionally approved Hardt's claim, telling her that final approval hinged on her performance in a functional capacities evaluation intended to assess the impact of her carpal tunnel syndrome and neck pain on her ability to work.

Hardt completed the functional capacities evaluation in October 2003. The evaluator summarized Hardt's medical history, observed her resulting physical limitations, and ultimately found that Hardt could perform some amount of sedentary work. Based on this finding, Reliance concluded that Hardt was not totally disabled within the meaning of the Plan and denied her claim for disability benefits. Hardt filed an administrative appeal. Reliance reversed itself

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in part, finding that Hardt was totally disabled from her regular occupation, and was therefore entitled to temporary disability benefits for 24 months.

After reviewing the physician's report, the labor market study, and the results of the 2003 functional capacities evaluation, Reliance concluded that its decision to terminate Hardt's benefits was correct. It advised Hardt of this decision in March 2006.

After exhausting her administrative remedies, Hardt sued Reliance in the United States District Court for the Eastern District of Virginia. She alleged that Reliance violated ERISA by wrongfully denying her claim for long-term disability benefits. The parties filed cross-motions for summary judgment, both of which the District Court denied.

The court first rejected Reliance's request for summary judgment affirming the denial of benefits, finding that "Reliance's decision to deny benefits was based on incomplete information." Most prominently, none of the functional capacities evaluations to which Hardt had submitted had "assessed the impact of neuropathy and neuropathic pain on Ms. Hardt." In addition, the reviewing physician's report "was itself incomplete"; the basis for the physician's "medical conclusions was extremely vague and conclusory," and the physician had "failed to cite any medical evidence to support his conclusions," or "to address the treating physicians' contradictory medical findings,". The

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court also found that Reliance had "improperly rejected much of the evidence that Ms. Hardt submitted," and had "further ignored the substantial amount of pain medication Ms. Hardt's treating physicians had prescribed to her." Accordingly, the court thought it "clear that Reliance's decision to deny Ms. Hardt long-term disability benefits was not based on substantial evidence."

Although it was "inclined to rule in Ms. Hardt's favor," the court concluded that "it would be unwise to take this step without first giving Reliance the chance to address the deficiencies in its approach." In the court's view, a remand to Reliance was warranted because "[t]his case presents one of those scenarios where the plan administrator has failed to comply with the ERISA guidelines," meaning "Ms. Hardt did not get the kind of review to which she was entitled under applicable law."

Accordingly, the court instructed "Reliance to act on Ms. Hardt's application by adequately considering all the evidence" within 30 days; "otherwise," it warned, "judgment will be issued in favor of Ms. Hardt."

Reliance did as instructed. After conducting that review, Reliance found Hardt eligible for long-term disability benefits and paid her $ 55,250 in accrued, past-due benefits. Hardt then moved for attorney's fees and costs under § 1132(g)(1).

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The District Court assessed her motion under the three-step framework that governs fee requests in ERISA cases under Fourth Circuit precedent. At step one of that framework, a District Court asks whether the fee claimant is a "'prevailing party.'" If the fee claimant qualifies as a prevailing party, the court proceeds to step two and "determines whether an award of attorneys' fees is appropriate" by examining "five factors. Finally, if those five factors suggest that a fees award is appropriate, the court "must review the attorneys' fees and costs requested and limit them to a reasonable amount.

These five factors are: "'(1) the degree of opposing parties' culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.'"

Applying that framework, the District Court granted Hardt's motion. It first concluded that Hardt was a prevailing party because the court's remand order "sanctioned a material change in the legal relationship of the parties by ordering [Reliance] to conduct the type of review to which [Hardt] was entitled." The court recognized that the order did not "sanction a certain result on remand," but

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found that it "quite clearly expressed the consequences to [Reliance] were it to fail to complete its reconsideration in an expeditious manner." Accordingly, the remand order "signified that the court was displeased with the cursory review that [Reliance had initially given to [Hardt's] claim, but was inclined to reserve judgment and permit [Reliance] to conduct a proper review of all of the medical evidence." The court concluded that a fee award was appropriate under the five-factor test, and awarded $39,149 in fees and costs.

Reliance appealed the fees award, and the Court of Appeals vacated the District Court's order. According to the Court of Appeals, Hardt failed to satisfy the step-one inquiry -- *i.e.*, she failed to establish that she was a "prevailing party." The Court of Appeals reasoned that because the remand order "did not require Reliance to award benefits to Hardt," it did "not constitute an 'enforceable judgment on the merits' as *Buckhannon* requires," thus precluding Hardt from establishing prevailing party status.

In a unanimous decision, the Supreme Court reversed, and reinstated the attorney's fees award. Its basic point of reference was the American rule that each party bears its own fees unless the applicable statue provides otherwise. The court noted that the words "prevailing party" do not appear in the relevant attorney's fees provision. Nor, according to the Court does anything else in § 1132(g)(1)'s text purport to limit the availability of attorney's fees to a

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"prevailing party." Instead, § 1132(g)(1) expressly grants District Courts "discretion" to award attorney's fees "to *either* party." The Court noted that that language contrasted sharply with § 1132(g)(2), which governs the availability of attorney's fees in ERISA actions under § 1145 (actions to recover delinquent employer contributions to a multiemployer plan). In such cases, only plaintiffs who obtain "a judgment in favor of the plan" may seek attorney's fees.

Because Congress failed to include in § 1132(g)(1) an express "prevailing party" limit on the availability of attorney's fees, the Court of Appeal decision adding that term of art to a fee-shifting statute from which it is conspicuously absent more closely resembles "invent[ing] a statute rather than interpret[ing] one." Instead, the Court interpreted § 1132(g)(1) in light of precedents addressing statutory deviations from the American Rule that do not limit attorney's fees awards to the "prevailing party."

> Accordingly, a fees claimant must show "some degree of success on the merits" before a court may award attorney's fees under § 1132(g)(1). A claimant does not satisfy that requirement by achieving “trivial success on the merits" or a "purely procedural victor[y]," but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a "lengthy inquir[y] into the question whether a particular party's success was 'substantial' or occurred on a 'central issue.'

Because Hardt’s litigation ultimately resulted in her being awarded benefits, even though the award was technically made by the Plan itself rather than a

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court, the Supreme Court acknowledged that the Plan's decision was essentially forced by the order of a court. The Court held that the facts established that Hardt has achieved far more than "trivial success on the merits" or a "purely procedural victory." Accordingly, she had achieved "some success on the merits," and the District Court properly exercised its discretion to award Hardt attorney's fees in the case. The Court's decision did not address whether a simple remand order without more would make a plaintiff eligible for attorneys fees.

C. TIME LIMITS – EEOC – PAST DISCRIMINATORY ACTS

<u>Lewis v. City of Chicago,</u> ___ U.S.__ (2010), 130 S. Ct. 2191; (7th Cir.) (May 24, 2010). *The 300 day window in which a complainant may file a complaint with the EEOC remains open if a past discriminatory act is still in "use" within the past 300 days, even if more than 300 days has passed since the initial discriminatory act.*

In 1995, the City of Chicago used a written examination as an initial test to screen applicants who sought a position as a firefighter for the city. Applicants received a score of "well-qualified" or "qualified," or were otherwise notified that they were considered "not qualified" and would not be considered for the position. Of those who received a mark of "well-qualified," individuals were randomly selected to proceed to the next round of testing which included physical tests and medical examinations, and if satisfactory results were achieved, were hired for the position. When the pool of "well-

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qualified" applicants ran out, those from the "qualified" range were randomly selected to fill still-remaining spots. The random selection process, utilizing the 1995 score results, continued for multiple years.

In 1997, an African American applicant who scored in the "qualified" category and was not hired filed suit against the City of Chicago under Title VII of the 1964 Civil Rights Act. Specifically, he alleged that the 1995 written examination used by the city disparately impacted African Americans. The City sought to dismiss the case because it was filed in court more than 300 days after the applicant took the test in 1995. The district court allowed the trial to continue, calling the city's continued reliance on the test a "continuing violation" and therefore the 300 days window had not closed. The Seventh Circuit reversed, finding that the only illegal act took place more than 300 days prior, in 1995, when the City sorted the applicants into the "well-qualified," "qualified," and "not-qualified" categories.

The Supreme Court took the position of the district court. Finding that Title VII disparate impact theory protects against the "use" of an unlawful employment practice, the Supreme Court ruled that the 1995 scores were still in "use" when additional selections were made in 1996 and 1997. Since the scores from the 1995 test were still in "use" within the 300 day window, there was a cognizable claim under Title VII for disparate impact.

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D. PRIVACY – SEARCH OF TEXT MESSAGES

<u>City of Ontario v. Quon</u>, ___ U. S. ___ (2010)**,** 2010 U.S. LEXIS 4972 (9th Cir.) (June 17, 2010). *Because the search was reasonable in inception and scope, a city's search of its SWAT team members' pager text messages did not violate the Fourth Amendment of the United States Constitution.*

This case addresses a question of workplace privacy, specifically whether a city violated the privacy of one of its employees by reviewing the employee's text messages sent on a pager supplied by the city for work-related purposes. The City of Ontario, California, provided members of its police SWAT team pagers on which they could send alphanumeric text messages. The city envisioned the use of these pagers for work purposes, allowing its officers to respond and mobilize more effectively in the event of an emergency.

This suit arose when a SWAT team member had his pager communications reviewed by the city after consistently exceeding the allotted monthly usage. The city sought to determine if the usage was due to work-related or personal use to determine whether its current allowed use was sufficient to cover the (work-related) needs of the city. Found were a large number of personal messages, some sexually explicit in nature. The employee was disciplined. The SWAT team member alleged violation of the Fourth Amendment, which protects against unlawful searches by the government.

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The Supreme Court ruled that there was no violation because the search by the City was reasonable both at "inception" and in its "scope." It was reasonable in its inception because determining if the usage limits were sufficient to meet the work-related needs of the SWAT team was necessary for the "work-related" purpose of determining how the pagers were being used. It was reasonable in its scope because looking at the content of the messages was an "efficient and expedient" way to determine whether the use of the pager was work-related or personal in nature. Because it was reasonable in inception and scope, the city did not violate the Fourth Amendment of the United States Constitution.

E. NATIONAL LABOR RELATIONS BOARD – AUTHORITY TO ACT – QUORUM

New Process Steel, L.P. v. National Labor Relations Board, ___ U. S. ___ (2010), 2010 U.S. LEXIS 4973, (June 17, 2010). *The National Labor Relations Board does not have authority under the Taft-Hartley Act to decide cases with only with only two members on the Board. Three members, at the minimum, are required.*

The Taft-Hartley Act of 1947 increased the size of the National Labor Relations Board ("Board") from three to five members and allowed the Board to delegate its authority to a quorum of three members. This case arose in 2007 when a series of events left the board with four members, two of whose terms would come to an end at the close of the year. Prior to the departure of the two members, and in an effort to preserve its authority, the Board decided to solve

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the problem by delegating its authority to a three member quorum, composed of the two members who would remain at the end of 2007 and one who was set to leave at the end of the year. When 2007 came to a close, the Board contained only two members. The Board expressed its opinion that the two remaining members could continue to function, hearing and ruling on cases until new members were appointed to the Board. In the course of the following 27 months, the two member Board decided almost 600 cases.

A number of companies came forward to challenge the authority of this two member board. The Seventh Circuit ruled in favor of the Board, finding that, in light of the statutory language of the Taft-Hartley Act and its legislative history, the Board had acted appropriately and the two member Board had the authority to decide cases before it. The Court of Appeals for the District of Columbia, hearing a different case, came to the opposite conclusion. The Supreme Court, looking at the text of the statute, likely intent of Congress, and long-standing practice of the Board, sided with the Court of Appeals for the District of Colombia. It decided that the Board, to have the authority to act, must maintain at least three members in its delegee group. The cases were remanded for further proceedings consistent with this opinion.

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F. ARBITRATION – LABOR DISPUTE – ROLE OF COURT – ROLE OF ARBITRATOR

<u>Granite Rock Co. v. International Brotherhood of Teamsters,</u> 561 U.S. 2010, (June 24, 2010). *It is the role of the courts to decide "when" an arbitration clause in a collective bargaining agreement takes effect; the Labor Management Relations Act does not allow a claim for "tortious interference" with a labor agreement*

This case arose out of a labor dispute after a collective bargaining agreement expired and negotiations broke down between the Granite Rock, Co. and the union representing its employees. On June 9, 2004, the local union, supported by its parent union, initiated a strike in support of Granite Rock employees' position. On July 2, 2004, a new collective bargaining agreement ("CBA") was reached and the employees agreed to return to work. In the new Agreement was a no-strike provision. Nonetheless, in support of its bid to secure a separate agreement insulating the union and its members from liability for strike-related damages, the parent union encouraged another strike of Granite Rock employees. Granite Rock sued under the Labor Management Relations Act ("LMRA") for damages, alleging breach of the CBA and tortious interference with the Agreement on the part of the parent union.

The Supreme Court addressed two questions – first, given that the new agreement contained an arbitration clause which would allow an arbitrator to decide the issue of damages under the LMRA, should an arbitrator or the court

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decide the date on which an arbitration clause went into effect and therefore applied? Second, can there be a claim under the LMRA against the union for tortious interference with a contract? The Supreme Court settled the first question by extrapolating from the well-settled law: the question of *whether* an issue is covered by an arbitration clause is a matter for the courts. Reasoning that to settle the question of 'whether' an issue is covered, the court must decide *if* the arbitration clause is enforceable, it only makes sense to leave the question of 'when' an arbitration clause takes effect – and therefore when it is enforceable – to the courts as well.

The Supreme Court further held that the LMRA only allows actions for breach of contract; the claim advanced by the company of "tortious interference" with the CBA is not an actionable claim under the LMRA. Finding that the arbitration clause was in effect at the time of the second strike, the case was remanded to an arbitrator to decide the question of what damages are appropriate under the LMRA for breach of the collective bargaining agreement.

G. ARBITRATION – ROLE OF COURT – ROLE OF ARBITRATOR

Rent-A-Center West Inc. v. Antonio Jackson, 561 U.S.____ (2010), 130 S. Ct. 2772, 2010 U.S. LEXIS 4981 (June 21, 2010). *Where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, and a party challenges the enforceability of the agreement as a whole,*

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that challenge is for the arbitrator to decide. In the event a party challenges specifically the enforceability of the agreement to arbitrate, that challenge is for the court to decide.

H. ARBITRATION – CLASS ARBITRATION

Stolt-Nielsen S. A., et al v. Animalfeeds International Corp.. 130 S. Ct. 1758, 2010 U.S. LEXIS 3672, (April 27, 2010). *Imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act.*

I. ARBITRATION – DELAY IN RAISING PROCEDURAL COMPLIANCE ISSUES

Union Pacific Railroad Company v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region 558 U.S. ____ (2009), 130 S. Ct. 584, 2009 U.S. LEXIS 8943, (7th Cir.) (December 8, 2009). *Subject matter jurisdiction can never be waived whereas a claim-processing rule is ordinarily forfeited if the party asserting the rule waits too long to raise the point. Failure of a party to satisfy the requirement that parties to minor disputes attempt settlement in a pre-arbitration conference does not negate National Railroad Adjustment Board's jurisdictional authority. The conference requirement in the RLA is independent of the collective bargaining process.*

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II. DISCRIMINATION

A. AGE DISCRIMINATION

1. Gomez-Gonzalez v. Rural Opportunities, Inc., 626 F.3d 654 (1st Cir. 2010)

Plaintiff, at the time 49 years of age, was hired as the director of operations for a nonprofit. At the time she was hired she notified the employer about a back condition, which the employer accommodated by allowing the Plaintiff to work from home from time to time.

Five years later, the employer presented Plaintiff with a list of concerns it had regarding her performance. They accused plaintiff of an "overall failure of management." The employer hired a "peer director" that assumed many of Plaintiff's prior responsibilities. Plaintiff then went on an extended leave of absence for "work related depression" and applied for disability benefits. After her application was denied, she accused the employer of replacing her due to age and gender discrimination.

While Plaintiff was on leave, the employer discovered that Plaintiff had established an unauthorized checking account for the purposes of depositing donations and processing payments, which circumvented the employer's accounting system. After it discovered this breach, it terminated Plaintiff.

Plaintiff sued, claiming that the employer terminated her due to her age, gender and disability. The district court dismissed all her claims, and on appeal

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the first circuit affirmed. The court found that the opening of the island account, a serious breach of employer accounting policy, justified the discharge:

> She failed to advise the ROPRI board that its action in opening the island bank account was contrary to ROI's policies. After the ROPRI board voted to open the account, she failed to apprise ROI headquarters that such a measure had been passed. Finally, Ms. Gómez participated in the opening of the account and directed that donations made to ROI be deposited in that account. She did so knowing that, as an employee of ROI, she was required to adhere to ROI's fiscal policies and procedures.

The court also held that Plaintiff failed to establish that her subsequent request for an accommodation, consisting of weeks of stay at home work, would be reasonable. Thus, the failure to accommodate claim was denied.

2. <u>Diaz v. Jiten Hotel Mgmt.</u>, 2011 U.S. Dist. LEXIS 5478 (D.Mass. 2011)

The plaintiff alleges that after twenty-two years of excellent service and two "Department Head of the Year" awards, she was suddenly denied review and the corresponding annual raises. Her direct manager, Mitesh Patel ("Mitesh") repeatedly asked her when she was going to retire, told her that she was getting old, and indeed called her an "old pumpkin," an "old shoe," and an "old hankie." When she hired a 52-year old laundry attendant, he told her, "You're going to convert this hotel into a nursing home." The harassment, she alleges, permeated the environment. Indeed, another manager told her that

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management thought she was too old for the job and that "old people should remain home." Although Mitesh later left, Diaz's treatment continued. In the winter of 2006, Director of Sales Daniela DePina ("DePina") told her that "old people must remain home" and that management saw Diaz as too old for the job. Ms. DePina also told Ramon Suero that management was planning to fire Diaz because she was too old for the job.

On August 1, 2006, Diaz was fired. She was brought into a private meeting with Assistant General Manager James Krusky and Chet Patel and told that she was terminated. They said that the corporate office received an anonymous letter alleging that Diaz made discriminatory remarks against African Americans, employees, and guests of the hotel.

On August 7, 2006, Diaz filed EEOC and MCAD complaints. Shortly thereafter, three employees allegedly wrote letters stating that Diaz discriminated against hotel employees and guests. These letters were unsigned, typed in the same format, and all dated August 24, 2006 -- after Diaz was terminated. Ramon Suero testified that management brought him a letter to sign that alleged that Diaz had made racial slurs. He states that this letter was not true and that he signed it out of fear of losing his job.

On motion for summary judgment, the court denied the motion and held evidence was sufficient to create a triable issue of fact. The court rejected

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defendant's argument that the comments were only "stray remarks," holding that they came from those with authority and were frequent enough to evince the employer's hostility toward the aged. Further, the court found evidence of pretext in the employer's later decision to fire plaintiff, based on the testimony of the employee who said he was coerced into signing a statement about plaintiff.

B) GENDER DISCRIMINATION/SEXUAL HARASSMENT

1. Agusty-Reyes v. Dep't of Educ., 601 F.3d 45 (1st Cir. 2010)

Olga E. Agusty-Reyes[2] ("Agusty") was repeatedly sexually harassed by her supervisor at a Puerto Rico primary school where she taught fourth and sixth grade mathematics between August 2005 and January 2007. After Agusty refused the supervisors advances, he delayed evaluating her and ultimately gave her a poor evaluation to block her receipt of tenure. When she complained to her supervisor's supervisor at the Commonwealth's Department of Education ("DOE"), she was not told of the DOE's sexual harassment policy; she was instead told the only remedy she had was to file a union grievance. Soon after she did so, the supervisor attacked her, forcing her into his lap and sexually assaulting her until her screams brought school security to her rescue. The supervisor was later arrested for the attack. When she complained again to the

[2] For purposes of summary judgment proceedings, the court assumes all plaintiffs' allegations are true.

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DOE that the ongoing harassment had now led to a criminal attack, the DOE held a hearing on her harassment claims against the supervisor without giving her notice or opportunity to testify or to respond to his denials, apparently in accord with its policy. After these proceedings, the DOE reinstated the supervisor. Only the intervention of the police, enforcing a protective order from the local court, prevented him from returning to the school where she worked.

Plaintiff sued, alleging sexual harassment. The district court granted summary judgment based on its determination that a reasonable factfinder could only reach three conclusions. First, that the evidence compelled the conclusion that Agusty had not suffered a tangible employment action because ultimately she was given tenure, and the DOE was therefore entitled to assert the Faragher-Ellerth affirmative defense. (This defense precludes an employer's vicarious liability for a supervisor's harassment that did not result in a tangible employment action when the employer can show both that it acted reasonably to prevent and correct sexual harassment and that its employee unreasonably failed to avoid harm.) Second, the court held that the evidence compelled the conclusion that the mere existence of a DOE policy on sexual harassment and the DOE's statement it had complied with aspects of that policy satisfied the first prong of that defense because the DOE had acted reasonably. Indeed, the

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court emphasized the reasonableness of the DOE's response when confronted with the "relatively minor wrongdoing" that preceded the criminal attack. Third, the court held that the evidence compelled the conclusion that the second prong of the affirmative defense was satisfied because Agusty had been unreasonable in not filing a formal written complaint until after she was attacked (although Agusty had previously met with the DOE's Regional Director to complain about the supervisor's harassment and had been told to file a union grievance, which she did).

The First Circuit reversed and remanded for trial. It concluded that the negative evaluation given by the supervisor could be an "adverse employment action," which would negate the Ellerth defense. Second, it also concluded that evidence suggested that the employer had not reasonably implemented its sexual harassment policy and that plaintiff had made reasonable efforts to complain in an attempt to stop the harassment.

2. Vera v. McHugh, 622 F.3d 17 (1st Cir. 2010)

The plaintiff alleged that she was sexually harassed by a coworker and subsequently by a supervisor at the Fort Buchanan Army garrison in Puerto Rico, and then fired in retaliation for filing her sexual harassment complaints. Both claims of sexual harassment involved allegations depicting a hostile work environment. She first claimed that she had been harassed by a coworker. She

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met with the Army's EEO officer, who believed that the matter had been resolved. Plaintiff later claimed that she felt the matter had not been resolved.

Some time later, a new supervisor began working with plaintiff. During the time that she and the supervisor were using the same office, plaintiff described herself as experiencing "a constant invading [of] my space." She described how the supervisor would sit staring at her while they were in the office with the door closed and would block the door as she tried to leave. Plaintiff explained that the supervisor would look at her in a sexual way and then "smirk and laugh" because he knew it bothered her. At times, the supervisor would move his chair so close that their legs would touch, or he would stand close behind her so that she could feel his breath. Although Plaintiff acknowledged that the office was small and was not big enough for the two of them, she maintained that the touching could not have been accidental. Plaintiff told the supervisor not to invade her space, but the issue continued to occur. The supervisor referred to plaintiff as "baby" on at least one occasion. She filed a complaint against the supervisor, and when it was not resolved to her satisfaction (plaintiff was later terminated, and alleged the discharge was retaliatory) she filed suit.

In awarding summary judgment to the Army, the court found that the limited comments and matters which were subject to interpretation did not

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constitute a hostile work environment, and dismissed her claim. On appeal, the First Circuit overturned the summary judgment.

> Here, a jury could find that the intensity and frequency of the contact between Vera and Rodriguez altered the conditions of her employment despite the relatively short duration of their office-sharing. That Rodriguez's behavior caused Vera psychological trauma that persisted even after she had left the hostile environment, as evidenced by Lopez's testimony and the doctor's note written in April 2005, reinforces the conclusion that she experienced harassment that was both severe and pervasive. Likewise, it would be reasonable for the jury to conclude, based on Vera's account of Rodriguez's conduct, that his conduct was so objectively offensive that a reasonable person would find it to be hostile or abusive.

3. **Pelletier v. Town of Somerset, 458 Mass. 504 (2010)**

On October 18, 2000, the plaintiff filed a complaint with the MCAD; she was not then represented by counsel. The complaint named the highway department as the respondent, and alleged discrimination on the basis of gender and sexual orientation. The narrative portion of the complaint alleged that the plaintiff's supervisor Cabral "engaged in a pattern of harassment and disparate treatment against [her]," including treating her differently than male coworkers, specifically by restricting her from driving certain trucks. It ended with the statement that the plaintiff believed she was "subject to harassment and discriminatory terms and conditions of employment based on [her] sexual orientation and gender."

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After the case was filed at the MCAD, plaintiff hired an attorney and eventually sued. At trial, over objections by the town, the judge permitted the plaintiff to present evidence of alleged incidents that ranged over the full course of her career at the highway department, from the 1980's to 2000. Testimony included alleged incidents of inappropriate physical touching by a coworker in the late 1980's and by Mullaly, the superintendent in the late 1980's and early 1990's. It also covered allegations that pornographic materials permeated the department for many years before Cabral was even employed by the town. Stated more generally, testimony at trial focused on allegations actually investigated by the MCAD, allegations raised with the MCAD that the agency had expressly refused to consider, and allegations first referenced in the plaintiff's motion in limine filed six days before the start of trial. At the close of trial, the jury awarded nearly 1.9 million in damages against the town.

On appeal, the SJC remanded for a new trial, concluding that the court erred by allowing evidence of conduct which was not alleged in the initial MCAD complaint.

> We apply the scope of investigation rule and conclude that the scope of the MCAD investigation in this case should have been expected to cover the plaintiff's various claims of discriminatory treatment, sexual harassment, and hostile work environment allegedly occurring during the time period that Antone Cabral was her supervisor, but not her claims of discrimination relating to alleged events and incidents that preceded Cabral's supervisory tenure. These earlier incidents

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> were "separate and distinct both qualitatively and temporally," Lattimore v. Polaroid Corp., 99 F.3d 456, 465 (1st Cir. 1996), from what could reasonably be considered as within the range or reach of the MCAD's investigation. Because, however, a significant amount of evidence presented at trial concerned these earlier incidents, the town is entitled to a new trial on liability as well as damages.

C. RACE DISCRIMINATION

1. Barton v. Clancy, 2011 U.S. App. LEXIS 715 (1st Cir. 2011)

The mayor of Lynn, and Plaintiff had longstanding issues regarding the plaintiff's former position with the firefighter's union, his disability retirement, and other issues. After his retirement, the Lynn School District appointed plaintiff to a position as a high school basketball coach. In the fall of 2006 and the spring of 2007, after Barton was hired for the basketball coaching job, Clancy publicly criticized Barton's ability to perform the job on the ground that he had retired because of disability, repeatedly called upon school officials to rescind his appointment, and initiated investigations into Barton's payment of taxes and his disability pension.

Plaintiff sued, claiming that Clancy was harassing him on the basis of race. The court dismissed the case (which was upheld by the first circuit) on the grounds that even if racial harassment occurred, the mayor was not the employer of plaintiff. Plaintiff was employed by the school committee, not the mayor, and the school committee had ignored the mayor's suggestion that they

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should fire Plaintiff. Although the mayor is chair of the school committee, "The mayor's limited and indirect influence over public school athletic coaches does not indicate that Mayor Clancy exercised control over an important aspect of Barton's employment." The court went on to hold that although non employers can be held liable for harassment, those cases usually involve situations where the harasser harasses in the workplace (i.e.., a contractor at the workplace).

D. RETALIATION

1. <u>Ara v. Tedeschi Food Shops, Inc.</u>, 2011 U.S. Dist. LEXIS 6023 (D.Mass. 2011)

Plaintiff claimed that she was discriminated against because of her national origin, and filed an MCAD complaint. After the complaint, plaintiff claimed that her husband (a coworker) was fired, and that she was given reduced hours, and was transferred to another store.

The district court dismissed her claims, holding she had provided no proof that she suffered adverse employment actions after filing her complaint. Specifically, the court noted that she was transferred after the complaint, and plaintiff was not able to allege that her new manager ever made any derogatory comments about her. Her hours reduction came more than 18 months after her MCAD complaint, thus making it difficult to argue that the reduction was in

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retaliation for the complaint. Further, plaintiff resigned at about that time to start her own store, which was an explanation for her hours reduction.

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2. Sciacca v. Olympia Hotel Mgmt., 2010 U.S. Dist. LEXIS 115515 (D.Mass)

Plaintiff's hours were reduced from about 56 per week to 32. On January 5, 2007, plaintiff filed complaints with both the MCAD and the United States Equal Employment Opportunity Commission ("EEOC"), alleging that his hours were reduced from 56 to 32 because of his age. The MCAD and the EEOC dismissed the complaints for lack of probable cause. IN April, 2007, plaintiff left a voice mail on a co-worker's phone, threatening him because of his failure to help plaintiff in the MCAD charge. The coworker contacted the employer, who investigated then decided to terminate plaintiff based on the threats. Plaintiff filed a complaint with the MCAD on October 17, 2007, alleging that he was fired in retaliation for his earlier age-discrimination MCAD complaint. The MCAD investigator inferred a retaliatory motive because plaintiff's termination occurred "approximately 3.5 months after he filed his complaint," found that there was a dispute as to whether Olympia had reason to believe plaintiff was a threat to workplace safety, and issued a probable cause finding. Plaintiff then filed suit, which was removed to federal court by defendants. Dismissing the complaint, the court found that no evidence existed plausibly suggesting retaliation:

> Regardless, plaintiff cannot prove Olympia's articulated reason for the firing, his improper conduct including the Orlando voicemails and threats concerning Pappalardo, is mere pretext. His allegations

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> that the voicemails were not threatening, Lyon fabricated evidence, and defendants were concerned about engaging in retaliatory conduct are either not supported by the evidence or cut against his claim.
>
> Pappalardo, Lyon, and Flaherty all described the voicemails as angry and threatening, and Pappalardo recalled plaintiff threatening Orlando's life. Plaintiff's deposition testimony does not contradict these descriptions; he admitted that he threatened legal action but cannot otherwise recall the content of the messages. Orlando's letter provided further basis to believe that plaintiff engaged in threatening conduct.

3. Mercado v. Manny's T.V. & Appliance, Inc., 77 Mass. App. Ct. 135 (2010).

Plaintiff installed dishwashers for defendant company. However, he did not have a plumber's license or permit to do so. After an encounter with a plumbing inspector, plaintiff complained to his employer that he did not want to continue performing illegal installations. The employer told him to continue installing the dishwashers and to avoid the inspector's truck.

A short time later, plaintiff was injured making a delivery, and had to file workers compensation claims for his knee. Less than a week later, the company fired plaintiff. Plaintiff sued, and the trial court dismissed his claims.

The appeals court reversed, holding that there was sufficient grounds to allow the case to go to trial on whether the employer fired the employee in violation of public policy (the policy requiring licensed plumbers to perform installations) and whether the employer retaliated against plaintiff for his

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complaints about the same. However, the court upheld the dismissal of his ADA and FMLA claims, holding that the knee injury did not constitute a handicap nor a serious medical condition under either statute.

E. ADA OR 151B HANDICAP DISCRIMINATION

1. Kelly v. Cort Furniture, 717 F. Supp. 2d 120 (D.Mass. 2010).

Plaintiff had back problems, and received accommodation from her employer for the problems. For several years, plaintiff received positive reviews and raises from the employer, although they did complain about unscheduled absences and lateness.

In 2004 (after 2 years on the job) she received a formal reprimand for absenteeism. In May, 2005, while on her lunch break, she went to the ER for back pain. She did not return to work for over three hours. Upon her return, she discussed the matter with her supervisor, who found her explanation unbelievable. The employer terminated her shortly thereafter. Plaintiff sued, claiming the discharge was handicap discrimination.

The district court denied the employer's motion to dismiss the suit. It held that there was insufficient evidence to show that regular attendance was an essential function of plaintiffs job, or that her absences somehow rendered her "unqualified" to perform the position. Plaintiff had presented evidence that

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despite her absences, she had performed the position well and there was no evidence that the absence on the day of the ER visit hurt the employer in any way. Further, the court found that given the fact that the plaintiff did eventually provide the employer with an explanation (which was proven to be true) about her absence to go to the ER, the court found that a dispute of fact existed about whether the employer's reason for discharging plaintiff was pretextual.

2. Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113 (2010)

The plaintiff, Douglas Godfrey, worked for the defendant, Globe Newspaper Company, Inc. (Globe), for over twenty years. He started in 1977 as a substitute newspaper handler, later worked as a press operator (pressman), and became an assistant press foreman in 1997. The position of pressman consisted of loading and operating the presses to produce the printed newspapers and involved frequent climbing on the machinery. While the assistant press foreman position involved supervision of a "crew" of pressmen, it also required climbing on the presses to ensure that the paper was loaded properly and to resolve production problems.

In 2002, plaintiff was seriously injured on the job and remained our of work for nearly eighteen months. When he returned, he brought a doctor's note limiting him to 5 hours per work a day. He gave the note to a supervisor, who allegedly ripped the note up and threw it on the floor.

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Plaintiff was forced to take another leave, and was eventually fired because the Globe accused him of not turning over to them certain workers compensation payments (the Globe had a policy of paying workers in full while on workers compensation, in exchange for the workers signing over their workers compensation checks to the Globe).

The plaintiff sued, claiming both that the employer failed to accommodate him in 2003 by giving him light duty work or limiting his work hours, and also discriminated against him by firing him later. The court dismissed all claims, and the SJC (reversing in part the appeals court) affirmed the trial court. The court found that, notwithstanding the supervisor ripping up the doctor's note, the employer actually did allow plaintiff to leave early whenever he needed to; thus there was no dispute that the employer accommodated the employee's request about shorter work days. Further, the court found that during the relevant times, plaintiff was completely unable to climb on the presses due to his injury, which was an essential function of the job. Thus, there was no further accommodation the employer could make to help the employee return to work.

3. <u>Tompson v. Dep't of Mental Health</u>, 76 Mass. App. Ct. 586 (2010)

Plaintiff suffered from Crohn's Disease. She took an extended leave of absence, which the employer accommodated. She returned with several

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restrictions, which again the employer accommodated, including driving restrictions and bathroom availability. However, when the employee returned with another restriction- a 4 hour per day work limit the employer objected, and instead offered the employee several part time positions. She refused these positions, and the employer eventually terminated her, indicating that her position must remain full time. She sued.

On appeal, the appeals court upheld the trial court's summary judgment in favor of the employer. First, it held that the plaintiff was not a "qualified handicapped person" because her 4 hour restriction rendered her unable to perform the supervisory duties necessary for her job. Further, it held that the employer had made all reasonable attempts at accommodating plaintiff's disability, and that the request for a 4 hour limit on her position was not reasonable.

F. NONCOMPETITION COVENANTS

1. Maine Pointe, LLC v. Starr, 2011 U.S. Dist. LEXIS 10442 (D.Mass. 2011)

The plaintiff, Maine Pointe, LLC, claimed that the defendants, Peter Starr and Gestion Velocitas, Inc., intentionally interfered with advantageous business relations and violated the terms of their Independent Contractor/Consultant Agreement ("Agreement") by, among other things, accepting employment with a competitor of Maine Pointe, soliciting Maine Pointe's clients or prospective

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clients, and soliciting Maine Pointe's employees or former employees. Maine Pointe moved the court to enjoin the defendants from engaging in such activities.

The court dismissed the motion, holding that it did not have personal jurisdiction over the defendant:

> As for general jurisdiction, there is no evidence of "continuous and systematic" activity by Starr in Massachusetts. Furthermore, there appears to be no specific jurisdiction because the claims here do not arise out of, or relate to, Starr's activities in Massachusetts. Starr works and resides in Canada. He is a Canadian citizen. He was hired primarily to solicit Canadian companies. There is no evidence that he solicited any companies in Massachusetts.

The court went on to indicate that covenants not to compete are enforceable only to the extent necessary to protect the employer's legitimate business interests. While the plaintiffs alleged that the defendant contacted executives at other companies, it did not allege that these contacts somehow divulged trade secrets or confidential information, nor was it alleged that the companies were clients of the plaintiff or that the defendant had attempted to make them clients while working for plaintiff. It further failed to demonstrate that it suffered actual harm, or irreparable harm, since the contacted companies were not clients of the plaintiff to begin with.

2. EMC Corp. v. Arturi, 2010 U.S. Dist. LEXIS 132621

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Blotto worked for EMC. While working there he signed a noncompetition clause. After resigning from EMC, he went to work for Knowledgent, a competitor. The EMC noncompetition clause said, in relevant part:

> This section shall apply to you only if, as of the effective date of your termination, you are in a position at the Company that is at the director level or higher.

While neither party disputed that Blotto went to work for a competitor, a dispute arose as to whether Blotto was a “director or higher” at the date of his termination and thus whether the noncompete applied to him. When he was hired by EMC, Blotto was a "practice manager." At the time of his hiring, he sought and received confirmation from the company that he was not a director, and was thus not bound by the covenant not to compete. At least as early as September 2009, however, Blotto was classified as a "director" on EMC's electronic systems. His responsibilities and compensation increased significantly during his tenure at EMC. EMC, however, never informed Blotto in writing that he had been promoted from a practice manager to a director-level position, or that the non-competition provision in the KEA would apply to him.

The employer sued and moved the court for an injunction prohibiting Blotto from working for Knowledgent, but only after about 9 months had elapsed. By the time of hearing in the matter, the one year noncompete had

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already lapsed. Nevertheless, EMC asked the court to issue a one year injunction prohibiting Blotto from working for the competitor.

The court refused to grant the injunction, holding it had no grounds to impose specific relief beyond the stated time in the noncompete. It held that EMC could have contained a provision in the noncompete which would have allowed it to toll the one year noncompete provision while it determined if the noncompete applied to defendant and whether the defendant had actually taken action to harm the company.

3. Genuine Parts Co. v. Autopart Int'l, Inc., 27 Mass. L. Rep. 144 (Worcester 2010)

Plaintiff former employer sued former employees to enforce a noncompete. The employees' subsequent employer hired a lawyer to represent them in the action. The noncompetes contained a clause which indicated that the successful party in any suit to enforce the agreement would be entitled to attorney's fees.

After the defendants won the suit, they pursued attorneys fees against the former employer. The employer argued that the second employer (who paid the employee's attorney's fees) should not be allowed to use the noncompete to collect attorney's fees against the first employer. The trial court disagreed, and held that although the second employer was not allowed to collect the fees, that the defendant himself was still entitled to collect the fees, then assign them to

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the second employer. Attorney's fees of over $108,000 were assessed against the first employer.

G. BREACH OF EMPLOYMENT CONTRACT

1. Sovie v. Town of N. Andover, 2010 U.S. Dist. LEXIS 107078 (D.Mass. 2010)

Sovie entered into an employment agreement with the Town of North Andover Public Schools. Sovie was hired as a Payroll Coordinator for the period of January 29, 2007 through June 30, 2008, with the possibility of renewal upon completion of the contract. In a section entitled "Dismissal, Demotion, or Suspension," the contract states: "The Superintendent may suspend, demote or dismiss the Coordinator in accordance with the applicable provisions of Massachusetts General Laws."

At the time of Sovie's employment, Dr. Daniel O'Connor ("O'Connor") - the individual who interviewed and hired Sovie - was the Interim Superintendent of Schools in North Andover and Sovie's sole and direct supervisor. Soon after Sovie began her employment as Payroll Coordinator, O'Connor received several complaints regarding payroll issues.

On April 23, 2007, defendant Stephen Fortado ("Fortado") began working as the interim business administrator for the town's school system. Fortado states (and Sovie disputes) that in his first week as business administrator, Fortado received numerous complaints about Sovie's job

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performance. Fortado states that he communicated these complaints to O'Connor; O'Connor then terminated Sovie's employment on April 30, 2007.

The employee sued, and the employer claimed that no breach of contract existed because the employee was at will. However, the court held that since the contract was for a definite term, the contract created a "just cause" requirement for termination. The court went on to hold that there existed a dispute of fact for a jury over whether the employee's performance was sufficient to warrant a just cause termination.

2. **Moore v. Williams College, 702 F. Supp. 2d 19 (D.Mass 2010)**

On July 1, 2008, Plaintiff was appointed as a Visiting Lecturer in Defendant's Political Science Department for a one-year term. To obtain the position, he provided Defendant with various credentials, including a graduate but not an undergraduate transcript. Defendant later learned that Plaintiff had gained admission to graduate school by submitting forged undergraduate credentials and had never earned a bachelor's degree.

At the time of his appointment, Plaintiff was asked whether he had been convicted of a crime in the past five years. He answered in the negative and did not disclose a conviction for felony bank fraud that occurred more than five years previously.

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During the 2009-2010 school year, on November 9, 2009, Plaintiff pled guilty in the United States District Court for the District of Columbia to student aid fraud, bank fraud, and Social Security fraud. Documents submitted in connection with the plea proceeding confirmed that Defendant defrauded multiple institutions, including educational institutions, over a period of approximately twenty-five years.

On November 10, 2009, Defendant, having learned of Plaintiff's guilty plea, suspended Plaintiff without pay and denied him further access to the college, including his apartment in faculty housing. On November 12, 2009, William G. Wagner, Defendant's Interim President, sent a letter to Plaintiff explaining that he was being terminated for cause because of his guilty plea, his failure to notify the college of the crimes and subsequent plea, fraudulent credentials he had supplied to Williams College in seeking employment, and his misuse of a Williams College credit card.

Plaintiff then sued, claiming he was terminated in breach of his employment agreement because his misconduct occurred prior to his employment at Williams. The court noted that "cause" for discharge includes:

> dissatisfaction with [an] employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct, or other culpable or inappropriate behavior, or . . . grounds for discharge reasonably related, in the employer's honest judgment, to the needs of his business. Discharge for a 'just cause' is to be contrasted with

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> discharge on unreasonable grounds or arbitrarily, capriciously, or in bad faith.

The court held that "as a college in the business of credentialing undergraduates, defendant has reason to demand that members of its faculty come by their own credentials legitimately," and that "the termination by a college of an admitted felon, particularly one who has committed student aid fraud, can hardly be described as lacking just cause." Further, the court found that the employer did not violate COBRA in denying plaintiff continued health benefits since the employee had been fired for "gross misconduct."

H. FLSA/MASS WAGE LAW

1. <u>Gruchy v. DirecTech Del., Inc.</u>, 2010 U.S. Dist. LEXIS 103424 (D. Mass 2010)

Direct Tech installed satellite equipment for DirectTV. Plaintiffs were technicians who installed or repaired equipment for Direct Tech. Technician compensation is calculated by the number and type of jobs performed- they are paid a flat fee for each service they complete. If they "up sell" clients, they receive part of the profits.

Plaintiffs claimed that they were not paid time and one half for overtime in violation of the FLSA. The employer countered that they were "employees of a retail or service establishment" and that over half their pay came from commissions; thus according to the employer they were exempt from overtime.

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In denying defendant's summary judgment motion, the court indicated that it is a close call whether such employees are commission based, although it seemed skeptical that the piecework compensation the technicians received was sufficiently tied to sales to constitute a commission. Thus, the court set the matter for trial.

2. <u>Hines v. Longwood Events, Inc.</u>, 2010 U.S. Dist. LEXIS 62259 (D.Mass)

Plaintiff was a sales manager for defendant's event venue business. Specifically, she managed the relationships between nonprofit entities and the event center for purposes of holding fundraising events. Two other employees were events and sales managers, respectively. The managers were responsible for selling events and booking the center, signing contracts with the nonprofit entities and coordinating the event.

Upon resigning, one of the employees argued that she was entitled to overtime under the FLSA. The employer argued that the sales manager was an exempt administrative employee. Using the FLSA "short test" to determine if the sales manager was administrative, the court determined whether the employee's "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." The court evaluated the ten factors in 29 CFR 541.202 in coming to its conclusion:

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> [1] whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; [2] whether the employee carries out major assignments in conducting the operations of the business; [3] whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; [4] whether the employee has authority to commit the employer in matters that have significant financial impact; [5] whether the employee has authority to waive or deviate from established policies and procedures without prior approval; [6] whether the employee has authority to negotiate and bind the company on significant matters; [7] whether the employee provides consultation or expert advice to management; [8] whether the employee is involved [*16] in planning long- or short-term business objectives; [9] whether the employee investigates and resolves matters of significance on behalf of management; and [10] whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

The court concluded that the sales managers were in fact exempt administrative employees:

> In the instant case, the sales managers' primary duty was convincing clients to book events at the defendants' venues. They had to respond to individualized client concerns, answer questions while touring [*22] the properties with clients, and determine how best to "pitch" the venues. It is undisputed that they did so with guidance from an employee handbook and a scripted response to one client question. However, like the plaintiffs in John Alden, their conversations with each prospective client were dictated not by scripts mandated by defendants, but rather by the specific needs of individual customers as gleaned by the sales manager.

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3. Camara v. AG, 2011 Mass. LEXIS 16 (MA SJC – 10693 2011)

In an effort to promote safety and to decrease careless driving, ABC in recent years established a policy whereby drivers determined to be at fault are given an option of either accepting disciplinary action or entering into an agreement to set off the damages against their wages. The determination of fault is made after the ABC safety officer reviews records related to the incident and reports his findings to the safety manager. If the safety manager, in consultation with ABC management, determines the incident was a "preventable accident," she offers the driver a choice of making payment for the damages or accepting discipline. The findings of the safety manager as to whether an accident was preventable and the amount of damages are final and not subject to any appeal process. A driver determined by ABC to be at fault may enter into a written agreement with ABC for the payment of the cost of the damage by way of a setoff against wages due to the employee. Some drivers have chosen to accept disciplinary action instead of paying damages. Of those employees who have agreed to permit a setoff by ABC, the average setoff is fifteen dollars to thirty dollars per week.

The AG assessed a civil violation against the company, holding that the company's policy of offsetting damages against wages violated the weekly

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payment of wages act. Eventually, a district court judge overturned the AG decision.

The employer argued that the deductions came pursuant to a “valid set off” under 148 MGL 150. Set offs which are valid can be deducted from wages. On appeal, the SJC sided with the AG, concluding that the policy did not constitute a valid set off and thus the deductions violated the weekly payment of wages law.

> An arrangement whereby ABC serves as the sole arbiter, making a unilateral assessment of liability as well as amount of damages with no role for an independent decision maker, much less a court, and, apparently, not even an opportunity for an employee to challenge the result within the company, does not amount to "a clear and established debt owed to the employer by the employee."

J. ERISA

1. <u>Tasker v. DHL Ret. Sav. Plan</u>, 621 F.3d 34 (1st Cir. 2010)

The plaintiff worked for Airborne Express, Inc. (Airborne) for more than three decades. In 2003, DHL Holdings (USA) Inc., now DPWN Holdings (USA), Inc., acquired Airborne. The plaintiff worked briefly for the acquirer and then retired in March of 2004.

While employed by Airborne, the plaintiff participated in both the company's profit-sharing and retirement plans. After he retired but before he began receiving benefits, Airborne's plans were merged into their DHL counterparts, namely, the DHL Savings Plan and the DHL Retirement Plan.

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When he retired in 2004, the retirement plan permitted a participant, prior to his election to begin receiving benefits, to transfer the balance from his profit-sharing plan account into the retirement plan. The corresponding provision of the profit-sharing plan enabled a participant to take full advantage of this option by transferring his account balance from that plan to the retirement plan. Such a transfer, when effected, would drop the participant's profit-sharing plan account balance to zero and, thus, avoid any offset reduction in retirement plan benefits due to payouts from the profit sharing plan. This transfer option was in place when DHL acquired Airborne. It was likewise in place when the plaintiff retired, in March of 2004, at age 57.

Upon his retirement, the plaintiff stated his intention to commence the receipt of his annuity benefit on October 1, 2008, that is, at age 62. His account balance in the profit-sharing plan at retirement was $370,388.22.

The plaintiff requested and received benefit information from DHL. The company furnished him with written estimates detailing the benefit options then available to him. These estimates included projected benefit levels based on the formula contained in the retirement plan, with an offset. Predicated on his years of service and average compensation, his accrued benefit was estimated to be $5,824.27 per month, which was reduced to $4,775.90 by a factor related to his decision to begin receiving benefits before age 65. The offset from his profit-

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sharing account, which was also affected by age-related factors, was estimated to be $4,588.00 per month. The amalgamation of these two numbers resulted in a projected annuity benefit of $187.90 per month. This estimate assumed that the plaintiff's profit-sharing account balance would remain intact and at his disposal.

DHL furnished the plaintiff with a separate estimate of what his benefit might be if he exercised the transfer option permitted under Section 7.11 of the retirement plan: $4,163.92 per month as a joint survivor annuity -- a figure that contemplated emptying his profit-sharing account.

At the time that he received these estimates, the plaintiff could have elected to transfer his profit-sharing plan account balance into the retirement plan account, but he declined that course.

Effective December 31, 2004, DHL amended the retirement plan to eliminate the transfer option and prohibit transfers of the kind previously permitted. Without amending any other language, the amendment stated that the retirement plan "shall not accept transfers of any Profit Sharing account balances after December 31, 2004." DHL also amended the profit sharing plan to eliminate the right to transfer funds to the retirement plan.

In 2008, the plaintiff tried to exercise the transfer option and begin the distribution of his benefit as estimated in the second estimate that he had

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received in 2004. The plan administrator informed him that the December 2004 amendments foreclosed his use of the transfer option.

After unsuccessfully pursuing an administrative appeal, the plaintiff brought suit in the federal district court. He alleged a violation of ERISA's anti-cutback rule and sought an award of damages under 29 U.S.C. § 1132(a)(1)(B).

In relevant part, the anti-cutback rule states as follows:

> Decrease of accrued benefits through amendment of plan
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of --
>
> (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

However, a regulation enacted by the Treasury, pursuant to the anti-kickback rule, allows plans to eliminate transfer options, even when the effect of such transfer is to reduce benefits. 26 CFR 1.411(d)-4. The regulation states, in relevant part:

> HN8A-2. (b)(2)(viii) Provisions for transfer of benefits between and among defined contribution plans and defined benefit plans. A plan may be amended to eliminate provisions permitting the transfer of benefits between and among defined contribution plans and defined benefit plans.

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Based on the language, the court found the anti-kickback rule was not violated and upheld the trial court's dismissal of the case:

> This is a hard case – hard in the sense that it requires us to deny relief to a plaintiff for whom we have considerable sympathy. After all, the plaintiff worked for many years, planned for his retirement, and now finds that the annuity he can collect is roughly half the size that he had anticipated. On general notions of fairness, the plaintiff deserves better.
>
> But this case – like most hard cases – cannot be decided on generalized notions of fairness. [HN21]ERISA is a creature of statute, [**24] fleshed out by regulations. Subject to constitutional concerns not present here, courts must follow the path demarcated by Congress and the Executive Branch. Where, as here, the statute and the implementing regulations are clear, an inquiring court must follow their lead. No judge is free to disregard the law simply because he or she thinks that it would be fairer to do so in a given case.
>
> We have warned before, in the ERISA context, that hard cases have a propensity to make bad law. *See, e.g.,* *Burnham v. Guardian Life Ins. Co.,* 873 F.2d 486, 487 (1st Cir. 1989). This case is of that genre. Were we arbitrarily to ignore an unambiguous regulation allowing the action taken by the defendants, we would be making bad law. We must abjure so wayward an approach.
>
> [*44] Of course, the Secretary could modify the regulations to minimize or abate inequities of the sort that the plaintiff has experienced here. The Secretary, however, has not chosen to do so. By the same token, Congress could revise the stature, but it too has refrained from doing so. In the absence of any such ameliorative action by either Congress or the Secretary, our hands are tied.
>
> We need go no further. For the reasons elucidated above, [**25] we hold that the challenged plan amendments were permissible and, therefore, the elimination of the transfer options did not violate ERISA's anti-cutback rule.

2. **Estate of Jajuga v. Prudential Ins. Co. of Am., 2010 U.S. Dist. LEXIS 107889 (D.Mass. 2010)**

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The decedent participated in a life insurance plan through his work. The plan waived payment of life insurance premiums while employed. Decedent was then disabled and applied for a waiver of premiums. The plan administrator denied this request. At the time of the denial, the plan did not have "discretionary" language- language in the plan which gives the plan administrator the sold discretion to interpret the terms of the plan. The plan added the language to the plan shortly after denying the decedent's appeal.

After the appeal was denied the estate sued, claiming the denial was a violation of ERISA. The plan asked that the court review the denial under an "abuse of discretion" standard, citing the discretionary language in the plan. However, the court denied this request, and determined that a *de novo* standard should apply, since the discretionary language was not in the plan at the time of the benefit denial.

K. FMLA

1. Tayag v. Lahey Clinic Hosp., Inc., 2011 U.S. App. LEXIS 1697 (1st Cir. 2010)

Maria Lucia Tayag ("Tayag") was terminated by her employer, Lahey Clinic Hospital, Inc. ("Lahey"), while taking an unapproved seven-week leave to accompany her husband, Rhomeo Tayag ("Rhomeo"), on a spiritual healing trip. The district court denied her claims against Lahey on summary judgment, including two under the Family and Medical Leave Act.

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In June 2006, Tayag submitted a vacation request form for August 7 to September 22, 2006; her supervisor said this would leave the department with inadequate coverage but, as Tayag had indicated that her husband would be needing medical care, her supervisor provided the paperwork for an FMLA leave request. On July 8, Tayag requested FMLA leave to assist Rhomeo while he traveled, but did not inform Lahey that the travel was for a spiritual pilgrimage to the Philippines. Nor did she provide Lahey with any contact information to reach her during the trip.

On July 11, 2006, Rhomeo underwent an angioplasty procedure. That month, Tayag spoke to [*3] Susan Olsen--Lahey's benefits administrator--about the FMLA request, and Olsen requested new FMLA certification from Rhomeo's doctor. In early August, Tayag gave Olsen a note and then a certification from Rhomeo's primary care physician, Stephen Dong; the note stated that Rhomeo's liver, kidney, and heart diseases "significantly affect his functional capacity to do activities of daily living" and advised that Tayag receive medical leave "to accompany Mr. Tayag on any trips as he needs physical assistance on a regular basis."

Tayag also provided Olsen with the fax number of her husband's cardiologist so Lahey could send the doctor a certification form for completion. The cardiologist returned the form on August 8, 2006, stating that Rhomeo was

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"presently . . . not incapacitated" [*4] and that Tayag would not need leave. Olsen mailed Tayag letters on August 10 and 14 notifying her that the leave was unapproved, and Lahey representatives left phone messages at Tayag's home on August 8 and 17. Tayag did not receive any of these messages because she was in the Philippines from August 7 to September 22. Receiving no response, Lahey then sent a letter, dated August 18, terminating her employment.

In the Philippines, during August and early September 2006, the Tayags went to Mass, prayed, and spoke with the priest and other pilgrims at the Pilgrimage of Healing Ministry at St. Bartholomew's Parish. From September 8 to 22, the Tayags visited other churches and friends and family. While in the Philippines, Rhomeo received no conventional medical treatment and saw no doctors or health care providers. Tayag assisted him by administering medications, helping him walk, carrying his luggage, and being present in case his illnesses incapacitated him.

On April 30, 2008, Tayag filed suit against Lahey alleging a number of claims, including that her termination violated the FMLA.

Upholding the district court's decision, the court of appeals held that the "healing pilgrimage" was not medical care under the FMLA, and thus Plaintiff's leave was not protected by the statute. Further, the court noted that

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at least one physician found the plaintiff's husband was not incapacitated, which provided an alternate ground for the employer to deny the leave.

2. <u>Jodoin v. Baystate Health Sys.</u>, 2010 U.S. Dist. LEXIS 29931 (D.Mass)

Up until the time of her FMLA leave, plaintiff had been an exemplary employee of the employer and had received several positive reviews.
After a visit to the emergency room on May 14, 2007, Ms. Jodoin asked Ms. Horton (her supervisor) for FMLA paperwork, which was provided to her. Ms. Jodoin spoke with an unidentified nurse at Baystate DMS in May 2007. The nurse told Ms. Jodoin that her FMLA leave request was denied because hypertension was not considered a serious health condition under the FMLA. After doing her own research on-line and contacting a government hotline, Ms. Jodoin called the unidentified nurse back and told her that she qualified for leave under the FMLA. Ms. Jodoin never received any written documentation indicating that any request for FMLA leave was denied. In any event, on May 24, 2007, Baystate DMS sent Ms. Jodoin notification that her FMLA leave was provisionally granted, but that paperwork was missing, including a certification from her health care provider.

Thereafter, Ms. Jodoin submitted a note from her treating physician, Dr. Ballan, indicating that he had seen her on May 23, 2007; she was diagnosed with a "medical illness." The note further indicated that she had been out of

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work since May 14, 2007 and her return to work date was unknown; she was scheduled to be re-examined on June 18, 2007. Ms. Jodoin's FMLA leave was again provisionally approved, from May 14 - June 20, 2007. Additional information was again requested to ascertain if she had a serious health condition under the FMLA.

The processing of Ms. Jodoin's claim was made difficult because the information which Baystate DMS received from various health care providers showed different justifications for her absence. After receiving Dr. Ballan's certification that Ms. Jodoin suffered from a "medical illness," additional information was sought and Baystate DMS was informed that Ms. Jodoin was suffering from work related hypertension and depression. Thereafter, Baystate DMS was informed that Ms. Jodoin was suffering from a severe loss of vision. Ultimately, Ms. Jodoin received a full twelve weeks of FMLA leave. However, Ms. Jodoin did not receive full benefits under the FMLA until congenital nystagmus was listed as the medical reason she was seeking leave.

All medical information in support of leave under the FMLA relating to an employee's serious health condition is sent directly to, and reviewed by, Baystate DMS and not shared with managers. Managers are simply informed that the employee has been approved for FMLA leave

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Under Baystate Health's normal practice, if an employee is unable to return to work at the end of a twelve week FMLA leave, he or she is generally placed in "displaced" status, rather than terminated or laid off. If the employee cannot return after the twelve week period, but it is anticipated that the individual is likely to return in the near future, job protection for the employee's position is extended. However, if after the twelve weeks the employee cannot return to work, no return to work in the near future is foreseen and a manager needs to fill the position for operational reasons, the individual is placed in displaced status and the manager can proceed to fill the position.

On August 8, 2007, Ms. Jodoin's health care provider, Dr. C. Toomey, checked "no" when asked if Plaintiff was able to perform the essential functions of the employee's job. After Ms. Jodoin provided Dr. Toomey's certification to Baystate DMS, it was determined that Ms. Jodoin would be unable to return from her FMLA leave at that time. Baystate DMS informed Ms. Horton that Ms. Jodoin was not likely to return to work in the near future, if ever. Ms. Horton determined that it was necessary to fill Ms. Jodoin's position and, therefore, Ms. Jodoin was placed on "displaced status" as a Baystate Health employee. Baystate DMS, as per customary procedures, prepared the displacement letter using a standard template, for execution by the manager.

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On August 10, 2007, Ms. Jodoin was sent a notice that she was being placed on displaced status because she was unable to return from her FMLA leave. The notice informed Ms. Jodoin that her position would no longer be kept open, that she remained an employee of Baystate Health and that if she becomes medically cleared to return to work, she would be assigned a recruiter from the recruitment office to help her find a new position within the organization.

Managers are permitted to fill the position of displaced employees in order to meet work product requirements. As a displaced employee, Ms. Jodoin was eligible for an additional forty weeks of extended medical leave (bringing total leave availability up to fifty-two weeks) and remain covered by Baystate Health's insurance program. If a displaced employee is able to return to work and his or her former position has been filled, that employee can apply for vacancies anywhere within the Baystate Health system and can do so as an internal candidate. Internal candidates are given preference over any external candidates. If, after fifty-two weeks of extended leave, a displaced employee cannot return to work the employee is terminated. On May 15, 2008, a letter was sent to Ms. Jodoin informing her that since she was still unable to return to her position, with or without reasonable accommodation, her status was being changed from "Leave of Absence" to Administrative Termination".

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After she was terminated, Jodoin sued the employer for a variety of reasons including an allegation that they denied her reinstatement rights under FMLA. The court summarily dismissed the claim:

> The crux of Jodoin's claim is unclear: she does not allege that Baystate Health denied her rights under the FMLA--indeed, it is clear that Baystate Health gave Ms. Jodoin far more than the twelve weeks of leave required by the FMLA. Furthermore, she concedes that at the time she was terminated, more than a year after she first went on leave, she was not able to return to work. Clearly, Baystate Health did not deny her any rights which she was due under the FMLA. Furthermore, even if I were to assume that Baystate Health interfered with Ms. Jodoin's exercise of her rights under the FMLA by requiring her to change the basis for her requested leave, there is no evidence that she was prejudiced thereby. Cf. Goulette v. Port Huron Hosp., Civ.Act. No. 08-CV-12459, 2010 U.S. Dist. LEXIS 18741, 2010 WL 750170 (E.D.Mich. Mar. 3, 2010)(plaintiff who was given all FMLA leave to which she was entitled for one of three listed medical diagnoses had no cause of action against employer for failing to recognize a second diagnosis as reason for such leave). Therefore, Baystate Health is entitled to summary judgment on this claim.

L. USERRA

1. <u>Vega-Colon v. Wyeth Pharms.</u>, 625 F.3d 22 (1st Cir. 2010)

Wyeth is a pharmaceutical company located in Puerto Rico. In 2002, Vega was hired by Wyeth as a "packaging equipment supervisor." Vega was also a member of the United States Army Reserve. During his employment at Wyeth, Vega alternated between active and inactive status with the Army. Specifically, from 2002 to 2004 Vega was active and took various leaves from

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Wyeth for military training. From 2004 to February 2007, Vega went on inactive status and did not leave for any military training. In February 2007, Vega returned to active status and was promoted to captain with the condition that he join a military unit and participate in military exercises. Vega's Army unit was mobilized in November 2007 and he has been on military leave since then.

In February 2007, Vega received a job performance evaluation from Wyeth for his 2006 employment year. Per policy, Wyeth provided all of its employees with an annual written evaluation, which included a rating of between one and five with five being the most desirable. For the years 2003 through 2005, Vega was rated a three or "solid performer." For the year 2006, Vega's rating declined to a two, which signaled "needs improvement." Vega disagreed with his evaluation and requested that Wyeth initiate an investigation, which it did.

Then in July 2007, Vega was placed on a "performance improvement plan" ("PIP"). Per Wyeth policy, all employees who received a performance evaluation rating of two or lower were placed on a PIP. The PIP established objectives for Vega to complete within ninety days, which he timely completed. That November, Vega was informed that although he had completed the PIP's

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objectives, the PIP would be extended for other reasons until he returned from military service. Vega's Army unit was mobilized that month.

Vega filed suit against the employer, arguing that a number of its actions (not relevant to this discussion) in addition to the extension of the PIP violated USERRA. Vega testified that one of his supervisors, Andrew Espejo ("Espejo"), informed him that he did not pass the PIP because his performance was affected by his military service.

Based on the above facts, the district court, upheld by the appeals court, found that Vega satisfied the first prong under USERRA, particularly his burden of demonstrating that his military service was a motivating factor in Wyeth's actions. See 38 U.S.C. § 4311(c)(1). Both Espejo's comments, and the language contained in the PIP attributing the extension to Vega's leave, satisfied his burden on this issue. The PIP itself stated that Vega successfully completed its objectives prior to Wyeth's extending it. Further, Espejo purportedly remarked that Vega did not pass the PIP due to his military service. Given the PIP's language and the testimony concerning Espejo's comment, there was "sufficient doubt on this issue to make it a jury question."

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