

DEVELOPMENTS IN DISCRIMINATION AND RETALIATION LAW
AND THE FAMILY AND MEDICAL LEAVE ACT

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I. DISCRIMINATION

A. United States Supreme Court

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC² – the ministerial exception

Cheryl Perich was an elementary school teacher at Lutheran Church-member school. She underwent fairly rigorous religious training to become a permanent teacher there. But her duties were generally the same as other teachers in the school who hadn't gone through similar training. She taught both secular and religious subjects and attended chapel with her class; her religious duties consumed roughly 45 minutes of her workday.

Perich began suffering from narcolepsy several years into her tenure at the school and took disability leave for several months. When she told the school's principal that she would soon be returning to work, the principal informed her that her position had been filled. But Perich did not agree to a voluntary resignation. Instead, she reported to work on the first day she was medically cleared to do so, at which time the principal asked her to leave. Perich told the principal later that day that she had consulted with an attorney and planned to assert her legal rights. The school board then terminated her for insubordination.

Perich brought disability discrimination claims under the ADA and state law. The church argued that the suit was barred by the First Amendment under the "ministerial exception" (never before addressed by the Supreme Court) because the claims concerned the employment relationship between a religious institution and one of its ministers. Perich was a minister, according to the Court, and had been fired for a religious reason – her threat to sue the church violated its religious belief that disputes should be resolved internally.

Justice Roberts's opinion first confirmed the existence of a ministerial exception, under which the government may not interfere with a church's choices of ministers. The Court rejected

¹ Michael V. Serra, Esq. and Douglas Lloyd deserve special thanks for their assistance in the preparation of these materials.

² 132 S. Ct. 694 (2012).

the EEOC's contention that the ministerial exception is limited to those who perform exclusively religious functions and refused to adopt a formulaic test for when an individual qualifies as a minister. The Court relied on a number of factors in holding that Perich was a minister, including her job title, the church's characterizations of Perich's role, her religious education, and her responsibility for leading church services about twice per year. Her claim of disability discrimination was thus barred by the First Amendment.

Wal-Mart Stores, Inc. v. Dukes, et al.³ – class action commonality requirement and unconscious bias in discretionary decision-making

In *Wal-Mart*, the Supreme Court rejected certification of a class of roughly 1.5 million current and former female employees alleging gender discrimination under Title VII of the Civil Rights Act of 1964. The *Wal-Mart* decision has significant implications for class certification under Rule 23 of the Federal Rules of Civil Procedure and gives helpful guidance to employers on how to guard against discrimination allegations.

The plaintiffs alleged that Wal-Mart's management decisions were unlawfully influenced by gender stereotypes and unconscious bias against women. They argued that the corporate culture infected the decision making of Wal-Mart's thousands of managers and, consequently, all female employees were victims of discrimination. The plaintiffs alleged that their local managers disproportionately exercised their discretion over pay and promotions in favor of men, leading to unlawful disparate impact on female employees. And, because Wal-Mart was aware of this effect, its refusal to curb managers' authority amounted to disparate treatment. The plaintiffs sought injunctive and declaratory relief, back pay, and punitive damages.

Class certification under Rule 23(a)(2) requires a showing that the class members "have suffered the same injury," and the common contention of class members "must be of such a nature that it is capable of class-wide resolution . . . in one stroke." This required the *Wal-Mart* plaintiffs to present significant proof that Wal-Mart operated under a general policy of discrimination. But Wal-Mart's written policy explicitly prohibited discrimination and imposed penalties for denials of equal employment opportunities. And the Court rejected the plaintiffs' sociological expert's testimony that Wal-Mart had a strong corporate culture vulnerable to gender bias since the expert could not determine with specificity the degree to which gender stereotypes played a meaningful role in employment decisions.

According to the Court, the only discriminatory corporate policy that the plaintiffs' evidence could conceivably establish, then, was Wal-Mart's general policy of giving local managers discretion over employment matters. The Court acknowledged that giving discretion to lower-level supervisors may be the basis of Title VII liability under a disparate treatment theory. But the *Wal-Mart* plaintiffs failed to identify how Wal-Mart's managers exercised their discretion in a common way such that discrimination pervaded the entire company. The plaintiffs failed to meet the commonality requirement despite presenting statistical evidence showing that: (a) women

³ 131 S. Ct. 2541 (2011).

constituted 70 percent of Wal-Mart's hourly workforce but only 33 percent of management; (b) the higher the level of management, the fewer the women; (c) women were paid less than men in every region; and (d) the salary gap widened over time for men and women hired for the same job at the same time. Anecdotal evidence in the form of 120 affidavits from women workers who said they were subjected to discrimination also did not suffice for commonality under Rule 23(a)(2).

The dissent of four justices criticized the majority for focusing on the differences among the would-be class members, rather than their similarities, asserting that the threshold requirement of Rule 23(a)(2) is merely the existence of a single question of law or fact common to the plaintiffs. In addition, the dissent focused on the realities of unconscious workplace bias, stating that "managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetrates gender stereotypes."

B. First Circuit Court of Appeals

Tuli v. Brigham & Women's Hospital⁴ – the continuing violation doctrine

Dr. Sagun Tuli, a female neurosurgeon, among other things alleged that gender-based harassment by two fellow doctors, Dr. Day (her supervisor) and Dr. Kim, created an unlawful hostile work environment under Title VII and M.G.L. c. 151B. The jury awarded Dr. Tuli \$1,000,000 in compensatory damages on this claim. Dr. Day was alleged to have repeatedly made remarks, from 2002 to 2007, about Dr. Tuli's inability to perform her job because she was female. Dr. Tuli also alleged that Dr. Day would give her prolonged hugs and try and hold her hand. Dr. Kim made numerous sexual remarks towards her from 2005 to 2007. Dr. Tuli complained about the doctors' acts, but the hospital did nothing to prevent their repetition. She filed her complaint with the MCAD in November 2007. The hospital argued that the events that occurred outside the 300-day window before she filed could not be considered in the hostile work environment determination.

The court rejected the hospital's argument, writing that the facts presented a "classic case" of the continuing violation doctrine under *Nat'l R.R. Passenger Corp. v. Morgan*⁵ which states "Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile work environment can be considered by a court for purposes of determining liability." Additionally, the timeline of events satisfied Massachusetts' parallel analysis under *Cuddy v. Stop & Shop Supermarket Co.*⁶ which doesn't penalize victims of discrimination for reporting misconduct as it occurs and attempting to work with their employers to remedy the situation. In October 2007, Dr. Day presented to the hospital's credentials committee that Dr. Tuli should have her hospital credentials revoked because of her behavior on the job. Based on his presentation, the committee required that Dr. Tuli undergo a mandatory evaluation by an outside agency to determine whether

⁴ 656 F.3d 33 (1st Cir. 2011). The *Tuli* case is also included in the section of these materials addressing retaliation cases.

⁵ 536 U.S. 101 (2002).

⁶ 434 Mass. 521 (2001).

she was fit to perform. The court held that Dr. Day's presentation to the committee could be viewed as the point at which the situation became hopeless, triggering the clock for the sum of prior acts comprising the continuing violation under *Cuddyer*. The First Circuit thus upheld the jury's damages award.

Román-Oliveras, et al. v. Puerto Rico Electric Power Authority (PREPA)⁷ – individual liability under the ADA

Héctor Luis Román-Oliveras worked for PREPA for 22 years. Based on alleged unfair treatment, he brought claims against PREPA and two supervisors for retaliation resulting from his union activities and for disability discrimination based on his schizophrenia. The district court dismissed Román's complaint in its entirety. The First Circuit reversed the District Court's dismissal of Román-Oliveras' "regarded as" claim of disability discrimination under the ADA against PREPA.

The Court affirmed the dismissal of Román-Oliveras' ADA claims against the two supervisors. The issue of individual liability under the ADA had never before been addressed by the First Circuit or the Supreme Court, although other circuits had taken the view that the ADA doesn't provide for individual liability. The individual defendants argued that the First Circuit's ruling precluding individual liability under Title VII should be extended to the ADA given the statutes' similarities, and the Court agreed. "We see no basis for reaching a different outcome under Title I of the ADA. . . . Given the parallel statutory language and the identical 1991 amendment to the statutes' remedial provisions, we think it apparent that Congress intended that these two employment discrimination provisions be treated uniformly."

DeLia v. Verizon Communications, Inc.⁸ – "employer" under Title VII and Chapter 151B

Caroline DeLia worked as an advertisement artist for a wholly-owned Verizon subsidiary, Idearc. Based on alleged harassment by her supervisor, DeLia made a complaint to Verizon's employment and ethics hotline. A Verizon EEO investigation found no sexual harassment, but concluded that DeLia's supervisor acted unprofessionally. As a result of the investigation, the supervisor was issued a final warning by Idearc and DeLia was given alternative working arrangements. She later went out on disability and did not return.

Subsequently, DeLia brought claims of hostile work environment, sexual harassment and retaliation under Title VII and M.G.L. c. 151B against Idearc, Verizon and the supervisor. Verizon moved for summary judgment on the grounds that it was not DeLia "employer" within the meaning of either statute. Accepting this argument, the district court granted summary judgment in favor of Verizon, which the First Circuit upheld.

⁷ 655 F.3d 43 (1st Cir. 2011).

⁸ 656 F.3d 1 (1st Cir. 2011).

DeLia argued that the following indicia created material issues of fact regarding Verizon's control of her workplace, each of which the panel was quick to reject:

- The keycard to her building bore the Verizon logo. The court wrote that this fact bore no relevance to the type of control necessary to establish the identity of DeLia's employer.
- The Verizon Code of Business Conduct governed the terms of her employment. But despite DeLia's contention, the Code explicitly stated that Verizon didn't supervise or control the employment terms and conditions of its subsidiaries' employees. The Code also defined the term "Verizon" as referring to all its subsidiaries. The Court, therefore, determined that the Code's language suggested nothing more than that the employment terms therein were just as likely to have been established by Idearc.
- Verizon administered her benefits. The court rejected this as indicia because Idearc, not Verizon, funded her benefits; Idearc maintained its own accounts, records, and payroll and issued DeLia her annual W-2 form.
- DeLia received a letter from Verizon's President and CEO to congratulate her on 15 years of service. The court wrote that the record provided no support for DeLia's assertion that the authority to congratulate is co-extensive with the authority to control.

Thus, these record facts, taken together, failed to demonstrate that Verizon had control over the manner and means by which DeLia performed her job. And because DeLia could not establish an employment relationship, her discrimination claims against Verizon failed as a matter of law.

Hernandez-Miranda v. Empresas Diaz Masso, Inc.⁹ – “current year” for damages cap under Title VII

Edna Hernandez-Miranda prevailed on her sexual harassment and intentional discrimination claims on the basis of allegations including forced oral sex, extreme continuing sexual abuse and what the Court characterized as “ugly details” under Title VII. After the jury awarded \$300,000, the trial judge reduced the award to \$50,000 pursuant to 42 U.S.C. s. 1981a(B)(3)(A), which sets incremental limits ranging from \$50,000 to \$300,000 based on number of employees, for punitive damages, non-pecuniary damages and future pecuniary damages awards resulting from intentional discrimination. On a question of first impression for the First Circuit, the Court joined the Fourth, Fifth and Seventh Circuits in concluding that the “current” year to be considered for purposes of the section 1981a(B)(3) caps is the year in which the discrimination occurred, rather than the year of the award. This conclusion is consistent with the “current or preceding” calendar year used for purposes of determining the number of employees to establish the jurisdiction of Title VII under 42 U.S.C. s. 2000e(b). Hernandez-Miranda was ultimately awarded \$200,000.

⁹ 651 F.3d 167(1st Cir. 2011).

C. United States District Court, District of Massachusetts

Ayanna v. Dechert LLP¹⁰ - associational disability discrimination

Arial Ayanna's wife suffered from mental illness. During her pregnancy with the couple's second child, Ayanna's wife's condition deteriorated and she attempted suicide. Subsequently, in his second year with the Dechert firm, Ayanna took paternity and FMLA leave time and continued to provide care to his family after her returned to work. Ayanna was subsequently terminated from his employment. Asserting that his prioritization of family responsibilities did not comport with Dechert's traditional male "macho" culture, Ayanna brought claims for violation of the FMLA and for sex discrimination and handicap discrimination under M.G.L. c, 151B.

Based on the plain meaning of Chapter 151B, section 4(16), the court allowed Dechert's motion to dismiss Ayanna's "associational" disability discrimination claim. The Court rejected the MCAD's interpretation of the statute to include associational disability, stating that the MCAD is entitled to substantial deference but that its interpretation does not carry the force of law. The Court does not directly address the question of associational discrimination under any other aspect of the statute.

D. *Massachusetts Supreme Judicial Court*

Joule, Inc. v. Simmons¹¹ – mandatory arbitration provisions

The defendant, Randi Simmons, signed an employment agreement with her employer, Joule, Inc. that purportedly mandated arbitration of any discrimination claims. Joule later terminated Simmons's employment, which Simmons claimed was because of sex and pregnancy discrimination and retaliation. Rather than pursuing her claim through arbitration as provided in her employment agreement, Simmons filed a complaint with the MCAD. Joule, in turn, filed a complaint and motion to compel arbitration in the Superior Court. Simmons countered that the arbitration agreement was unconscionable and unclear that that she had a right to proceed in the MCAD regardless of the arbitration agreement. The MCAD intervened and argued that its authority to investigate and adjudicate Simmons's discrimination claim was not affected by the arbitration agreement. The Superior Court denied Joule's motion to compel arbitration and stayed further proceedings pending the outcome of Simmons's MCAD complaint.

¹⁰ 2012 WL 39580.

¹¹ 459 Mass. 88 (2011).

The SJC agreed that the MCAD's authority was not affected by the arbitration provision because the MCAD was not a party to the employment agreement. However, the Court vacated the order of the Superior Court and remanded the case for determination of the validity of the mandatory arbitration provision.

Under G.L. c. 151B, § 5, MCAD may hold a hearing on the discrimination claim in its own name. Technically, after certification, the employee is no longer pursuing the case because it proceeds in the name of the Commission. So, regardless of whether the arbitration provision was enforceable, the MCAD could proceed with its investigation and resolution of Simmons's discrimination complaint under § 5, including by granting monetary damages. Simmons could even participate in the MCAD proceedings by, for example, testifying or providing information and materials necessary for the MCAD's investigation. However, if the arbitration provision were enforceable, Simmons would be barred from becoming a litigant or party to the MCAD proceedings by intervening in the MCAD's post-determination case.

Regarding mandatory arbitration agreements, the SJC emphasized that employers must be clear and explicit in their arbitration provisions with respect to the types of claims that are to be resolved through arbitration. The Court stated, "[i]f an employer and an employee enter into a valid and sufficiently clear agreement to arbitrate any and all disputes relating to discrimination, then the party seeking arbitration of such a dispute is entitled to have the agreement enforced.

The SJC, therefore, recognized that arbitration and MCAD proceedings can "continue concurrently, on parallel tracks." With respect to the prospect of duplicative recoveries, the Court noted, "it goes without saying that the courts can and should preclude double recovery by an individual."

E. EEOC regulation – "reasonable factor other than age"

The EEOC issued a new rule regarding the reasonable factor other than age defense in disparate impact claims under the ADEA. The rule became effective on April 30, 2012. It confirms that the plaintiff bears the burden of isolating and identifying the specific employment practice that allegedly caused any observed statistical disparities, and the employer then bears the burden of production and persuasion to demonstrate the reasonable factor other than age defense. The regulation defines the reasonable factor other than age defense and provides a non-exhaustive list of facts and circumstances that employers should consider in determining whether an employment practice with an adverse impact on older workers is justified by a reasonable factor other than age.

To establish the defense, an employer must show that the employment practice was reasonably designed to further or achieve a legitimate business purpose and was administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.

Employers should ask the following questions when implementing a reduction in force or any other employment practice that may have an adverse impact on older workers:

- Is the employer practice based on a factor that is related to the employer's stated business purpose?
- Did the employer define and apply the factor fairly and accurately?
- Did the employer give guidance or training to managers and supervisors about how to apply the factor and avoid discrimination?
- Did the employer limit supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes?
- Did the employer assess the adverse impact of its employment practices on older workers?
- What was the degree of harm to individuals within the protected age group in terms of both the extent of the injury and the numbers of persons adversely affected?
- To what extent did the employer take steps to reduce the harm, in light of the burden of taking those steps?

II. RETALIATION

A. First Circuit Court of Appeals

Bhatti v. Trustees of Boston University¹² - retaliation based on adverse employment action

The plaintiff, Claudine Bhatti, an African-American female, brought federal claims against her employer for discrimination, retaliation, and hostile work environment under Title VII and 42 U.S.C. s. 1981. She alleged that her supervisors required her to perform unpaid setup time because of her race. She also alleged that she was docked vacation or sick time for minor deviations from her scheduled workday, while her white co-workers were permitted to take extended lunches or leave early without having to place a written request and without being charged vacation or sick time. Bhatti claimed that, after complaining to her boss about these forms of discrimination, her employer retaliated against her by issuing unfounded written reprimands. She also alleged that she was subjected to hostile work environment. The University acknowledged that Bhatti worked under "less-than-stellar" management but contended that its bad management practices applied across the board.

The First Circuit agreed with the district court that Bhatti presented insufficient evidence to survive summary judgment on her discrimination claim. The court held that Bhatti's hostile work environment claim failed as well because the alleged conduct was not threatening or offensive, was conducted in private so as not to be humiliating, and had no effect on her work performance.

¹² 659 F.3d 64 (1st Cir. 2011).

As for her retaliation claim, the court acknowledged that reprimands may constitute an adverse action. But, even assuming that the reprimands at issue were undeserved, they were not material because Bhatti did not suffer any tangible consequences as a result; the reprimands were merely directed at what management perceived to be behavior in need of correction. The court wrote that “a criticism that carries with it no consequences is not materially adverse and therefore not actionable,” concluding that the retaliation claim failed as a matter of law.

Tuli v. Brigham & Women's Hosp.¹³ – retaliation based on adverse employment action

Dr. Sagun Tuli, a female neurosurgeon, brought claims of gender discrimination, hostile work environment, retaliation, and other torts against her employer, Brigham & Women's Hospital, and her supervisor, Dr. Day. Drs. Tuli and Day had a contentious history. Dr. Tuli sat on the hospital's Quality Assurance and Risk Management Committee. As part of her duties, she investigated three of Dr. Day's cases, which were later reported to the state Board of Registration of Medicine. Also, starting in 2005 and continuing until 2007, Dr. Tuli had reported to the hospital's chief medical officer that Dr. Day treated her and other women in a demeaning and inappropriate way. Dr. Day allegedly made constant remarks about her ability to practice medicine based on her gender, among other forms of disparate treatment.

Dr. Day sat on the hospital's credentials committee. And when Dr. Tuli's credentials came up for review by the committee, Dr. Day reported that Dr. Tuli was in need of anger management training and that a significant number of the hospital staff did not want to work with her. As a result, the committee conditioned Dr. Tuli's reappointment on obtaining an evaluation from an outside health-services organization and complying with the terms of their evaluation.

The First Circuit held that it was for the jury to decide whether the credentialing committee's order conditioning Dr. Tuli's credentials on mandatory counseling constituted an adverse employment action sufficient for a retaliation claim. “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.’”

Moreover, even though the record did not reflect that other members of the credentialing committee harbored animus toward Dr. Tuli, the jury could have concluded that there was a causal connection between Dr. Tuli's protected conduct – her reporting of Dr. Day's potentially discriminatory conduct – and the adverse employment action taken against her – a mandatory psychological evaluation. Dr. Day, who did harbor animus towards her, was the person responsible for presenting Dr. Tuli's case to the committee. And since the history between Drs. Tuli and Day was not fully disclosed to the credentialing committee, it was for the jury to decide whether the committee was misled by Dr. Day in a way that altered the outcome.

¹³ 656 F.3d 33 (1st Cir. 2011). The *Tuli* case is also included in the section of these materials addressing discrimination cases.

B. Massachusetts Supreme Judicial Court

Psy-Ed Corp. v. Klein, et al.¹⁴ – retaliation based on conduct long after employment relationship

Kimberly Schive, who is deaf, filed a MCAD claim in 1997 alleging that her employer, Psy-Ed, discriminated against her by failing to provide her with an interpreter during meetings and phasing out her job. Stanley Klein, one of Psy-Ed's co-founders, had initially signed an affidavit in Schive's MCAD proceeding supporting Psy-Ed's position. But, after learning that his contract with Psy-Ed would not be renewed, Klein signed a second affidavit supporting Schive's position. The MCAD issued a finding of probable cause against Psy-Ed in December 1999, and two weeks later, Psy-Ed sued Klein and Schive in the Superior Court for defamation, civil conspiracy, and interference torts. Klein and Schive then filed claims against Psy-Ed asserting retaliation.

The SJC wrote that because of the commonly used term "adverse employment action," which does not appear in the statutory provisions prohibiting retaliation, "confusion has arisen as to whether the conduct challenged as retaliatory must target a current employee in order to fall afoul of §§4(4) and (4A)." The court clarified this confusion, ruling that "an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." The statute doesn't require that an employer-employee relationship exist at the time of the wrongful conduct. If the rule were otherwise, employers could threaten former employees with litigation or other retaliatory acts to deter them from complaining about being discriminated against while they were employed.

According to the SJC, the lower-court judge correctly ruled that Schive engaged in legally protected conduct by bringing her discrimination claim with the MCAD. He was also correct in ruling that Psy-Ed's subsequent lawsuit against Schive was an adverse employment action caused by Schive's reasonable efforts at the MCAD. With respect to Klein, the SJC vacated the lower court's grant of summary judgment in favor of Psy-Ed since the lower court had improperly reasoned that Klein's claim failed as a matter of law because the alleged retaliatory acts against Klein occurred over two years after the employment relationship had ended. This was error because a person need not be a current employee to enjoy protection from retaliation.

III. FAMILY AND MEDICAL LEAVE ACT

A. First Circuit Court of Appeals

Tayag v. Lahey Clinic Hospital, Inc.¹⁵ – spiritual healing trips

¹⁴ 459 Mass. 697 (2011).

¹⁵ 632 F.3d 788 (1st Cir. 2011).

Maria Lucia Tayag was terminated from her employment for taking an unapproved 7-week leave to accompany her husband on a spiritual healing trip. Previously, Tayag had taken short intermittent FMLA time to assist her husband who was in ill health. Lahey declined to approve FMLA leave for Tayag's trip on the basis of medical certifications from the husband's primary care physician stating generally that Tayag should be given medical leave "to accompany Mr. Tayag on any trips as he needs physical assistance on a regular basis" and from the husband's cardiologist stating the husband was "presently ...not incapacitated" and that Tayag did not require medical leave.

The trip consisted of attending Catholic mass, praying and talking with priests and other pilgrims at the Pilgrimage of Healing Ministry at St. Bartholomer's Parsh in the Philippines, as well as visiting other churches, friends and family. The husband received no conventional medical treatment and saw no doctors or health care providers during the trip. Tayag assisted by administering medication, helping with walking, carrying luggage and being present in case of incapacity from her husband's illness.

Tayag claimed interference with her rights under the FMLA and retaliation for exercising her FMLA rights. The Court concluded, however, that the Tayag's healing pilgrimage did not constitute medical care within the meaning of the FMLA. Under the FMLA, "health care provider" is defined as a "doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state..." Similarly "serious health condition" is defined as "an illness, injury, impairment or physical or mental condition that involves... inpatient care in a hospital, hospice or residential medical care facility; or ...continuing treatment by a health care provider." Faith healing is addressed in the FMLA regulations as care provided by others "capable of providing health care services," including "Christian Science practitioners" under certain circumstances.

Affirming summary judgment, the Court determined that the faith healing provision did not apply in this case where Tayag's husband got ordinary medical care. The Court reasoned that the scope of faith healing under the FMLA is limited to situations in which the faith healing essentially replaces traditional medical care such that "there is no duplication either for government insurance programs or for employers providing FMLA leave." In reaching its decision, the Court refers to Medicare and Medicaid regulations that provide benefits for "religious nonmedical health care institutions" of "patients who choose to rely solely upon a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs."

The Court concluded that Tayag's FMLA claims also failed on the grounds that she did not provide adequate certification by a health care provider as required by Lahey. Such requirement is permitted under the FMLA. For intermittent leave, the certification must include a statement that the leave is necessary for the care of "a serious health condition" or will "assist in... recovery" and must state the expected duration and schedule of the leave.

B. ***Department of Labor proposed regulations*** – expanding the scope of the FMLA

The DOL's Wage and Hour Division has published a Notice of Proposed Rulemaking to implement the following statutory amendments to the FMLA. The public comment period for the proposal ended on April 30, 2012.

1. Military caregiver leave

The proposal expands coverage for "military caregiver leave" to include care for covered veterans with a serious injury or illness. Covered veterans are those who have been discharged within the five preceding years. There is a flexible, three-part definition for a veteran's serious injury or illness. The proposal also expands military caregiver leave to cover serious injury or illnesses to active duty servicemembers and covered veterans that resulted from aggravation in the line of duty of a preexisting condition.

2. Qualifying exigency leave

The proposal extends "qualifying exigency leave" to include employees whose family members serve in the Regular Armed Forces (in addition to the National Guard and Reserves), and adds a new requirement that the employee's family member be deployed to a foreign country.

3. Airline flight crew amendments

The proposal implements a special minimum service hours requirement for airline flight crew employees. Due to the nature of the industry, flight crew employees have had difficulty meeting the existing, generally applicable minimum hours requirement for FMLA eligibility (i.e., 1250 hours in the 12 months preceding the leave). The proposal provides that airline flight crew employees will meet the service eligibility requirement if they have worked or been paid for not less than 60 percent of the applicable total monthly guarantee and have worked or been paid for not less than 504 hours during the 12 months prior to their leave.

2012 Employment Law Update

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Discrimination

***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).**

- The ministerial exception as an affirmative defense to employment discrimination claims against religious institutions may apply to lay teachers based on their religious education and duties.

Discrimination

Wal-Mart Stores, Inc. v. Dukes, et al., 131 S. Ct. 2541 (2011).

- Class action commonality requirement was not met by putative class of 1.5 million current and former female employees.
- Unconscious bias in discretionary decision-making acknowledged by the Court.

Discrimination

***Tuli v. Brigham & Women's Hospital*, 656 F.3d 33 (1st Cir. 2011).**

- In hostile work environment sexual harassment claims under Title VII and Chapter 151B, incidents over a period of 5 years are actionable continuing violations under federal and state law.

Discrimination

Román-Oliveras, et al. v. Puerto Rico Electric Power Authority (PREPA), 655 F.3d 43 (1st Cir. 2011).

- No individual liability under the Americans with Disabilities Act.

Discrimination

Delia v. Verizon Communications, Inc.,

656 F.3d 1(1st Cir. 2011).

- Claims against Verizon under Title VII, ADA and Chapter 151B fail due to insufficient facts to establish that Verizon was plaintiff's "employer." All facts taken together do not demonstrate adequate level of control by Verizon of "manner and means" by which plaintiff performed job for Verizon subsidiary.

Discrimination

Hernandez-Miranda v. Empresas Diaz Masso, Inc., 651 F.3d 167(1st Cir. 2011).

- The number of employees in the year the discrimination occurred determines the amount of applicable damages cap for intentional discrimination claim under Title VII.

Discrimination

***Ayanna v. Dechert LLP*, 2012 WL 39580.**

- M.G.L. c. 151B does not cover associational disability discrimination, based on plain meaning of the statute. With respect to associational discrimination, the MCAD is entitled to substantial deference but its interpretation does not carry the force of law.

Discrimination

***Joule, Inc. v. Simmons*, 459 Mass 88 (2011).**

- A mandatory arbitration provision that is enforceable with respect to discrimination claims brought by an employee does not preclude MCAD proceedings under M.G.L. c. 151B, § 5.

Discrimination

1. EEOC rule clarifying the “reasonable factor other than age” (RFOA) defense -
 1. Makes EEOC regulations consistent with recent Supreme Court holdings that the defense to a *ADDEA* disparate impact claim is RFOA, not business necessity;
 2. To establish RFOA, the employer must reasonably design and administer the employment practice to achieve a legitimate business purpose;
3. Includes a list of considerations relevant to reasonableness.

Retaliation

Bhatti v. Trustees of Boston University, 659 F.3d 64 (1st Cir. 2011).

- Reprimands without tangible consequences are not materially adverse employment actions and, therefore, do not constitute actionable retaliation under Title VII or 42 U.S.C. s. 1981.

Retaliation

***Tuli v. Brigham & Women's Hosp.*, 656 F.3d 33 (1st Cir. 2011).**

- Requiring a physician to undergo a psychological evaluation as a condition of continued hospital credentials may constitute an adverse employment action for a retaliation claim under Title VII.

Retaliation

Psy-Ed Corp. v. Klein, et al., 459 Mass. 697 (2011).

- Employers can be held liable for retaliation against ex-employees under Chapter 151B, even if the wrongful conduct occurs long after the employment relationship ended.

Family and Medical Leave Act

Tayag v. Lahey Clinic Hospital, Inc., 632 F.3d 788
(1st Cir. 2011).

- Faith healing constitutes “medical care” under FMLA only when such treatment is in lieu of treatment by a traditional health care provider, such as in the case of Christian Scientists who are precluded by their religion from obtaining traditional medical care.

Proposed FMLA Regulations

1. Military caregiver leave -

- A. Permits leave to care for covered veterans (those who served within the last five years) with serious injury or illness;
- B. Includes a flexible, three-part definition for a veteran's serious injury or illness;
- C. Permits leave to care for active servicemembers and veterans with serious injury or illness due to aggravation to preexisting conditions.

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Proposed FMLA Regulations

2. Qualifying exigency leave -

- A. Now includes employees whose family members serve in the Regular Armed Forces;
- B. Adds a requirement that the employee's family member be deployed to a foreign country.

3. Special minimum hours of service requirement for airline flight crew members -

- A. Worked or been paid not less than 60% of total monthly guarantee;
- B. Worked or been paid for not less than 504 hours during prior 12 months.

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