

News

Goldman Preserves Deane's Trial Court Win



David Goldman

David Goldman scored another appellate victory in *Vargas v. Riverbend Management*. In its decision, the Law Court affirmed the defense verdict secured by Devin Deane in the Superior Court.



Devin Deane

In *Vargas*, the Law Court took the opportunity to clarify the circumstances under which an employer can be held vicariously liable for the discriminatory actions of its employees.

In *Vargas*, the plaintiffs were customers who had a negative interaction with a McDonald's drive-thru employee when that employee served them the iced coffee that they had ordered but then refused to provide them with an extra cup of ice they requested at the service window unless they went back to the back of the drive-thru line and ordered it there.

After the first employee walked away from the window, a different employee gave the plaintiffs their extra cup of ice and, upon the plaintiffs' request, told them the name of the employee who they interacted with earlier.

The plaintiffs drove away from the service window and stopped in the parking lot to talk with each other when they noticed the employee who had refused them the ice delivering food to a different customer in the parking lot. The plaintiffs opened their window and made a comment letting the employee know that they knew his name, at which point the employee responded with a racially insulting expletive.

When the Plaintiffs complained of the incident to McDonald's, the franchise owner had his manager investigate the incident to determine if a negative interaction had happened, fired the employee as soon as he confirmed as much, and reached out repeatedly to the Plaintiffs to apologize and try to make the feel comfortable returning to his McDonald's. The Plaintiffs, nevertheless, sued the McDonald's franchise asserting the existence of vicarious liability for the franchise owner for the employee's public accommodations discrimination under the Maine Human Rights Act ("MHRA").

Following a bench trial, the judge ruled that vicarious liability against the franchise owner was inappropriate and granted judgment in its favor. On appeal, the Plaintiffs argued that the MHRA's broad language rendering discrimination in access to public accommodations unlawful implied that employers should be held liable for any employee's discriminatory act committed while at work and subject to the employer's control regardless of any other

facts. The Law Court disagreed. In so doing, the Court spoke to at least two issues that will be of importance to practitioners to understand moving forward.

The first was the Law Court's confirmation that the MHRA "incorporates principles of vicarious liability" and does not, as the plaintiffs would have had it, essentially impose strict liability on employers for their employees' actions while at work. The Court then went on to address a disagreement between the parties over whether Maine courts look to the Restatement (Second) of Torts or Restatement (Third) of Torts for guidance on vicarious liability determinations.

Although the Law Court acknowledged that the two Restatement standards are similar, it recognized that "the two Restatements are not identical." In particular, the Restatement (Third) standard "diminishes the significance of whether the employee's conduct at issue occurs during working hours and at the workplace" while also adopting "a somewhat more concrete test" for scope of employment questions than the Restatement (Second) of Torts. Ultimately, the Court clarified that from this point forward Maine courts should rely upon the Restatement (Third) of Torts standard for vicarious liability determinations under the MHRA, though the Restatement (Second) of Torts retains instructive in other circumstances, most notably in cases arising of the a "context of vicarious-liability claims based on an employer's or agent's negligence or other unintentional acts."

The second key takeaway from the Vargas decision was the Court's discussion of the many ways in which the McDonald's franchise owner had done right. In particular, the Court found notable that, in advance of this incident, the franchise owner had long had a "zero tolerance" policy towards discriminatory behavior by employees, had instituted employee training on this policy, and that there was no prior behavior from the employee in question or any other employee that would have made the possibility of a discriminatory act of the kind that occurred foreseeable. The Court also found relevant that, the franchise owner took quickly took action in response to the Plaintiffs' complaint, including promptly firing the employee in question and doing what he could to reach out to the Plaintiffs and apologize for what had occurred.

Vargas could prove to be a highly consequential opinion. It clarifies when a business can be held liable for its employees' discriminatory behavior and, in the manner it does so, properly incentivizes employers to ensure that they are taking all appropriate steps to ensure that discriminatory behavior by those employees is not a reasonably foreseeable occurrence, while making clear that, if an employer takes such steps, it won't necessarily be held liable for an isolated incident of discriminatory behavior by an employee solely because that behavior occurs while the employee is on the job.

NHD Sponsors Bench-Bar Hockey Game

For the past 12 years, Norman, Hanson & DeTrois has sponsored the Maine Bench-Bar Hockey Game to promote civility and collegiality among the legal community. The irony of a hockey game promoting civility and collegiality is not lost on us.



Tom Marjerison and John Veilleux started the game, and Sam Johnson has ably taken over management of the contest. In addition to Tom Marjerison, John Veilleux, and Sam Johnson, Devin Deane and JD Hadiaris suited up for the game.

Cummings Named to Finance Authority of Maine Board

Governor Janet Mills recently nominated [Dan Cummings](#) to the Board of Directors of the Finance Authority of Maine (FAME). The Joint Committee on Innovation, Development, Economic Advancement and Business and the Maine Senate both unanimously approved his nomination.

Dan has nearly 35 years of experience in the lending industry representing credit unions throughout the state and serves as General Counsel to the Maine Credit Union League.

Article by Pattershall & Brogan on Employment Discrimination

An article written by [Brad Pattershall](#) and [Jonathan Brogan](#) was recently published in *Maine Town & City*, a periodic publication of the Maine Municipal Association (MMA). The article addresses how to mitigate claims of employment discrimination by implementing best practices.

NHD frequently represents MMA insureds both before the Maine Human Rights Commission and in court on discrimination claims. The article can be accessed here: [Download \(memun.org\)](#)

Brogan Named to National Academy of Distinguished Neutrals

Norman Hanson & DeTroy, LLC is pleased to announce that Jonathan W. Brogan has been inducted into the National Academy of Distinguished Neutrals (NADN)

Jonathan W. Brogan is a partner and chair of the firm's litigation group. He is an experienced trial lawyer, having tried more than 250 trials to verdict on a range of issues. He is a Fellow of the American College of Trial Lawyers, considered by most the highest honor a trial lawyer can receive from his peers. Jonathan is also a highly skilled mediator having mediated numerous civil disputes to successful resolution for plaintiffs and defendants.

The National Academy of Distinguished Neutrals is a professional association whose membership consists of ADR professionals distinguished by their hands-on experience in the field of civil and commercial conflict resolution. Membership is by invitation only and all Academy members have been thoroughly reviewed and found to meet stringent practice criteria. Members are amongst the most in-demand neutrals in their respective states, as selected by their peers and approved by local litigators.

"We're delighted to recognize Jonathan W. Brogan to the Academy's Maine Chapter in recognition of Excellence in his mediation practice," commented Darren Lee, Executive Director of NADN.

Hadiaris & Lavoie Secure Defense Verdict

J.D. Hadiaris and Mark Lavoie secured a defense verdict following a medical malpractice jury trial at the Penobscot Judicial Center in Bangor, Maine.

J.D. and Mark's client, an orthopedic surgeon, was accused of breaching the standard of care in obtaining informed consent for shoulder surgery, and causing damages, including shoulder dysfunction and the need for the Plaintiff to undergo further surgery. The jury rejected the Plaintiff's theory, and after six days of trial, found that the surgeon acted appropriately in his care and treatment of the Plaintiff.

J.D. and Mark had also argued that the Plaintiff could not establish the second necessary element of her malpractice claim, *i.e.*, that harm was caused by the alleged negligence of the surgeon. However, in light of the jury's 'no negligence' finding, it was not necessary for the jury to address the second necessary element of the Plaintiff's malpractice claim.

JD Hadiaris and Mark Lavoie are Partners in Norman Hanson & DeTroy's Medical Malpractice Litigation Group. They regularly represent health care providers and practitioners in the defense of malpractice claims in Maine and New Hampshire courts, and before medical malpractice prelitigation screening panels.

NHD Wins Major Contract Case

Mark Lavoie recently secured a defense verdict in a seven-figure contract case involving a Maine hospital system.

The Plaintiff, a vendor providing Medicare and Medicaid billing services, claimed that a third-party association had negotiated a contract for a "success fee" (essentially a contingent fee arrangement), so it would receive a percentage of any additional federal reimbursements it secured for the Hospital. In the past, the Plaintiff had been paid a flat fee for its services, and the difference between that fee and the "success fee" was a staggering amount.

Mark and the hospital defended the case by presenting evidence that the association did not have authority to negotiate on its behalf, a hotly contested issue, and that the Plaintiff did not satisfy conditions precedent for collecting its fee. Following a lengthy jury trial and after brief deliberations, the jury returned a unanimous verdict that there was no enforceable contract for a "success fee."

Abby Liberman Joins NHD

Norman, Hanson & DeTroy is proud to announce that Abby Liberman has joined the firm's litigation group. Abby is a proud McAuley High School graduate. She attended Acadia University in Wolfville, Nova Scotia where she graduated with an Honors degree in History. She spent her summers during college working as a horse wrangler in Colorado for a hunting outfitter.

Abby is a 2023 *cum laude* graduate of the University of Maine School of Law. While attending law school, Abby interned at the United States Attorney's Office and participated in Moot Court competitions.

Kelsey Kenny Joins NHD

Norman, Hanson & DeTroy, LLC is pleased to welcome Kelsey Kenny to the firm. Kelsey is a 2023 *cum laude* graduate of the University of Maine School of Law where she earned a certificate in Information Privacy Law with

distinction. She is also a 2018 graduate of the University of Massachusetts-Amherst.

While in law school, Kelsey was a managing editor of the Maine Law Review and co-founded the Student Journal of Information Privacy Law. She is published in both journals and participated in multiple moot court competitions. Kelsey was summer associate at Norman, Hanson & DeTroy and served as a judicial extern to Magistrate Judge Karen Frink Wolf in the Federal District Court for the District of Maine.

Erika Roberge Joins NHD

Norman, Hanson & DeTroy, LLC is pleased to welcome Erika Roberge to the firm. Erika is a 2023 *cum laude* graduate of the University of Maine School of Law and a 2016 *summa cum laude* graduate of Husson University. She will primarily focus her practice on workers' compensation matters. Erika has a background in workers' compensation after having worked as an adjuster for MEMIC both before and during law school.

While attending the University of Maine School of Law, Erika completed externships at the Androscoggin County District Attorney's Office and the United States Attorney's Office. She also served as a student attorney for the Youth Justice Clinic at Maine Law. Erika graduated from Maine Law *cum laude* and with a distinction for Pro Bono Service. A lifelong Mainer, Erika lives in Sebago with her husband and two hound dogs.
