NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

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Workers' Compensation Discrimination and Personnel Action: A Legal Tightrope

BY STEPHEN W. MORIARTY AND JENNIFER A. W. RUSH

A Petition for Appellate Review is now pending before the Maine Supreme Judicial Court in a case that raises critical issues regarding the limits of legitimate personnel action in the context of a compensable injury. In our last issue we reported on the decision of the full labor-management Workers' Compensation Board in the matter of *Shaver v. Poland Spring Bottling Corp.*, in which the Board found that an employer's policy regarding the reporting of injuries that was neutral on its face was nevertheless discriminatory within the meaning of the Act. If the Court accepts the case for review, it will have an opportunity to clarify the proper scope of an employer's exercise of its rights when dealing with an injured employee.

Background

39-A M.R.S.A. §353 is the Workers' Compensation Act's anti-discrimination section and prohibits an employer from discriminating against an employee "in any way for testifying or asserting any claim under this Act." Historically the Law Court has interpreted the statute to prohibit any employer conduct that is rooted substantially or significantly in an injured workers' assertion of rights under the Act. *Delano v. City of South Portland*, 405 A.2d 222 (Me. 1979). In other words, the statute prevents an employer from taking action against an employee in retaliation for reporting an injury, claiming statutory benefits available under the Act, or testifying in support of such a claim.

In the *Shaver* matter, the employer's personnel policy required the immediate reporting of all occupational injuries, and further provided that a failure to immediately report constituted grounds for termination. Late one day Shaver fell at work, injuring his knee, but he did not report the incident immediately as he assumed that it was of no significance. On the following day he experienced an increase in symptoms and then reported the injury. He was terminated for non-compliance with the employer's established policy. There were no disputes, however, concerning the occurrence of the injury itself, and he received full workers' compensation benefits for the period of disability that followed. Nevertheless, Shaver did file a Petition to Remedy Discrimination in response to the termination, challenging the validity of his separation under the policy.

STEPHEN W. MORIARTY

JENNIFER A.W. RUSH

Although finding the policy to have been harsh in its consequences, the presiding Hearing Officer nevertheless concluded that the purpose of the immediate reporting requirement was to promote a safe work place by eliminating conditions that cause injuries. The Hearing Officer found no retaliatory motive and concluded that the employer's policy was neutral on its face and had in fact been applied in a neutral manner. Accordingly, the petition was denied. Recognizing the importance of the legal issue, the Hearing Officer requested review by the full labor-management Workers' Compensation Board pursuant to §320, and the Board accepted the appeal.

In a 4-3 decision in June of this year, the Board reversed the Hearing Officer and found that the decision to terminate Mr. Shaver was in fact sub-

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stantially rooted in an assertion of rights under the Act; i.e., the right to report the occurrence of an injury within the time period established by §301 without adverse consequence. As the Board held:

> The employer's policy forced the employee to choose between reporting an injury or losing his job. An Employee has a right to report a work related incident or injury without fear of retaliation by an Employer. If an Employer takes any disciplinary action against an Employee for the assertion of such a right, the Employee is protected by the Workers' Compensation Act, for the Employer has discriminated against the Employee.

In addition, the Board expressed concern that the policy had effectively shortened the 90-day period for giving notice under the Act, and observed that "the employer cannot substitute its judgment for that of the Legislature." Finally, the Board found that policies such as Poland Spring's immediate reporting requirement had a "chilling effect" that discouraged workers from reporting occupational injuries. The Board held that an employee "cannot be disciplined for timely reporting or claiming that he or she sustained a work-related injury."

NORMAN, HANSON & DETROY, LLC

newsletter

is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

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In reaching its decision, the Board relied exclusively upon the Law Court's decision in *Lindsay v. Great Northern Paper Co.*, 532 A.2d 151 (1987). This article will review the *Lindsay* decision as well as more recent opinions from the Law Court interpreting the Act's anti-discrimination provision.

The *Lindsay* decision

Great Northern Paper had established a policy of progressive discipline for absenteeism, which provided for increasingly severe penalties for unexcused absences within designated periods of time. At the point at which Lindsay injured his back, he had already used up the maximum allowable number of unexcused absences. Following his injury, he was out of work for two months and received workers' compensation benefits. When he returned to work he was suspended without pay for two weeks in accordance with the absenteeism policy, on the grounds that the absence caused by the injury was a final unexcused absence sufficient to trigger the disciplinary suspension. Lindsay filed a petition claiming discrimination pursuant to the predecessor of current §353.

On appeal the Court upheld the hearing Commissioner's determination that application of the policy to the claimant was discriminatory. Although the policy itself was facially neutral, the Court found that implicit in the Act was a right to take time off from work to recover from the disabling effects of an injury. The Court concluded that "the absenteeism policy unlawfully discriminates against [Lindsay] because it labels his rightful absence because of a work-related injury as an unexcused absence." According to the Court's analysis, therefore, the suspension without pay imposed in response to lost time to facilitate medical recovery was discriminatory.

Although the Court may have been influenced by the former "liberal construction" language found in the Act at the time of Lindsay's injury, the decision has never been overruled or explicitly modified.

More recent decisions

In more recent years the Court has been far less willing to find discriminatory conduct and has upheld employer personnel action that serves a genuine and legitimate employer interest. For example, in *Maietta v. Town of Scarborough*, 2004 ME 1997, 854 A.2d 223, an injured police officer had taken a series of leaves of absence and ultimately was placed out of work indefinitely by a treating physician. He was then terminated for excessive absenteeism, and in response he claimed unlawful discrimination under §353. Although the presiding Hearing Officer found that the disciplinary action was taken in good faith, he granted the Petition to Remedy Discrimination. On appeal the Court observed that "we look at the motivation for an adverse employment action to determine that the discrimination claim…has been established," and noted that a decision in favor of an employee must include a Hearing Officer's finding that the "assertion of the workers' compensation claim was the primary basis or cause for the discipline or termination of an employee". Because the Hearing Officer's decree did not contain a finding that the discipline was motivated by the assertion of a workers' compensation claim, the decision was vacated and remanded for a new hearing.

In *Laskey v. Sappi Fine Paper*, 2003 ME 48, 820 A.2d 579, the employee had returned to work for a number of years under medical restrictions resulting from an occupational injury. In an effort to downsize its workforce, the employer terminated all individuals whose restrictions prevented them from performing the essential functions of their jobs. Laskey claimed discrimination because his restrictions arose from an occupational injury. The Court rejected the claim and held that such an expansive interpretation of §353 "would make any employment action due to a work restriction arising from a work-related injury a prohibited discrimination." The Court found no evidence of discrimination in the application of the employer's policy.

Similarly, in *Jandreau v. Shaw's Supermarkets, Inc.*, 2003 ME 134, 837 A.2d 142, an injured worker challenged a

policy that called for termination whenever an employee was absent from work for six months, regardless of the reason for the absence. The Court ruled against the employee, finding that "there is no per se discrimination when an employer makes a bona fide employment decision according to the employee's post-injury ability to work, even though the employee's inability to work may result from a work-related injury."

These decisions clearly reflect the Court's tendency to affirm personnel action undertaken in good faith by an employer even though an occupational injury may have resulted in absenteeism, accommodations, or permanent restrictions.

Conclusion

If the Court grants the employer's Petition for Appellate Review in *Shaver*, it will presumably address the apparent conflict between the rights of the injured as explained under *Lindsay* and the more pragmatic recognition of the bona fide personnel management concerns of employers as reflected in *Maietta*, *Laskey*, and *Jandreau*. Shaver's attorney will argue that the stated safety concerns behind Poland Spring's policy were simply pretextual and that the employer used the policy as an excuse to terminate employees who reported work-related injuries. The employee will also argue that the Court should amplify upon the *Lindsay* rationale and should conclude that implicit in the Act is the right to report a work-related injury without suffering any adverse consequences. Attorneys frequently warn that "bad facts make bad law," and there is a risk that the harsh consequences of the discipline imposed in *Shaver* may jeopardize policies that broadly seek to promote safety or in some other manner serve an employer's legitimate interests. We will follow all developments in this appeal in future editions of the *Newsletter*. ☐

Domestic Violence and Animal Abuse

By Anne H. Jordan

The Problem

It is well known and documented that domestic violence is a horrible and continuing national disgrace. According to the National Coalition Against Domestic Violence, in 2005 there were over 690,000 reported nonfatal incidences of violence committed against victims by current or former spouses, partners, boyfriends or girlfriends in the United States. Another 1600 persons were murdered by current or former spouses or partners.

Domestic violence hurts not only the victims and their families but also directly impacts communities, medical service providers and business. Last year, 4.1 billion dollars was spent in the United States for medical or mental health treatment for victims of domestic violence. The National Center for Disease Control also determined that 1.8 billion dollars worth of lost productivity and wages were directly attributable to the after effects of domestic violence.

Maine faired no better. According to the Maine Department of Public Safety, a victim of domestic violence calls a law enforcement agency to report an assault every hour and forty-one minutes each and every day of the year. Of the eleven thousand fifty- five reported assaults in Maine in 2004, five thousand one hundred eighty-eight, or 46.9% of all reported assaults, occurred between household or family members. Sadly, it is estimated that in 60% of these assaults, children directly witnessed the violence.

What is lesser known by the general public, however, is the direct link between domestic violence and abuse of animals. Violence against animals, whether via threats, assaults, strangulation, intentional starvation, beatings or other cruel acts that cause death, occurs every day in this country. Often times, this violence runs concurrent with, or as a precursor to, violence perpetrated against the human owner or caregiver of the animal.

According to recent ground breaking studies by Utah State University professor Dr. Frank Ascione, batterers often use violence, coercion and threats to maim, kill or harm a beloved pet, in order to exercise power and control over their spouse, child or partner. Dr. Ascione's study surveyed the largest domestic violence shelters in each of the fifty states. He also reviewed studies conducted earlier here in the United States as well as similar studies in Canada and Australia. The results of these studies found that more than fifty-four percent of the seven hundred women who were living in domestic violence shelters reported that their pets had been threatened, harmed or killed by their abusers.

ANNE H. JORDAN

"There are some batterers who very well know how strongly attached their partner is to the animals in her life." Ascione said. His research also found that batterers knew that by preying on the unconditional love and affection that a human victim has for her pets, they could control that victim and often prevent the victim from leaving the abusive situation. By harming or killing a pet, batterers effectively telegraphed to the victim, and the children in the home, the same harm that would occur to them should they try to leave.

Dr. Ascione's study, and the results of other studies before his, confirmed that very often a victim's concern for the welfare and safety of their pets is a real barrier to fleeing their violent partners. Their fears of harm to a pet may also affect a victim's decision making about staying with, leaving and or returning to the batterer. The study results also confirmed that children's deep attachment to their pets, and their fears of what would happen to their animal should they flee, also provided an obstacle to the child's safety and to their leaving an abusive household.

"He only hits me when I deserve it".

York County Victim of Domestic Violence

A victim of domestic violence was adamant that she be able to return to her home and retrieve her beloved dog before her abuser was arrested. When asked why she replied "When I left him before, he started mailing me pieces of my cat to tell me if you don't come back, this is what I'm going to continue to do".

Columbus, Ohio survivor of Domestic Violence as quoted in the New York Times April 1, 2006

"We must not loose sight of the fact that violence begets violence. Where there is animal cruelty in the home, chances are, someone else is being hurt too".

The Linkage Project

Maine's Response

After a June 2005 presentation at the Maine State Bar Association by Anne Jordan of Norman Hanson and DeTroy, Norma Worley of the State Animal Welfare Program and Hillary Twinning from the Humane Society of the United States, describing the connection between domestic violence and animal abuse, legislation was introduced that would permit a court to enter an additional order addressing pets whenever a victim of domestic violence secured a Protection From Abuse Order from the Courts. This legislation provided that a Court may enter an order "directing the care, custody or control of any animal owned, possessed, leased, kept or held by either party or a minor child residing in the household."

The law, the first in the nation, and possibly in the world, became effective August 25, 2006. Preliminary reports from domestic abuse advocates and the Courts indicate that victims are using this law and are reporting that it is allowing them to escape from abusive situations. Since its passage, New York and Vermont have passed similar laws based on Maine's example, and legislation is currently contemplated or pending in Pennsylvania, Illinois, Wisconsin, Washington State and Arizona. Inquiries about our new law have come from as far away as California, Canada, Australia and Japan.

Maine has also become a leader in the establishment of pet safe haven programs that provide temporary shelter or foster homes for pets of families that must flee abusive situations. At the present time, six shelters-the Animal Welfare Society in Kennebunk, the Greater Androscoggin Humane Society, the Humane Society of Knox County, Bangor Humane Society, the Animal Refuge League in Westbrook and the Kennebec Valley Humane Society, have foster care programs where victims of domestic violence can bring their pets and ensure their safety while they seek out and arrange alternative housing for their families.

The PAWS program, run by the Animal Welfare Society, uses volunteer homes to temporarily foster pets for victims of domestic violence who are living at the Caring Unlimited Domestic Violence Shelter. To ensure the safety of the animals, their owners and the foster families, owners are not told the name or the address of the foster homes and foster families do not know the victim's names. If a victim is unable to arrange for housing that permits animals, or finds herself in a position where she feels she must surrender the animal, arrangements are made for adoptions into new homes.

In recent years, PAWS has provided temporary homes for dogs, cats, birds, horses, small creatures and even a pot bellied pig! Other shelters have more informal agreements with domestic violence programs and local law enforcement officials which arrange for temporary homes for pets. Still other organizations across Maine are currently being trained by the Linkage Project and Katie Doloff of the Animal Welfare Society in order to provide training and education on the link between domestic violence and animal abuse and to establish foster care programs as well.

There is still much more to be done to address the problems of domestic violence and violence against animals. If you would like more information about these problems, would like to volunteer, or you need advice or assistance in this area, contact your local domestic violence program or animal shelter, the Maine Coalition to End Domestic Violence (www.mcedv.org), the Linkage Project at 207-774-1175, (www.linkageproject.org), the National Domestic Violence Hotline at 1-800-799-SAFE, The American Humane Association at 1-800-227-4645 (www.americanhumane.org) or Anne Jordan at Norman, Hanson & DeTroy. □

Three Recent Law Court Decisions

By David P. Very

DAVID P. VERY

Law Court addresses damages for trespass and the cutting of trees

It was a quiet quarter for the Law Court with respect to decisions regarding torts and insurance. The Law Court did issue three decisions on damages for trespass and the cutting of trees.

In the first decision, *Wood v. Bell*, 2006 ME 98 (August 7, 2006), the Law Court dealt with the issue of the forfeiture value of trees. Pursuant to 14 M.R.S.A. § 7552, the measure of damages for the owner of any trees wrongfully taken may be the market value of the trees, or in lieu of market value, the forfeiture amounts set forth in the statute. The forfeiture amounts are determined pursuant to the diameter of each tree.

Because the land had already been cleared, the plaintiff was unable to present evidence of the actual trees that were cut. Therefore, the plaintiff presented an expert who testified that he viewed aerial photographs of the cleared area of the disputed parcel taken prior to the clearing, and he then picked an area of trees that he felt were similar to the area of trees felled and removed. He then measured the trees in the sample area, calculating the forfeiture value of the trees, which he then converted to a measurement of forfeiture value per square foot. He then multiplied that value by the square footage of the cleared area to arrive at the forfeiture value for the disputed parcel.

The Superior Court held that such evidence was speculative because the diameter of the felled trees had not actually been measured and therefore instructed the jury to disregard the evidence on forfeiture.

On appeal, the Law Court held that in determining damages, reasonable certainly is sufficient, and absolute certainty is not required. The Court stated that it is sufficient if a reasonable basis for compensation is afforded, although the result be only approximate. The Law Court overturned the Superior Court and held that the plaintiff's expert presented an opinion based on a presentation of facts from which forfeiture value could reasonably be determined.

The second case involved the ability to recover common law damages in addition to statutory damages. In *Fuschetti v. Murray*, 2006 ME 100 (August 16, 2006), the defendant, in order to improve his view, cut down and damaged trees on the plaintiff's property. The parties had agreed that the defendant committed a trespass and destroyed or damaged trees on the plaintiff's property. They also agreed on the number and diameters of the trees that the defendant had wrongfully cut down, for the purposes of calculating forfeiture damages pursuant to the statute.

On the defendant's motion for summary judgment, the Superior Court ruled that the cost for replanting and restoring the trees on plaintiff's property was not an appropriate measure of damages under the statute. The Court, however, suggested that the plaintiff amend the complaint to add a common law trespass claim and stated that the plaintiff could potentially recover those costs at common law. As a result, after jury verdict, the plaintiff was awarded forfeiture damages in the amount of $3,225 and restoration costs in the amount of $5,306 for the replanting and restoring of the trees.

On appeal, the Plaintiff argued that the Superior Court erred in concluding that the costs of replanting and restoring the property are not recoverable under the statute. This was an important issue to the plaintiff as the statute will double any damages for negligent acts and treble any damages for intentional acts. The Law Court stated that while earlier versions of 14 M.R.S. § 7552 may have allowed restoration damages, the statute in its current form did not allow for the recovery of costs for the replanting and restoring of trees. The statute only allows damages to be sought in the alternative for either the value of the lost trees, the loss in the overall value of the property, or the forfeiture value pursuant to the statutory amounts. The Law Court therefore held that the Superior Court was correct to limit the plaintiff's recovery to the statutory forfeiture amounts.

On cross appeal, the defendant argued that the Superior Court erred in awarding the plaintiff common law damages for the same tree damage. The Law Court agreed. The Law Court stated that the plain language of the statute indicated that it was the legislature's intention to occupy the field entirely. Therefore, the Law Court held that the statute replaced the common law with respect to damage to trees from a trespass. The Court therefore concluded that the plaintiff was not entitled to recover both statutory and common law damages for the same loss. Hence, the portion of the judgment awarding the plaintiff common law trespass damages was vacated.

The third case dealt with the issue of whether the statute authorizes individual damages, as opposed to damages awarded against several defendants jointly and severally. In *Mehlhorn v. Derby*, et al., 2006 ME 110 (September 7, 2006), the plaintiff, who owned property on Peaks Island, discovered that several trees and bushes had been cut down on his property. He sued his

neighbors, Derby and Geiermann, for trespassing on his property and destroying his trees and bushes, and also sued Newell, who allegedly was hired by the neighbors to remove several trees.

Prior to trial, the Superior Court ruled that the plaintiff was entitled to seek both common law and statutory damages and that the replacement cost of the trees was an allowable measure of damages for common law trespass. As a result, the plaintiff only submitted evidence of replacement costs of the trees. The jury awarded $8,000 in damages to the plaintiff for the costs of replanting the lost trees. As the jury only found that the defendants acted negligently, and as there was no evidence submitted as to the value of the lost trees, the reduction in the value of the land, or the forfeiture value of the trees, the Court entered judgment in the amount of $250 against each of the three defendants individually pursuant to the mandatory minimum amount under the statute.

On appeal, the Law Court, citing its earlier decision in *Fuschetti v. Murray*, vacated the damage award for the replacement of the trees based on the common law claim. The Law Court then addressed the issue as to whether it was appropriate for the Superior Court to assess statutory damages against each of the defendants individually, as opposed to jointly and severally. The statute provides that a person who negligently cuts trees on another's property, "is liable to the owner for two times the owner's damages as measured under § 3 or $250, whichever is greater." The defendants argued that there was no rational basis for multiplying statutory damages by the number of the defendants. The Law Court stated that there are no Maine cases that examine the issue of joint and several liability versus individual and separate liability for statutory damages. The Court also held that whether the statutory damages are purely remedial, or whether they are punitive, would also have bearing on the issue. The Court stated that it is not readily apparent from the statute as to whether the legislature intended the damages to be remedial or punitive. Because the Court held that the defendants focused their appeal primarily on the common law trespass issue, and only made a brief mention of the statutory damages issue, and perhaps because it only involved $250, the Law Court decided to apply the "settled appellate rule," which states that issues averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. The Law Court thus declined to reach the issue. □

Kudos

PETER DETROY, STEPHEN HESSERT, ROD ROVZAR, MARK LAVOIE, JIM POLIQUIN, PAUL DRISCOLL and JONATHAN BROGAN have been listed in the 2007 edition of "The Best Lawyers in America", an achievement of outstanding recognition by their peers.

At a recent Blaine House Tea held to recognize the top projects in Maine directed at ending domestic violence, ANNE JORDAN and state animal welfare director Norma Worley were honored for their outstanding work in securing the passage of the Pets and Domestic Violence Law.

STEVE MORIARTY moderated a panel discussion titled "Impact of Permanent Impairment on the System" at the recent Comp Summit Seminar at Sugarloaf.

ADRIAN KENDALL has been invited to speak on legal issues arising in international trade at a seminar sponsored by the Maine International Trade Center. He will be joined by representatives from Citizens Bank and the U. S. Small Business Administration in a program titled "The Tools of Trade: International Payments, Trade Finance and Legal Documents".

PETER DeTROY has been honored by LawDragon as one of the top 500 attorneys in the country.

The American Law Firm Association Workers' Compensation Seminar was held in Atlanta, Georgia on September 21 – 22, 2006 and STEVE HESSERT served as program chair. Together with Dan Ferguson, BIW's Director of Risk Management and Workers' Compensation, he presented a program titled "Use of Surveillance and Posturing a Case for Litigation".

Several days later, Steve participated in the Legal Institute at the annual meeting of the International Association of Industrial Accident Boards and Commissions Convention in Little Rock, Arkansas. Together with attorneys from Michigan, Missouri, and Ohio, Steve spoke on evidence-based medicine, multi-state jurisdiction, and controlling medical costs. Incidentally, at the same meeting Maine Workers' Compensation Board Executive Director Paul Dionne was elected President of the IAIABC.

LANCE WALKER has been invited by the Maine Claims Management Council to give a presentation on insurance coverage developments, claims handling strategies, and coverage litigation tactics.

STEVE MORIARTY and seven teammates competed in the recent Lake Winnipesaukee Relay, a 65.1 mile relay

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Workers' Compensation Law Court Decisions

By Stephen W. Moriarty

Employer Immunity

By statute employer immunity extends to employers which contract with a private employment agency for temporary help services as long as the temporary services agency has secured the payment of workers' compensation benefits by purchasing insurance. Last year the Law Court ruled in *Marcoux v. Parker Hannifin/Nichols Portland Division*, 2005 ME 107, 881 A.2d 1138, that immunity can only exist when a temporary employee is subject to the direction and control of a third party employer. In that decision the Court held that an award of summary judgment on behalf of the employer claiming immunity was inappropriate as there were disputed factual questions regarding the employer's exercise of direction and control over the injured claimant at the time of injury.

In a more recent decision the Court has further clarified the availability of employer immunity in a case involving an individual injured while employed by a temporary services agency. In *Penn v. FMC Corp.*, 2006 ME 87, 901 A.2d 814, the claimant was employed by Manpower, an employment agency, and was assigned to work at a facility operated by FMC. The claimant at all times worked under the direction and control of FMC personnel, and was paid for his work by Manpower. FMC, in turn, paid Manpower a fee for his services. At the time of the assignment, FMC needed help in handling an increased volume of business.

The claimant was injured on the job and received benefits under Manpower's workers' compensation insurance coverage. He then filed a lawsuit seeking damages for negligence against FMC, and FMC sought summary judgment on the grounds that it was immune from suit. The Superior Court granted summary judgment in favor of FMC, and the Law Court affirmed.

On appeal, the claimant asserted that he was not a "temporary" worker within the meaning of the statute because his assignment at FMC was not time-limited and because he was never explicitly told that his position would only be short-term. The Court ruled that §104 of the Act does not contain any temporal limit on a temporary employee's "temporary help services" assignment, nor does it require that a temporary services employee be explicitly informed that the assignment is temporary in order for the employer's §104 immunity to be preserved. The Court held that the claimant was employed by a temporary services agency and was working under the direction and control of FMC employees at the time of his injury. The Court found no ambiguity in the statute and ruled that there were no disputed material facts sufficient to overcome the granting of summary judgment. Accordingly, FMC was immune from suit.

Hardship Extensions

Section 213(1) provides that benefits for partial may be extended beyond the durational limit "in cases involving extreme financial hardship due to inability to return to gainful employment". An employee had been injured in 1998 when he worked full time and averaged 55 hours per week. In 2000 he obtained part time employment with a different employer and earned substantially less income per week than prior to the injury. Worker's compensation benefits for partial incapacity based upon the differential in pay were made until the durational limit was reached. The employee then filed a Petition for Extension of Benefits, and the full labor-management Workers' Compensation Board granted the petition in a 5 -1 decision and ordered reinstatement of partial benefits. The employer appealed to the Law Court.

In *Richards v. S. D. Warren Company* (July 27, 2006) (Memorandum Decision), the employer argued that the Board had no authority to extend the duration of benefits because the employee was in fact working part time and therefore had returned to "gainful employment" within the meaning of the statute. In a brief and unpublished Memorandum Decision, the Court essentially avoided the legal issue and ruled that the Board's factual findings were fully supported by the evidence. No attempt was made to interpret the key statutory language, and the Court did not explain why benefits could be extended where there had in fact been a return to gainful employment. This result is surprising, because the Court actually had to grant the employer's Petition for Appellate Review in order to hear the appeal, and the Maine Rules of Appellate Procedure provide that a petition should only be granted where a case raises an important question of law or where a decision contains an error of law resulting in substantial prejudice to a party. Obviously, therefore, the Court made a preliminary determination that the employer's appeal involved significant legal matters, and yet ultimately the Court chose not to address those issues.

Generally speaking, the Court issues memoranda decisions where there are no facts in dispute and where the legal issues are well-established. Decisions of this type are not considered to have significant precedential value. Given the legal issues raised by the employer (which were implicitly recognized by the Court when it granted the Petition for Appellate Review), it is difficult to understand why the Court resorted to the mechanism of a memorandum decision to decide the case. □

race around New Hampshire's largest lake. The team took first place honors in the men's 50+ division.

LANCE WALKER and his wife Heidi welcomed into the world a new baby girl named Ava Quinn. Ava was born on June 1. Congratulations to the new parents!

Two new hires have joined the medical malpractice group at Norman, Hanson & DeTroy, VENETIA CARP and KATHRYN SHEEHAN. Venetia and her husband recently relocated to Maine from Texas where she worked as an administrative assistant in higher education at the University of Texas in Austin. Venetia will be supporting Noah Wuesthoff as a legal assistant.

KATHRYN received her B.S. in Nursing and J.D. from American University and will be working at the firm as a medical malpractice paralegal. Kathryn was recently employed as a part-time attorney at Lowry & Associates. ☐

New Associate: Jeffrey B. Herbert

Jeff Herbert has joined the firm as an associate in the commercial practice group. Jeff grew up in Hollis, Maine and graduated from the University of Southern Maine with a degree in Political Science and Communication in 1991. While at USM, Jeff participated in a study abroad program called "Semester at Sea", in which he and his classmates departed from Vancouver, British Columbia and circumnavigated the globe. It was a major highlight of his college experience to have the opportunity to incorporate classroom studies into actual practice within the numerous countries he visited throughout the semester.

Jeff worked at UNUM as a financial analyst before enrolling at the University of Maine School of Law. While in law school, Jeff was the production editor of the Maine Law Review for two years, and graduated cum laude in 1999.

Before joining the firm, Jeff worked as a Real Estate Manager for Hannaford Brothers.

Jeff and his wife Christine reside in Westbrook with their three children. He and his family are major sports and camping enthusiasts. Jeff is currently coaching two soccer teams, and when not spending time with his family he enjoys running and playing golf. ☐

JEFFREY B. HERBERT

New Associate: Hannah L. Bass

Hannah Bass has joined the firm as an associate in the general liability group. Hannah was raised in Wilton and Yarmouth, Maine and graduated from Bowdoin College in 1999 with honors.

While still in college, Hannah became involved in the maritime employment. She served as a crew member aboard Casco Bay Lines ferries, and was a yacht delivery crew member, which included navigating the intercoastal waterways between South Carolina and Norfolk, Virginia. She also served as a sternman aboard two Chebeague Island lobster boats, and currently holds a U. S. Coast Guard Captain's license, Master 100 gross tons.

Hannah graduated from the University School of Law in 2006. While in law school, she served as co-chair of the Maine Association for Public Interest Law at their annual auctions in 2004 and 2005. Money raised at these events funded fellowships for law students working in the public interest sector.

Hannah worked at the firm as a summer intern in 2005, and in the spring of this year served as a student attorney in the Family Law Division of Pine Tree Legal Assistance. A resident of Portland, Hannah enjoys telemark skiing, reading fiction, and anything involving boats and the ocean. ☐

HANNAH L. BASS

2006 Fall Forum and Client Reception

November 17, 2006 • Portland • Regency Hotel • 20 Milk Street
The Fall Forum 2 - 4 PM • Annual Client Reception 4 - 7 PM

The 10th annual Norman, Hanson & DeTroy, LLC, Fall Forum for our clients will be held in Portland on Friday, November 17, at the Portland Regency Hotel.

The Forum will be followed by our annual client reception at the hotel, and we cordially invite all interested clients to join us. Please mark your calendars, and look for your invitation and topic announcements in the mail.

We hope to see you there!

Concurrent Sessions
2:00 - 4:00 p.m.

Workers' Compensation

The Year in Review
A summary of significant Law Court decisions.
Speakers:
Stephen W. Moriarty, Esq.
Doris V. R. Champagne, Esq.
C. Lindsey Morrill, Esq.

Medical Fee Schedule
An update of current issues concerning the Boards' medical fee schedule.
Speaker:
John H. King, Jr., Esq.

Workers' Compensation Discrimination
A discussion of the impact of the *Shaver* decision and other issues concerning discrimination.
Speaker:
William O. LaCasse, Esq.

Surveillance
The opportunities and pitfalls in the use of surveillance evidence.
Speakers:
Stephen Hessert, Esq.
Robert W. Bower, Jr., Esq.
Daniel Ferguson, Director of Risk Management and Workers' Compensation, Bath Iron Works

Property and Casualty

Developments in Insurance Coverage
A discussion of current issues and trends in insurance coverage law.
Speakers:
James D. Poliquin, Esq.
Lance E. Walker, Esq.

The Year in Review
A summary of recent Law Court decisions and legislative developments affecting the defense of claims.
Speaker:
David P. Very, Esq.

Adjuster's Recorded Statements
Techniques and approaches for winning at trial.
Speaker:
David L. Herzer, Jr., Esq.

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