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News

Bystander Liability Clarified by Maine Supreme Court

BY: Jonathan W. Brogan, Esq.

Recently the Maine Supreme Court made a significant decision regarding bystander claims of negligent infliction of emotional distress. *Coward v. Gagne and Sons Concrete Blocks, Inc.,* 2020 ME 112 (9/17/2020).

The longstanding test in Maine was decided in a case called *Culbert v. Sampson Supermarket* which stated that there would be bystander liability if the bystander was (1) present at the scene of the accident, (2) suffered serious mental distress as a result of seeing the accident and the ensuing danger of the victim, and (3) was closely related to the victim. That has been the test in the Maine courts since 1982. Since that time, there has been a gradual change in the law, in other states, regarding these three factors.

In Coward v. Gagne and Sons Concrete, our Supreme Court was presented with a horrific case. Thomas Coward and his wife, Lisa Coward, brought a claim against Gagne and Sons Concrete after their son was killed in a crush injury by steel re-bar being delivered to their place of business. Thomas Coward did not see the accident but heard the accident occur, arrived “seconds later” and witnessed his son die. Though the Superior Court granted Gagne and Sons’ motion for summary judgment, the Supreme Court overturned that summary judgment and remanded Mr. Coward’s claim for negligent infliction of emotional distress and Mrs. Coward’s claim for loss of consortium to the Superior Court for further action. The underlying wrongful death was tried and a more than $2,000,000 verdict was entered for the Estate of Phil Gagne, the decedent.

Throughout the years, we have always used the *Culbert* test in determining whether a bystander had a claim. The issue in the Gagne and Sons case was contemporaneous perception. It was decided that being within a 100 feet of the accident, hearing the crashing re-bar and the victim’s screams and arriving within seconds to witness the aftermath met the plaintiffs’ burden.

The issue of what contemporaneous perception means, in Maine, has been somewhat nebulous. The Court has now said that it does not mean that the bystander is required to directly witness and immediately be aware that an injury causing event is taking place.

The Court concluded that perception of an accident can arise from any of a person’s senses, not just sight. The bystander’s observation of the victim’s injuries must occur in the immediate aftermath of the injury producing event, but they cannot be called to the scene or otherwise not be present at the scene, and the bystander must have perceived the injuries or death of the victim as an immediate result of their perception of the injury producing event. No specific time was established by the Court for this perception of injury however the Court did state that a “brief amount of time” is enough. In other words, learning through indirect means of an accident and then going to the scene would not be enough, but hearing or seeing the event and then immediately perceiving the damage is enough.

The Court’s lengthy decision (26 pages) does not extensively change the law as it has been interpreted in the Superior Court for many years. However, this Supreme Court case finally ends the belief that bystander liability is limited to actually seeing the event and perceiving it contemporaneously as opposed to perceiving the event and, within a reasonable amount of time, understanding what has happened.

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If you have any questions about this decision or its ramifications, please do not hesitate to contact any of us here at Norman Hanson & DeTroy to discuss it.

New Attorney Announcement – Nicole Sawyer and Christine Johnson

This past year Norman Hanson & DeTroy welcomed two new attorneys to the firm.

Nicole Sawyer

Nicole is a Maine native who has historically served the people of Maine before joining Norman, Hanson & DeTroy. She attended the University of Maine at Farmington before ultimately graduating from the University of Maine at Augusta. She was inspired to go to law school while working at the Department of Health & Human Services. During her time at the University of Maine School of Law, she was a judicial intern for the Lewiston District Court and with Judge Kermit V. Lipez of the United States First Circuit Court of Appeals. While at Maine Law, she was also selected for the Charles A. Harvey, Jr. Trial Practice Immersion Fellowship, in which she shadowed and assisted many of Portland's top litigation attorneys over the course of an eleven-week rotation.

Nicole was chosen to serve as the student research assistant for the Maine Advisory Committee on Rules of Evidence from 2017-2018, and honed her legal research skills to provide the Committee with guidance for evaluating and proposing changes to the Maine Rules of Evidence. During that same term, Nicole was selected to be Research Editor for the *Maine Law Review*. In her final year of law school, she counseled and represented clients in the Cumberland Legal Aid Clinic. After graduating *magna cum laude* in 2018, she served as a law clerk for four justices of the Maine Superior Court. Nicole lives in Freeport with her husband and their two dogs. In her free time she enjoys walks in the woods, a good game of cribbage, and finding treasures at estate sales.

Christine Johnson

Christine Johnson is a lifelong resident of York County. She attended the University of Vermont, the University of Southern Maine, and Maine School of Law. Before attending law school, she was a case manager at Sweetser and worked with at-risk youth in an immersive adventure therapy program. While in law school, Christine was a student attorney at the Cumberland Legal Aid Clinic, volunteered for the Abused Women's Advocacy Project, and completed an externship at Pine Tree Legal Assistance.

Christine's legal career began at a small bankruptcy firm in Kennebunk, and developed into consumer advocacy work. For several years, she was an active member of MASH (Maine Attorneys Saving Homes), a volunteer advocate for Maine's Volunteer Lawyer's Project, and a mediator for the Maine Judicial Branch. From there, she represented local and national lending institutions in a variety of matters. She has a solid background in real estate, with an emphasis on foreclosure litigation and creditor rights. She also has experience in probate and debt collection. She has presented and participated in numerous panels related to Maine's Foreclosure Diversion Program and Consumer Financial Protection Bureau rules. Christine lives in Buxton with her husband and two daughters. She enjoys spending time with her family and many outdoor activities, including running, hiking, and gardening.

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Kudos

Mark Lavoie represented the Maine Chapter of the American College of Trial Lawyers at its annual meeting, held in La Qunita, California and scored third place with his group in the organization's golf tournament.

Robert Cummins was recently nominated by Governor Mills and approved by the State Legislature to serve as a commissioner on the Maine Commission on Indigent Legal Services.

Katlyn Davidson, Lindsey Sands and **Elizabeth Brogan** presented at the 26th annual Maine Workers' Comp Summit held at the Samoset Resort in Rockport. Katlyn and Lindsey presented at the Summit's opening plenary session, "Keys to Compliance and Successful Outcomes," which provided an overview of Maine's workers' compensation system and provided instruction on key elements oF claims handling and litigation practices. Elizabeth presented at two plenary sessions regarding legislative updates to the Maine Workers' Compensation Act and the legal year in review, discussing Law Court and Appellate Division decisions of note over the past year.

Elizabeth Brogan served on a working group convened by the Workers' Compensation Board pursuant to the workers' compensation omnibus bill, LD 756, enacted in 2019. The results of the group's work, on issues related to work search, vocational rehabilitation and protections for injured workers whose employers have wrongfully not secured workers' compensation coverage, were reported to the Joint Standing Committee on Labor and Housing at the end of January.

Kathyrn Longley-Leahy has been appointed to a second three-year term as an Advisor to 10th, 11th and 12th grade girls at Edward Little High participating in the Olympia Snowe Women's Leadership Institute program as "Olympia's Leaders. The Institute is designed to elevate the confidence and aspirations of high school girls by helping them build the leadership, collaboration and problem-solving skills needed to become successful in their lives, families, careers and communities. The Institute has state-wide support by leading organizations and over 360 professional women volunteer as mentors and classroom advisors to more than 500 high school girls across the State of Maine.

David Very was awarded the Defense Research Institute's State Leadership Award at the DRI Annual Meeting. DRI is the largest international membership of defenses attorneys with over 22,000 members.

Elizabeth Brogan was a featured presenter regarding new developments in workers' compensation law and the legislative process at the annual meeting of the Maine Health Care Association Workers' Compensation Fund.

Health Law Update

By Christopher C. Taintor, Esq.

"The Sooner the Better"
Is Not Enough to Prove Causation

The Maine Supreme Judicial Court, sitting as the Law Court, recently decided *Holmes v. Eastern Maine Medical Center,* 2019 ME 84, 208 A.3d 792. In *Holmes*, the Court affirmed judgments in favor of three defendants: Eastern

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Maine Medical Center (EMMC), a surgeon employed by the hospital, and a radiologist employed by a separate entity. The Superior Court entered summary judgment in favor of the radiologist, who was represented by Mark Lavoie and J.D. Hadiaris of NH&D. Because the other defendants' motions for summary judgment had been denied, the case went to trial before a jury, which returned verdicts in their favor. The Law Court decision, which focused on the claim against the radiologist, is significant because of what the Court had to say about a malpractice plaintiff's need to prove that a causal connection actually exists between a defendant's alleged negligence and specific, identifiable harm suffered by the patient.

Michael Holmes underwent colon surgery at EMMC on August 14, 2012. On August 20th, he returned to the EMMC emergency department complaining of abdominal pain. The covering surgeon promptly ordered a CT scan. The scan was first read that evening by a "nighthawk" radiologist, and then read again the following morning (the 21st) by the defendant-radiologist. Neither radiologist interpreted the scan as showing evidence of an anastomotic leak — that is, a condition in which bowel contents leak into the abdomen at the junction of the two parts of the bowel that were surgically reconnected after the earlier surgery. The patient was thought to have an ileus, a condition in which the intestinal track "slows down," and so he was monitored with the expectation that he would recover bowel function

Over the course of the day on August 21st, however, Mr. Holmes' condition got worse. The severity of his condition was recognized that evening — about 14 hours after the defendant-radiologist's reading of the CT scan — and exploratory surgery was performed. In the course of that second surgery an anastomotic leak was detected and repaired. The leak had allowed bowel contents to enter Mr. Holmes' abdomen, causing a severe systemic infection. He remained in the hospital, gravely ill, for several weeks, suffered a stroke while hospitalized, and was left with serious deficits.

The plaintiff presented an expert who testified at deposition that the defendant-radiologist, reading the CT scan at 8:00 a.m. on August 21st, had negligently failed to diagnose an anastomotic leak. The key issue at the summary judgment stage was whether, assuming the leak was present and diagnosable at that time, its consequences had already become unavoidable. The radiologist pointed to testimony by the Plaintiffs' own experts, who said that the most serious sequelae of the leak — the systemic infection and the stroke — could have been avoided only if the leak had been detected and repaired on the evening of August 20th, roughly 10 hours before the defendant-radiologist read the CT scan. The Plaintiffs, on the other hand, pointed to testimony from one of their experts, who said that Mr. Holmes could have avoided *some* harm even if diagnosis and intervention had occurred on the morning of the 21st. His opinions, however, were vague at best. The expert testified that it is generally better to treat infections earlier than later, because every minute that passes with an untreated infection causes the patient to suffer "physiologic hits." His testimony, as characterized by the Plaintiffs, was that surgery performed earlier "would have had some benefit in terms of improving the potential for a better outcome" — essentially, "the sooner the better."

The Superior Court judge ruled, and the Law Court agreed, that this testimony was insufficient to get the plaintiffs' case to a jury. Notably, the Law Court cited cases from other jurisdictions which have held that it is not enough for an expert to say that "time is of the essence," or that "every hour counts." Rather, there must be evidence sufficient to enable a jury to find that a defendant's negligence more likely than not caused some specific, identifiable injury. Because no expert could say that intervention on the morning of August 21st probably would have averted any particular injury to Mr. Holmes, the judgment was affirmed.

Reasoned Medical Decisions Do Not Amount to "Disability Discrimination"

In *Cutting v. Down E. Orthopedic Assocs., P.A.,* 2019 WL 1960329 (D. Me. 2019), the United States District Court for

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the District of Maine addressed a question that has not received much attention: when a physician's decision whether to treat a patient is influenced by the existence of a disability, can that decision ever be characterized as "disability discrimination" under the Americans with Disabilities Act (ADA) and the Maine Human Rights Act (MHRA)? In the *Cutting* case, which NH&D defended, the District Court explained the limited circumstances under which liability can be imposed on treating physicians for disability discrimination, and entered summary judgment against the plaintiff because the evidence was insufficient to bring her claim within the reach of the ADA or the MHRA.

The plaintiff in the *Cutting* case suffered from Tourette's syndrome, which caused her to have repeated involuntary body movements, including repetitive shoulder flexion of the right arm in an outward motion, which her medical records described as resembling a "punching motion." The frequency and severity of plaintiff's tics depended on factors which included her stress level, and whether she was comfortable in her surroundings. In 2013, she was referred to an orthopedic surgeon for long-standing, persistent right shoulder pain. The surgeon examined the shoulder and diagnosed the plaintiff as suffering from acromioclavicular arthritis with possible rotator cuff tendonitis and impingement, and recommended surgery.

While waiting to decide whether to proceed with surgery, the plaintiff saw other providers. One doctor told her that he questioned whether she would be able to limit the motion of her right arm enough to heal post-surgically. Eventually, however, the plaintiff did decide to undergo surgery. The surgeon performed an open distal clavicle excision – the removal of part of the distal clavicle and arthroscopy. During the arthroscopic portion of the procedure, he identified both a partial thickness rotator cuff tear and a full thickness rotator cuff tear. He debrided and smoothed the rough edges around the tears, but chose not to attempt a rotator cuff repair because he believed the plaintiff would re-tear the tendon following surgery when she experienced movements caused by her Tourette's syndrome.

The plaintiff later sued, contending she was afforded services "on the basis of disability" that were "not equal to that afforded to other individuals," in violation of the ADA and MHRA. Although she alleged various subsidiary acts of discrimination, the essence of the lawsuit was her dissatisfaction with the surgeon's decision not to repair her rotator cuff tear when he discovered it during surgery, because he believed her tics would disrupt the repair. In essence, she claimed that her rights were violated because she was denied the benefit of a procedure the surgeon would have performed on a person who did not have her disabling condition.

The Court rejected that claim, reasoning that it was one of "medical malpractice, not discrimination," and that "[s]pecific medical decisions, which must account for a patient's conditions and traits to meet the professional standard of care, generally do not constitute unequal service delivery 'on the basis of disability' within the meaning of the ADA." The Court went on to explain:

> Ultimately, medical care decisions can only be challenged "by showing the decision to be devoid of any reasonable medical support."
>
> [T]he point of considering a medical decision's reasonableness in this context is to determine whether the decision was unreasonable *in a way that reveals it to be discriminatory.* In other words, a plaintiff's showing of medical unreasonableness must be framed within some larger theory of disability discrimination. For example, a plaintiff may argue that her physician's decision was so unreasonable – in the sense of being arbitrary and capricious – as to imply that it was pretext for some discriminatory motive, such as animus, fear, or "apathetic attitudes."

Cutting v. Down E. Orthopedic Assocs., P.A., at *7 (quoting *Lesley v. Hee Man Chie*, 250 F.3d 47, 55 (1st Cir. 2001)).

Cutting is consistent with a handful of federal decisions which tell us that where medical treatment decisions are

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concerned, the scope of liability for disability discrimination is quite narrow. There can be liability where the discrimination is obvious and objectively groundless – for example, in the seminal case of *Bragdon v. Abbott*, 524 U.S. 624 (1998), where a dentist simply refused to treat an HIV-positive patient because of unfounded fears about the transmissibility of the virus. As one federal appellate court has said, however, "[w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory.'" *United States v. Univ. Hosp., State Univ. of New York at Stony Brook*, 729 F.2d 144, 157 (2d Cir. 1984).

"Conscience Rule," Enacted by DHS,
Is On Hold Pending Appeal

Over the past several decades, Congress and state legislatures have enacted statutes which give employees, both generally and in the health care field specifically, the right to act in ways that are consistent with their religious beliefs. The broadest protection, in the sense that it cuts across all sectors of the economy, is found in Title VII of the Civil Rights Act of 1964. Title VII gives employees the right to accommodations in the workplace when *bona fide* religious practices or beliefs conflict with job requirements, so long as those accommodations do not impose an "undue hardship" on employers.

The most common examples of conflict between work and religious observance involve attendance and dress. Where attendance is concerned, the Supreme Court has said that an employer is not required "to bear more than a de minimis cost" in order to accommodate an employee's religious scheduling preference. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84 (1977). Under that standard, employers are not required to bear additional costs to give days off based on religion, when they do not bear additional costs to give other employees the days off they prefer, since that "would involve unequal treatment of employees on the basis of their religion."

Other, less typical examples of conflict between work and religion, which have also produced Title VII litigation, include:

- A male employee who had a religious objection to working in an area where there were nude pictures of women hanging on the wall, *Lambert v. Condor Mfg., Inc.*, 768 F. Supp. 600 (E.D. Mich. 1991);
- A Roman Catholic surgical aide who refused to clean instruments which were used to perform abortions, *Tramm v. Porter Memorial Hospital,* 1989 U.S. Dist. LEXIS 16391 (N.D. Ind. Dec. 22, 1989);
- An atheist telemarketing employee who objected to interacting on the phone with religious organizations, *McIntyre-Handy v. West Telemarketing Corp.*, 97 F. Supp. 2d 718, 736 (E.D. Va. 2000); and
- A Roman Catholic police officer who objected to being assigned to guard an abortion clinic, *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998).

It is in the field of health care, however, that the conflicts have become most pointed. In 1973, shortly after the Supreme Court decided *Roe v. Wade*, Congress passed the "Church Amendment," which prohibits public officials from requiring any person to perform a sterilization procedure or abortion if doing so would be contrary to his or her religious beliefs. Within a decade after *Roe*, at least forty states, including Maine, had enacted statutes allowing health care providers the right to choose not to provide sterilization procedures and abortions. Since then, "conscience protection" has expanded, so that many laws now relieve health-care providers of not only the need to perform procedures they object to, but also the obligation to provide counseling or referral services to patients.

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In 2019, the United States Department of Health and Human Services (HHS) adopted a rule which, if implemented, would supersede all the conscience protections that currently exist under various federal laws. In support of the rule, HHS asserted that the rule was necessary because there has been confusion about existing conscience protections, and because there has been a "significant increase" in the number of complaints the Department's Office of Civil Rights (OCR) has received about violations of existing laws.

The HHS rule broadly prohibits any "health care entity" – including any hospital, pharmacy, medical laboratory, and "other health care provider or health care facility" – from taking adverse action against an employee for refusing to perform or "assist in the performance" of health care activities on account of "religious, moral, ethical or other reasons." The Rule defines the term "assist in the performance" as "tak[ing] an action" with a "specific, reasonable, and articulable connection" to furthering a particular procedure, program or service. Assisting may include "counseling, referral, training, or otherwise making arrangements" for the procedure, program or service at issue. In litigation, HHS has acknowledged that the rule, as drafted, "would authorize individuals at some remove from the operating theater or medical procedure at issue to withhold their services." It "would apply, for example, to a hospital or clinic receptionist responsible for scheduling appointments, and to an elevator operator or ambulance driver responsible for taking a patient to an appointment or procedure." "It would also, for the first time, . . . permit abstention from activities ancillary to a medical procedure, including ones that occur on days other than that of the procedure."

Under the Rule, a health care entity's attempts to accommodate an employee's religious or moral objections does not constitute discrimination if the employer offers an "effective accommodation" and the employee "voluntarily accepts" that accommodation. Conversely, if the employee does not consent to the accommodation offered by the employer, the employer must carry out the procedure using "alternate staff or methods" that do not require additional action by the employee, and may not take action which constitutes an "adverse action" against the employee or excludes her from her "field of practice."

In a lengthy decision handed down on November 6, 2019, a federal judge in the Southern District of New York prohibited HHS from implementing the rule. *State of New York v. United States Dept. of Health and Human Services,* 2019 WL 5781789 (S.D.N.Y. Nov. 6, 2019). Two weeks later, a federal judge in the Eastern District of Washington largely adopted the New York decision. *Washington v. Azar*, 2019 WL 6219541 (E.D. Wash. Nov. 21, 2019). The decisions rest on several grounds. Although many of the grounds for the decisions are matters of technical administrative law, they also include, more notably, the Courts' view that the Conscience Rule conflicts with Title VII of the Civil Rights Act, and with the Emergency Medical Treatment and Active Labor Act (EMTALA).

With respect to Title VII, the judge in the New York case noted that the Conscience Rule "defines 'discrimination' so as not to contain the defense that the accommodation sought by the employee would present an 'undue hardship' to the employer." That is, the Rule would not "protect an employer who, on account of hardship, refuses to accommodate the employee." By way of example, the Court explained that under the Conscience Rule, if a hospital which receives federal funds offered an employee a transfer from a unit which performs functions the employee objects to (for example, obstetrics), to a unit which does not (such as neonatal care), the transfer would constitute "discrimination" under the Conscience Rule unless the employee agreed to the transfer. In that situation, a health care facility which receives federal funds "could face liability to HHS – including a loss of funding – under the Rule," even though the transfer would be perfectly reasonable under Title VII. Because HHS does not have the power to make rules which abrogate rights granted by Congress, this conflict with Title VII was fatal to the Conscience Rule.

The Court also observed that the Conscience Rule would conflict with EMTALA. Under EMTALA, hospitals that receive federal funds and have emergency departments must provide emergency care to any patient suffering from an emergency medical condition, regardless of the patient's ability to pay. EMTALA does not include an exception for religious or moral refusals to provide emergency care. However, the Conscience Rule's definition of "discrimination"

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could expose a provider (such as a hospital, clinic or ambulance service) to liability for failing to accommodate an employee's conscience objection in emergency-care situations. The Court therefore reasoned that the Rule is invalid on the additional ground that it would "create, via regulation, a conscience exception to EMTALA's statutory mandate."

In summary, as matters currently stand the Conscience Rule is unenforceable. That is in part because it deprives health care employers of rights they have under Title VII, and in part because compliance with the Rule would put hospitals at risk of violating EMTALA. Both district court decisions are now on appeal, one to the Second Circuit and one to the Ninth Circuit Court of Appeals. Decisions will likely come down within the next several months. In light of the current social and political climate, though, it is reasonable to expect that the issue is destined for decision by the Supreme Court.

NHD Represents "Friends of the Court" in Supreme Court Super PAC Challenge

Russ Pierce and Chris Taintor have recently entered an appearance in the United States Supreme Court, on behalf of a group of law professors and researchers, who are Amici Curiae ("Friends of the Court") supporting a group of Congressional Petitioners asking the Supreme Court to review a seminal decision of the D.C. Circuit involving campaign finance reform. The D.C. Circuit's 2010 decision in *SpeechNow* gave rise to Super PACs and "independent expenditure organizations." Our Amici clients conducted empirical research on the central questions arising from *SpeechNow*, and are presenting a summary of their research in their Brief for Amici Curiae.

Judicial and Legislative Developments in Maine Employment Law

BY: Devin W. Deane, Esq.

The last several months have seen a great deal of activity in the field of employment law. In a series of decisions, the Maine Supreme Judicial Court and the United States District Court for the District of Maine have more clearly defined the limits on liability under the Maine Whistleblowers Protection Act (MWPA). Meanwhile, the Maine Legislature has enacted several laws which grant Maine workers new rights in the areas of leave, pay, and protection from discrimination.

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Judicial Decisions

Pushard v. Riverview

On January 30, 2020, the Maine Supreme Judicial Court decided the case of *Roland Pushard v. Riverview Psychiatric Center*, 2020 ME 23. In *Pushard*, the Court clarified that an employee does not necessarily qualify as a whistleblower simply because he or she complained about a dangerous condition in the workplace. Rather, one must actually reveal a condition that is not generally known to the employer.

Roland Pushard was the Director of Nursing at Riverview. He complained to the hospital director, Jay Harper, about his concern with the inadequacy of the institution's staffing practices. He told Harper that he believed Riverview patients were put at risk because the hospital was staffed by under-qualified caregivers. After Pushard was terminated, he brought suit alleging that he was fired in violation of the MWPA, which prohibits retaliation against an employee who, "acting in good faith, . . . reports to the employer . . . , orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual." 26 M.R.S. § 833(1)(B). The Law Court had previously ruled, in *Cormier v. Genesis Healthcare LLC*, 2015 ME 161, 129 A.3d 944, that a healthcare worker could be protected under the MWPA for reporting staffing-related safety concerns. The Court said, however, that Pushard was not protected under the Act because "he was not exposing a concealed or unknown safety issue. Instead, he was simply giving his opinion concerning his supervisor's attempts to address well-known problems related to staffing." The Law Court explained:

Pushard's conduct does not meet that standard because he was simply engaged in a policy dispute with his employer about how best to handle Riverview's staffing issues. That Riverview was understaffed was known to the public, the Legislature, and Riverview employees. Even if the specific staffing decisions about which Pushard complained were not widely known, it is uncontroverted that Pushard "did not believe that he was making Harper or anyone else aware of anything they were not already aware of." For this reason, Pushard was not *reporting*; he was complaining.

The implications of the *Pushard* case are hard to gauge. It seems unlikely that the Maine Legislature meant to deny job protection to those who complain about unsafe conditions or illegal practices whenever those things are already known to some members of management. On the other hand, in situations like the one in *Pushard*, where a problem truly is public knowledge, the protection of the MWPA arguably should not extend to every employee who echoes what others have said. The Law Court seems to have understood that the facts of the *Pushard* case were fairly unusual, and therefore tried to limit the reach of its holding. The Court expressly observed that it had "no occasion here to articulate a comprehensive standard for what qualifies as a protected report." In particular, the Court "decline[d] to adopt an 'initial reporter' rule for WPA cases, as urged by Riverview." Therefore, it remains to be seen how momentous the decision will be. At the very least, however, we can be sure that in cases to come, there will be litigation over the question of when pre-existing awareness of an unsafe condition or an illegal practice makes an employee a "complainer," who can be disciplined for commenting on those conditions and practices, rather than a statutorily-protected "reporter."

Apon v. ABF Freight Systems, Inc.

In two separate decisions rendered over the course of several months in the same case, the United States District Court for the District of Maine established additional limits on liability under the Whistleblowers Protection Act.

The Plaintiff in the Apon case was an Operations Supervisor for ABF Freight System, Inc., a national trucking company. When the federal government enacted rules to implement "hours of service" and meal break requirements in the Federal Motor Carrier Safety Act – measures to make sure that drivers didn't become

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overworked and overtired while driving – ABF took steps to ensure compliance. The company required all management personnel to sign a document entitled "Leadership Responsibility Hours of Service and Meal Break Compliance Form." The "Leadership Form" stated that "[c]ompliance must be achieved through oversight, enforcement, and leadership of the Branch Managers and Linehaul Managers." Because the Leadership Form did not mention Apon's job title (Operations Supervisor), he refused to sign it, and he was fired for his refusal. He then sued, alleging violations of both the "reporting" and "refusal" protections of the Whistleblower Protection Act. Apon claimed that his firing was motivated in part by the fact that he had reported to a supervisor his reasonable, good faith belief that his signature on the form would violate state or federal transportation laws, rules, or regulations. He also claimed that the firing was motivated in part by his refusal to commit an illegal act.

ABF, represented by NH&D, first moved to dismiss the "refusal" claim on the ground that Apon had not identified any particular law he would have violated if he had signed the Leadership Form. There is well-settled authority that employees are protected from retaliation if they *report* what they genuinely and in good faith believe to be violations of the law, even if they are wrong – that is, even if the employer is not actually violating the law. ABF argued, however, that in order to be protected under the MWPA for refusing to carry out a directive, an employee must allege, and ultimately prove, that the directive was actually illegal. The District Court agreed and granted the motion, reasoning that "Section D of the MWPA . . . does not protect an employee who has refused to carry out a directive to engage in an activity that he *genuinely believes would be* a violation of a law or rule. Rather, it protects employees who, acting in good faith, refuse to carry out a directive or engage in an activity that "*would be* a violation of a law or rule."

After the dismissal of the "refusal" claim, the parties conducted discovery on the "reporting" claim, and at the close of discovery ABF moved for summary judgment. ABF argued that the "reporting" claim also failed because, even if Apon was telling the truth when he said he believed it would be illegal for him to sign the Leadership Form, he had not conveyed that belief to anyone at ABF. The District Court agreed on this score as well. According to the Court, it was not enough that Apon objected to the form, telling his supervisor that he "had an issue with the form" and that he needed someone to explain why he, as an Operations Supervisor, was required to sign it. The Court reasoned that "for an employee's conduct to fall within the protection of the MWPA, the purpose of which is to deter retaliation against employees who report what they reasonably believe to be illegal acts, *the employee must communicate that he or she thinks the reported act is illegal*. Put another way, 'it is a basic prerequisite to a whistleblower protection claim that the plaintiff has actually blown the proverbial whistle.'"

Legislative Developments

In the fall of 2019 the Maine legislature enacted several new laws and amendments to existing laws that affect employment law in Maine. Many of the laws, which took effect in the fall and by now have been widely publicized, are intended to curb unfair or discriminatory employment and pay practices. Others are intended to provide Maine workers opportunities for paid time off for inevitable life events.

Earned Employee Leave

The Maine Legislature enacted LD 369, "An Act Authorizing Earned Employee Leave," which is intended to ensure that Maine workers have adequate opportunities to take time off without losing pay to take care of inevitable life events. The law is the first of its kind in the United States. It requires an employer – except an employer in a seasonal industry – that employs more than 10 employees for more than 120 days in any calendar year to provide each employee earned paid leave based on the employee's base pay. The law specifies that an employee is entitled to earn one hour of paid leave for every 40 hours worked, up to 40 hours in one year of employment, with accrual of leave beginning at the start of employment. The employee is required to work for 120 days before an employer is required to permit use of the paid time off. The law requires reasonable notice prior to use of the paid time off. The

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Department of Labor is required to prepare rules for the implementation of this law. The rulemaking process is underway and the law will take effect January 1, 2021. The Department of Labor has the exclusive authority to enforce the new law and remedy violations thereof.

Pay Equality

The Legislature also enacted LD 278, "An Act Regarding Pay Equality." The law prohibits an employer from inquiring about a prospective employee's compensation history until after an offer of employment that includes all terms of compensation has been negotiated and made to the prospective employee. As stated in the Act's legislative findings and intent, it is intended to address wage inequality that is perpetuated when an employer bases its compensation decision on the pay history of a prospective employee. The rationale is that a prospective employee will continue to experience wage inequality if her pay is based on the unequal pay she received in the past. The Act further provides that an employer's inquiry into a prospective employee's compensation history is evidence of unlawful employment discrimination under the Maine Human Rights Act and Maine Equal Pay Act, for which the employee may recover compensatory damages. An employer may be fined not less than $100 and not more than $500 for each violation of the Act.

Pregnant Workers

Through enactment of LD 666, "An Act to Protected Pregnant Workers," the Legislature required employers to provide reasonable accommodations for employees' pregnancy-related conditions, unless providing the accommodations would impose an undue hardship on the employer. The Act specifies that reasonable accommodations may include, but are not limited to, providing more frequent or longer breaks; temporary modification in work schedules, seating, or equipment; temporary relief from lifting requirements; temporary transfer to less strenuous or hazardous work; and provisions for lactation.

Gender Identity

LD 1701, "An Act to Clarify Various Provisions of the Maine Human Rights Act," was also enacted into law. The Act adds gender identity as a protected class under the Maine Human Rights Act and prohibits "[d]iscrimination in employment . . . on the basis of sexual orientation or gender identity." The Act defines gender identity as "the gender identity, appearance, mannerisms or other gender-related characteristics of an individual, regardless of the individual's assigned sex at birth." Religious organizations that do not receive public funds are exempted from compliance with the law.

Noncompete Agreements

Another law enacted by the legislature, LD 733, "An Act To Promote Keeping Workers in Maine," limits the scope and enforceability of non-compete agreements. The Act states that "[n]oncompete agreements are contrary to public policy" and are enforceable only to the extent that they are reasonable and no broader than necessary to protect:

1. The employer's trade secrets (as defined by statute);
2. The employer's confidential information that does not qualify as a trade secret; or
3. The employer's goodwill.

26 M.R.S. § 599-A. The Act outright prohibits noncompete agreements for an employee earning wages at or below 400% of the federal poverty line. 400% of the current federal poverty line is $49,960. According to the U.S. Census Bureau, per capita income and median household income in Maine were $29,886 and $53,024 in 2017, respectively. Thus, noncompete agreements are now prohibited for a significant majority of Maine employees. An employer may

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be fined not less than $5,000 for violating this prohibition. The Department of Labor is responsible for enforcement of the prohibition; the Act does not create a private right of action for the affected employee.

"Wage Theft"

Finally, the Legislature enacted LD 1524 "An Act to Prevent Wage Theft and Promote Employer Accountability." The law creates additional remedies for so-called "wage theft" by an employer, which is defined as a violation of state laws regarding minimum wage, overtime, and timely and full payment of wages, among others. The additional remedies include injunctive relief through the courts and cease operations orders from the Commission of Labor. The remedies are in addition to existing penalties and, with respect to injunctive relief, the Act provides that an employer must pay costs and attorneys' fees to the prevailing party (either an employee or the Department of Labor). The Act is intended to curb abusive wage payment practices, which affects the employee involved, but also affects the State's payroll tax base, and creates an unfair advantage as compared to competitors who play by the rules.

Employers should review their personnel policies, including policies regarding compensation, paid leave, reasonable accommodations, and noncompete agreements, to ensure their consistency with the newly enacted laws. Employment counsel at Norman, Hanson & DeTroy are available to provide further and specific guidance with these and other employment matters.

NHD COVID-19 Safety Considerations

In light of the COVID-19 outbreak, Norman, Hanson & DeTroy, LLC, has adjusted its policies so that its services and response capabilities for clients remain unaffected, while doing our best to prevent risk of spreading the coronavirus in our workplace and our community.

Because of safety considerations relating to COVID-19, we are closing reception to all walk-in traffic. Every effort will be made to conduct meetings and conferences via telephone or other electronic forms of communication. If the circumstances require an in-person meeting, it will need to be scheduled through your attorney, and we will ask any visitor to respect social spacing recommendations from the CDC.

We are following state and federal CDC Guidelines, and are:

- limiting our business travel plans and in person meetings in favor of conference calls or video conferencing where possible;
- assuring that our lawyers are technologically enabled to work remotely in case of a need for confinement or spread prevention. The quality of work and communications will not be affected adversely;
- instructing that if meetings need to be held in person, every effort will be made to avoid close contact;
- updating our practices to be consistent with current CDC guidelines on prevention and risk management.

Norman, Hanson & DeTroy is committed to continuing to provide our clients with experienced, effective and efficient legal services in a timely manner, consistent with the official recommendations for dealing with the coronavirus outbreak.

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Thank you for your understanding as we work through this health crisis together.

Several NHD attorneys recognized in the 2019 edition of New England Super Lawyers and New England Rising Stars

Norman, Hanson & DeTroy is proud to announce that the 2019 edition of New England Super Lawyers and the 2019 New England Rising Stars has recognized several of our attorneys for inclusion in the publications. We congratulate each of these attorneys for this accomplishment.

Top 100 2019 New England Super Lawyers
Mark G. Lavoie – 2019

Super Lawyers
Jonathan W. Brogan – 2019 – Personal Injury – General: Defense
Stephen Hessert – 2019 – Workers' Compensation
Kelly M. Hoffman – 2019 – General Litigation
John H. King, Jr – 2019 – Workers' Compensation
Mark G. Lavoie – 2019 – Personal Injury – Med Mal: Defense
Thomas S. Marjerison – 2019 – Personal Injury – General: Defense
James D. Poliquin – 2019 – Insurance Coverage
John R. Veilleux – 2019 – Personal Injury – General: Defense

Super Lawyers Rising Stars
Christopher L. Brooks – 2019 – Creditor Debtor Rights
Devin W. Deane – 2019 – Civil Litigation: Defense
Joshua D. Hadiaris – 2019 – General Litigation
Grant J. Henderson – 2019 – Workers' Compensation
Matthew Mehalic – 2019 – Insurance Coverage
Darya I. Zappia – 2019 – Business/Corporate

NHD honored to be included among the top "Highly Recommended" law firms in the State of Maine

Norman Hanson & DeTroy is honored to be included among the top of the "Highly Recommended" law firms in the State of Maine in the 2020 edition of *Benchmark Litigation's* "The Guide to America's Leading Litigation Firms and Attorneys" In addition, the following attorneys received individual recognition from *Benchmark Litigation*:

Local Litigation Stars

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Jonathan W. Brogan – 2020

Mark G. Lavoie – 2020

Future Stars

Thomas S. Marjerison – 2020

Joshua D. Hadiaris – 2020

Benchmark 40 & Under Hot List!

Joshua D. Hadiaris – 2019

Norman Hanson & DeTroy Attorneys Receive Honors from Best Lawyers

Norman, Hanson & DeTroy is proud to announce that fourteen of its attorneys have been named to the 2020 edition of The Best Lawyers in America, the oldest and most respected peer review publication in the legal provision. First published in 1983, Best Lawyers is based on an exhaustive annual peer-review survey comprising of nearly 4 million confidential evaluations by some of the top attorneys in the country. The Best Lawyers list appears regularly in Corporate Counsel Magazine, and is published in collaboration with U. S. News & World Report. The following attorneys were honored by Best Lawyers for their work and expertise in the listed practice areas:

John W. Geismar – 2020
Tax Law

Robert W. Bower, Jr – 2020
Labor Law
Worker's Compensation Law – Employers

Jonathan W. Brogan – 2020
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Paul F. Driscoll – 2020
Litigation – Real Estate
Real Estate Law

Stephen Hessert – 2020
Worker's Compensation Law – Employers

Kelly M. Hoffman – 2020
Litigation – Labor and Employment
Professional Malpractice Law – Defendants

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John H. King, Jr – 2020
Worker's Compensation Law – Employers

Mark G. Lavoie – 2020
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Thomas S. Marjerison – 2020
Personal Injury Litigation – Defendants

Russell B. Pierce, Jr. – 2020
Appellate Practice
Commercial Litigation
Ethics and Professional Responsibility Law
Product Liability Litigation – Defendants
Professional Malpractice Law – Defendants

James D. Poliquin – 2020
Appellate Practice
Bet-the-Company Litigation
Commercial Litigation
Insurance Law
Personal Injury Litigation – Defendants

Daniel P. Riley – 2020
Administrative/Regulatory Law
Government Relations Practice

Roderick R. Rovzar – 2020
Corporate Law
Real Estate Law

John R. Veilleux – 2020
Insurance Law
Personal Injury Litigation – Defendants

In addition, six attorneys have been designated by Best Lawyers as the "Lawyer of the Year" for 2020 for the greater Portland area. We congratulate them for having achieved this impressive recognition.

James D. Poliquin – 2020 Appellate Practice

Kelly M. Hoffman – 2020 Professional Malpractice Law – Defendants

Mark G. Lavoie – 2020 Medical Malpractice law – Defendants

Paul F. Driscoll – 2020 Litigation – Real Estate

Robert W. Bower, Jr. – 2020 Workers' Compensation Law – Employers

Russell B. Pierce, Jr. – 2020 Product Liability Litigation – Defendants

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Portland Office: (207) 774-7000
Lewiston Office: (207) 777-5200

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