

Maine Human Rights Act definition of disability is broader than federal counterpart

BY ANNE M. CARNEY

The federal Americans with Disabilities Act (ADA) narrowly defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities” of an individual. 42 U.S.C.A. § 12102(2)(A). Recent decisions of the United States Supreme Court have reaffirmed that the ADA’s definition of disability applies only to a narrow category of individuals. Recently, in *Toyota Motor Mfg., Ky., v. Williams*, 534 U.S. 184 (2002), the United States Supreme Court emphasized the extent of impairment required to meet the ADA definition of “disability.”

[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long-term.

Id. at 198. The mere fact that an individual has been diagnosed as having an impairment does not satisfy the ADA’s definition of disability. *Id.* The Supreme Court concluded that the plaintiff’s evidence that her carpal tunnel syndrome substantially limited her ability to perform manual tasks associated with her job did not meet the definition of disability, because she did not generate evidence that she was substan-

tially limited in the ability to perform a variety of manual tasks central to most people’s daily lives. *Id.* at 200-01. The Supreme Court’s *Toyota Motor Mfg.* decision is consistent with previous Supreme Court decisions that strictly construed the ADA definition of disability. In *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Supreme Court held that the plaintiff’s monocular vision did not constitute a disability because he was able to compensate for his blindness in one eye, such that it did not substantially limit his ability to perform any major life activity. *Id.* at 567. Similarly, in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), the United States Supreme



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Court found that applicants for airline pilot positions who were denied employment due to severe myopia were not disabled because corrective lenses remedied the myopia to the point that the individuals were not substantially limited in the ability to perform any major life activity. *Id.* at 487.

Like the ADA, the Maine Human Rights Act (MHRA) protects disabled individuals from discrimination based upon disability in employment, as well as a number of other contexts. The Maine Human Rights Act defines disability as:

Any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental condition or illness, and includes the physical or mental condition of a person

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that constitutes a substantial disability as determined by a physician or, in the case of a mental disability, by a psychiatrist or psychologist, as well as any other health or sensory impairment that requires special education, vocational rehabilitation or related services. 5 M.R.S.A. § 4553(7-A).

While this definition appears to be much broader in scope than the ADA definition of disability, the Maine Human Rights Commission adopted a rule that incorporated the federal “substantially limited” requirement into the analysis of whether an individual is disabled for purposes of the MHRA.

In *Whitney v. Wal-Mart Stores, Inc.*, 2006 ME 37, the Law Court addressed whether an employee who was restricted to working no more than nine hours per day, and no more than 45 hours per week, was “disabled” for purpose of a Maine Human Rights Act claim. This issue arose in the context of litigation in federal court, and was certified to the Maine Supreme Judicial Court because it raised a unique issue of state law on which there was no clear controlling precedent. The federal court litigation involved disability discrimination claims under both the ADA and the MHRA. The federal court granted summary judgment on the ADA claim, consistent with Supreme Court precedent requiring a plaintiff to prove substantial limitation. Evidence that an employee can work up to nine hours per day and 45 hours per week, does not establish a substantial limitation in the ability to work.



The Law Court construed the MHRA definition of disability as establishing three categories of covered conditions: (1) “any disability”, (2) a condition that “constitutes a substantial disability as determined by a physician”, and (3) an impairment that requires services such as special education and vocational rehabilitation. *Id.*, ¶ 24. The “substantially limits” language applies only to a claim based upon the second category. *Id.* at ¶ 25. Although not noted by the Law Court, the “substantial” requirement contained in the second category of disability differs markedly from the federal statute. Where the federal statute calls upon a plaintiff to generate evidence of an actual limitation in the plaintiff’s ability to perform a major life activity, the MHRA definition requires only that a plaintiff provide a physician’s note stating the physician’s conclusion that the plaintiff has a substantial disability.

In a strongly-worded dissent, three justices argued that the MHRA definition of disability is ambiguous, because it is vaguely worded and unclear. *Id.* at ¶ 36. One of the dissenting justices pointed out that the MHRA definition of disability “consists of a single, seventy-seven word run-on sentence that contains thirteen commas and employs the disjunctive “or” eight times.” *Id.*, ¶ 46. The dissenters also pointed out that

the Legislature could not have intended the MHRA to make the courts accessible to disability discrimination claimants on the basis of minor or trivial disabilities and infirmities. *Id.*, ¶ 42.

The Law Court’s holding in *Whitney v. Wal-Mart* dramatically expands the class of potential disability discrimination plaintiffs. Virtually every individual can identify in him or herself a minor infirmity, defect or condition caused by accident, disease or birth defect. Each individual who is not in perfect physical and mental condition has standing to request an employer, business or landlord to accommodate his or her “disability,” and to sue under the MHRA if the accommodation is denied. The anticipated boom in disability discrimination litigation could be averted if the Legislature revised the MHRA definition of disability. A more narrowly tailored definition of disability would enable the Maine Human Rights Commission and Maine’s courts to expend limited executive and judicial resources to protect those individuals whose disabilities truly and significantly impact the “basic human right to a life with dignity.” 5 M.R.S.A. § 4552. □

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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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Coordination of workers' compensation benefits under section 221

BY C. LINDSEY MORRILL

Section 221 of the Maine Workers' Compensation Act provides for the coordination of benefits that an employee receives from other sources, whether it be benefits under the Social Security Act or an employer-established benefit plan. Section 221 can be a valuable tool for insurers in reducing overall workers' compensation benefits. That being said, available setoffs are rather limited to what is expressly allowed under Section 221. The Law Court has routinely declined to deviate from the express language of the Act, stating, "[t]he rights of employers and employees pursuant to the Workers' Compensation Act are uniquely statutory, and we decline to interpret the Act to provide setoffs of workers' compensation benefits in the absence of express statutory language authorizing a setoff." *Goff v. Central Maine Power Co.*, 1998 ME 264, 721 A.2d 182, 185.

Section 221 (1) points out three main sources of benefits which can offset workers' compensation benefits. These include: (A) old age social security benefits; (B) employer-provided self-insurance plans, wage continuation plans, or disability insurance policies; and (C) pension or retirement programs established or maintained by the employer. It is the employer's burden to produce the evidence necessary to show that a particular benefit falls within one of the categories noted above. See *Daley v. Spinnaker Industries, Inc.*, 2002 ME 134, 803 A.2d 446, 450. Hearing Officers engage in a case-by-case, fact-intensive analysis to determine whether an offset will be permitted, and therefore it is necessary to submit substantial supporting evidence to the record.

Social Security

Section 221(1)(A) allows for offset of 50% of the amount of old age social

security benefits. The Law Court, in *Casey v. Town of Portage Lake*, 598 A.2d 448 (Me. 1991), found that this also includes "widows' benefits" paid under the Social Security Act. As for social security disability benefits, Subsection (3)(E) provides that the benefits can be offset, but only if the Social Security Act is revised so that receipt of state workers' compensation benefits do not prompt a reduction of social security disability benefits. As of 2006, such a revision has not been adopted.

Wage Continuation Plans

Subsection (1)(B) further provides an offset for self-insurance plans, wage continuation plans, or disability insurance provided by the employer. The offset is limited to the after-tax amount of payments received by the employee and provided by the employer. The offset is available only for benefits provided by the same employer from whom workers' compensation benefits are received. In addition, the full offset is available if the employee did not contribute to the cost of the plan. However, if the employee contributed to the plan or to the cost of insurance premiums, the offset is limited to the employer's proportionate share.

The Law Court has defined a 'wage continuation plan' broadly, "including any payment intended to provide temporary wage replacement while an employee is incapacitated by an illness or injury." *Gendreau v. Tri-Community Recycling*, 1998 ME 14, 705 A.2d 1106, 1108 (emphasis added). See also *Daley v. Spinnaker Industries, Inc.*, supra, (stating, "[p]ursuant to *Gendreau*, therefore, the test for determining whether employer-paid benefits are a 'wage continuation plan' is whether 'the essential purpose and character of the benefits [are for] wage replacement during [a]



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period of work-related incapacity."). In *Gendreau*, the Court found that the employer's sick leave payments fell squarely within the wage continuation category because construing sick pay as such "is consistent with the policy of the Act prohibiting double recoveries and the stacking of benefits." The Law Court noted that a written plan or additional formalities are not required to evidence a wage continuation plan; rather, it is the intent and purpose of the plan that controls.

The *Gendreau* Court placed importance on the fact that "[t]here was no evidence to suggest that *Gendreau*'s sick leave plan could be used, or 'cashed out,' for any purpose other than as a wage replacement during periods of disability." This suggests that in order to fall within the category of a "wage continuation plan," the benefit received can only be received for periods lost from work as a result of the employee's disability. Wages received for annual leave or accrued vacation pay, therefore, would not fall within this category.

In December of 2003, the Law Court issued *Johnson v. Southern Container Corp.*, 2003 ME 141, 843 A.2d 1, and gave employers a sharp wake-up call, reminding them that evidence must be entered into the record showing that the

disability plan is “established or maintained by the same employer from whom benefits . . . are received.” In this case, the employee worked for Weyerhaeuser from 1973 to 1994. In 1994, Southern Container purchased Weyerhaeuser's Westbrook facility. During litigation, Southern Container and Weyerhaeuser had been described as “successor companies,” and the Hearing Officer had found that Southern Container had purchased the assets and liabilities of Weyerhaeuser. On appeal, the Law Court found that there was insufficient evidence to establish that Southern Container was in fact a successor corporation and that there was no evidence of record establishing an asset and liability purchase. In the absence of evidence that Southern Container had actually assumed liability for payment of the Weyerhaeuser pension, the Court concluded that an offset could not be granted.

A common question is whether severance pay can constitute a wage continuation plan. This can only be determined on a case by case basis, but the Law Court has indicated that an employer will have a difficult time crafting severance pay into the definition of a wage continuation plan. The Court first addressed this issue in *Goff v. Central Maine Power*, *supra*, when, without much discussion, the Court vacated the Workers' Compensation Board's finding that the employer was entitled to an offset for severance payments. The Court held that there was no express statutory authority in the former Workers' Compensation Act, which applied at the time of the injury, to support such a setoff.

Further analysis was provided in the subsequent case of *Daley v. Spinnaker Industries, Inc.*, *supra*. In *Daley*, the Law Court refused to take the position that no offset will be allowed for severance pay as a matter of law, despite their recognition that “[m]ost jurisdictions that have addressed this issue do not permit employers to offset workers' compensation benefits by severance payment.” Rather, the Court reiterated that the determination of whether the sever-

ance payment is a 'wage continuation plan' is established on a case-by-case basis. In order to establish that a severance payment is a wage continuation plan, the Court noted that it was the employer's burden to present evidence concerning the nature and purpose of the payment. The Court did not provide any suggestions as to what such evidence should consist of, but indicated that an employer should also show the method by which the amount of the severance pay was calculated. Ultimately, in *Daley*, the employer was found not to meet its burden in establishing that the essential purpose and character of the severance payments at issue were for wage replacement during Daley's period of work-related incapacity. As severance payments often appear to be more of a payment in exchange for an employee's agreement to terminate employment than a payment associated with the employee's incapacity, an employer would likely have a long row to hoe in trying to obtain an offset for these payments.

Pension or Retirement Plans

Lastly, under subsection (1)(C), an offset is allowed for pension or retirement payments pursuant to a plan created or maintained by the employer. The Law Court has upheld decisions allowing for offsets on what is withdrawn from these plans in the form of cash; however, it has expressly disallowed setoffs where an employee rolls over benefits into IRAs. See *Jordan v. Sears, Roebuck & Co.*, 651 A.2d 358 (Me. 1994); *St. Pierre v. Falcon Shoe*, 2004 ME 106, 854 A.2d 212.

In *Jordan*, the Law Court framed the issue as “whether Jordan has 'received' a payment [by rolling over pension benefits into an IRA] that 'triggered' the employer's right to a coordination.” The Court analogized pension benefits to the statute's treatment of social security benefits and noted that an employee could elect to take social security benefits older, or could also elect to defer them to maximize its benefits. The Court noted that the Legislature does not require an

employee to take early social security benefits in order to provide the earliest possible setoff for his employer, nor should the Legislature's intent be construed so as to discourage employees from rolling over pension funds into an IRA. Moreover, as Jordan was forced to retire due to his work-related injury, the Court found an interpretation allowing an offset for pension benefits being rolled over to an IRA would “penalize him for suffering a work-related injury and would be contrary to the purpose of the Act 'to shift the economic cost of work-injuries to the employer and ultimately the consumer.’”

The Legislature, however, created a noteworthy exception to the coordination of benefits provided by the Employer. Section 221(10) states that an offset will not be permitted for payments received under an employer-funded plan in existence on December 31, 1992. However, a plan which was entered into or renewed on or after January 1, 1993, may expressly preclude a coordination of benefits. In some cases, however, a renewed plan may be silent as to coordination.

In *Temm v. S.D. Warren Co.*, 2005 ME 18, 887 A.2d 39, a disability plan existed prior to December 31, 1992, and was renewed thereafter, but was silent with respect to coordination. Noting that the purpose of Section 221 “is to prohibit double recoveries and stacking of benefits”, the Court held that when disability benefits are paid pursuant to a plan renewed on or after January 1, 1993, the benefits are automatically subject to coordination unless the plan specifically provides otherwise.

Conclusion

The bottom line is that Section 221 provides employers with the opportunity to offset workers' compensation benefits with payments received by the Employee, provided they fall within the defined categories listed in subsection (1) and provided they are not exempted by Subsection (10). Establishing entitlement to coordination of benefits remains the employer's burden, and therefore should not be overlooked by employers or adjusters. □

Court limits financial institution's duty of care owed regarding personal information stored on stolen laptop computer

BY ADRIAN P. KENDALL

In a February, 2006 decision, the United States District Court for the District of Minnesota recently held that a loan origination and servicing company was not negligent in failing to encrypt personal information contained in a laptop computer that was stolen from an employee's home office. In the case *Guin v. Brazos Higher Education Service Corp.*, D. Minn., Civ. No. 05-668 (RHK/JSM), February 7, 2006, the court dismissed the negligence action brought against a lender by one of its customers whose financial information was allegedly contained on the stolen laptop. Granting Brazos Higher Education Services Corp.'s ("Brazos") motion for summary judgment, the court ruled that the lender did not breach a duty of care under either the Gramm-Leach-Bliley Act or its own data privacy policy to customers whose unencrypted data may have been stored on that laptop's hard drive.

The plaintiff Guin had argued that the Gramm-Leach-Bliley ("GLB") Act established a statutory-based duty for Brazos "to protect the security and confidentiality of customers' non-public personal information." For the purposes of the summary judgment motion, Brazos conceded that the GLB Act applied to the circumstances in the case and that the Act also established a duty of care.

The decision by the Minnesota District Court has important implications for financial institutions that are regulated by the GLB Act. The court found that Brazos had not breached its statutory duty of care to the borrower when it failed to encrypt personal information in its database, despite the GLB Act's mandate that companies "protect

the security and confidentiality of customers' non-public personal information."

Background Facts

Brazos is a non-profit corporation located in Waco, Texas, which originates and services student loans. It has approximately 365 employees, including John Wright, who worked as a financial analyst for the company out of an office located in his home in Maryland. Wright used loan level details in performing asset liability management tasks for his employer. Those details included customer personal information including names, addresses, social security numbers, and loan balances. Wright stored this data on his laptop at home.

When Wright's home was burglarized, the laptop was stolen. Wright immediately reported the theft to the local police department. After the police were unable to recover the laptop, Brazos took the additional step of hiring a private firm to further investigate the details of the burglary. The private firm was also unable to regain possession of the computer. Wright had not kept records of which data sets had been deleted from the hard drive. Because Brazos was not able to definitively determine which customers' personal data was contained on the laptop at the time of its theft, Brazos decided to send a notification letter to all of its 550,000 customers.

The letter notified these customers that a third party may have inappropriately accessed personal information relating to the loan, urged borrowers to place a "free 90-day security alert" on their credit bureau files and to also review consumer assistance materials



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published by the FTC. Brazos also established a call center to answer any specific questions that customers might have and to track any reports of identity theft.

The plaintiff Guin filed suit in U.S. District Court for the District of Minnesota alleging that Brazos was negligent although Guin suffered no harm as a result of the breach and did not experience any type of identity theft or other fraud. In fact, at the time the opinion was issued, Brazos had not been advised that any of its customers had been victimized as a result of the theft.

Negligence Not Proven

The court concluded that Guin failed to present sufficient evidence to support a finding that Brazos had violated duties imposed under the GLB Act. Under the GLB Act, a financial institution must comply with several objectives, including:

Develop, implement, and maintain a comprehensive written information security program that is written in one or more readily accessible parts and contains administrative, technical, and

physical safeguards that are appropriate to your size and complexity, the nature and scope of your activities, and the sensitivity of any customer information at issue;

Identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks; and

Design and implement information safeguards to control the risks you identify through risk assessment, and regularly test or otherwise monitor the effectiveness of the safeguards' key controls, systems, and procedures.

16 C.F.R. §314.4(a)-(c).

At the time that the laptop was stolen from Wright's home, Brazos had written security policies, current risk assessment reports, and proper safeguards for its customers' personal information as required by the GLB Act. Wright was authorized to have access to customer personal information because he needed that information to analyze loan portfolios as part of an asset liability management function. Accordingly, Wright's access to personal information was determined to be within the "nature and scope of Brazos's activities, as required by 16 C.F.R. §314.4(a)." The court went on to specifically note that the GLB Act does not prohibit anyone from working with sensitive data on a laptop computer in a home office. The court also noted that the GLB Act does not contain any requirement of encryption for personal information stored on a laptop computer.

No Violation of Company's Internal Privacy Policies Found

In addition to the alleged breach of obligations under the GLB Act, Guin also argued that Brazos failed to comply with the self-imposed reasonable duty of care assumed by Brazos under the company's data privacy policy. That policy included the statement that Brazos would "restrict access to non-public personal information to authorized persons who need to know such information." Brazos argued that it had acted with reasonable care in handling Guin's personal information. The court agreed. Specifically, it noted that Brazos had policies in place to protect personal information, trained its employee Wright with respect to those policies, and transmitted and used data in accordance with those same policies. The court also noted that Wright lived in a "relatively safe" neighborhood and had taken "necessary precautions to secure his house from intruders." His ability to foresee and deter the specific burglary was not found to constitute a breach of Brazos's duty of reasonable care to Brazos's customers.

Injury Not Proven

In addition to plaintiff Guin's inability to show any breach of duty, the court also found that Guin did not present sufficient evidence of injury and that any purported injury was not proximately caused by the claimed breach of duty. More specifically, the court rejected the notion that the theft of the laptop containing personal information, on its own, constituted identity theft. Guin was unable to provide any evidence that any personal information was "transferred, possessed, or used" by a third party with "the intent to commit, aid or abet any unlawful activity."

Accordingly, the court concluded that there was no genuine issue of material fact concerning whether Guin had suffered an injury.

Causation: Theft Not Considered Reasonably Foreseeable

Finally, in addressing the issue of causation, the court reviewed the facts in order to determine whether the criminal act in question was foreseeable. The court concluded that it was not. In reviewing that standard, the court noted again that Wright lived in a "reasonably safe" neighborhood and took precautions to secure his home. No specific facts were provided with respect to either of these findings. The court also noted that Wright was unaware of any previous burglaries on his block or in his immediate neighborhood and that there was no indication that either Wright or his employer, Brazos, could have possibly foreseen the burglary. The court concluded that Guin could not establish proximate cause.

Conclusion

This decision is obviously good news for lenders required to comply with the Gramm-Leach-Bliley Act. It is worth noting that the case could have been dismissed by the court based solely on the finding that no injury of any kind had been suffered by the plaintiff. Fortunately, the court addressed all of the elements of the claimed cause of action in rendering its decision. The decision also underscores the importance of not just having the appropriate protocols in place, but ensuring that they are implemented, with appropriate training. The scope of Brazos's response to the incident is also worth noting to the extent that it shows how seriously Brazos took its responsibilities to its borrowers. □

Two recent Law Court decisions

BY DAVID P. VERY

Setoff and costs

When both the plaintiff and the defendant receive money judgments, are the verdicts offset and who is awarded costs? The Law Court addressed these questions in *Runnells v. Quinn*, 2006 ME 7 (January 27, 2006).

Runnells, a home construction contractor, entered into a home construction contract for renovations to Quinn's home. During the renovations, the parties entered into an oral agreement for Runnells to perform additional renovations. Quinn refused to pay Runnells' final invoice and Runnells brought a complaint against Quinn claiming implied contract and/or quantum meruit. Quinn filed a counterclaim for breach of contract/implied warranty. The jury found for Runnells in the amount of \$27,742 on his complaint for quantum meruit/implied contract. The jury further found for Quinn in the amount of \$14,000 on her counterclaim for breach of contract/implied warranty. The trial court refused to award costs to either party.

On appeal, Runnells first asserted that the verdicts should have been offset and that one judgment in favor of Runnells should have been entered in the amount of \$13,742.40. The Law Court held that although the trial court, in its discretion, could have offset the verdicts, it did not exceed the bounds of its discretion in determining that the jury verdicts should not be offset, considering that there were separate verdict forms on multiple claims.

The Law Court then addressed the issue of the award of costs. Runnells contended that the trial court should have determined that he was the prevailing party, as he was awarded the entire amount of his unpaid bill, whereas Quinn was only awarded approximately half of the amount on her breach of warranty claim. The Law Court stated that

the court must use a functional analysis to determine who is the prevailing party for purposes of awarding costs. The determination of a successful party is based upon success on the merits, not just upon damages, looking at the lawsuit as a whole. Thus, the fact that Runnells was awarded \$27,742.40 on his claim, while Quinn was only awarded \$14,000 on hers, did not settle the issue.

The Law Court held that the trial court did not commit clear error in determining that, when looking at the lawsuit as a whole, neither party was the "winner" or the "loser." The Court stated that as there was no prevailing party, the trial court properly declined to award costs.

Statute concerning presentation of medical malpractice panel findings to jury found unconstitutional

The Maine Law Court, in a split decision, found that the statute concerning the presentation of medical malpractice panel findings to the jury is unconstitutional. In *Smith v. Hawthorne*, 2006 ME 19 (March 1, 2006), Dr. Catherine Hawthorne had treated James Smith for an open fracture of his ankle, but the fracture did not heal correctly. Smith filed a medical malpractice claim against Hawthorne. The medical malpractice prelitigation screening panel unanimously determined that (1) Hawthorne deviated from the applicable standard of medical care; (2) the deviation did not cause James Smith's injury; and (3) Smith's negligence was not equal to or greater than Hawthorne's negligence. Pursuant to 24 M.R.S. § 2857(1), the trial court allowed in evidence the panel's findings favorable to Hawthorne, but refused to allow in evidence the panel's finding favorable to Smith. The jury was merely told, "The panel in this case unanimously concluded that the acts or omissions complained of by the Smiths were not the legal cause of the injuries that he



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has alleged." The jury issued a verdict in favor of Hawthorne and Smith appealed.

Use of unanimous panel findings is governed by 24 M.R.S. § 2857(1), which provides in pertinent part:

B. If the panel findings as to both the questions under section 2855, subsection 1, paragraphs A and B are unanimous and unfavorable to the person accused of professional negligence, the findings are admissible in any subsequent court action for professional negligence against that person by the claimant based on the same set of facts upon which the notice of claim was filed.

C. If the panel findings as to any question under section 2855 are unanimous and unfavorable to the claimant, the findings are admissible in any subsequent court action for professional negligence against the person accused of professional negligence by the claimant based on the same set of facts upon which the notice of claim was filed.

Thus, if the answers to both the negligence and proximate cause questions are affirmative and unanimous, the claimant is allowed to present to the jury those findings. However, if the answers to the negligent and proximate cause

questions are split, only the defendant is allowed to present to the jury the findings favorable to the defendant.

Smith argued on appeal that the statute violates his constitutional right to a jury trial. Smith argued that because the statute results in giving the jury part, but not all, of the panel's findings, the jury is misled and its role as a fact finder is usurped.

The Law Court noted that no other state in the country permits a similar asymmetrical admission of panel findings. The Court noted that states with screening panels either forbid the admission of a panel's findings in a subsequent trial or require that all findings be admitted.

The Court further stated that the admission of only those findings favorable to one party distorts the jury's fact-finding role. The partial admission reduced the strength and persuasiveness of the Smith's case to the jury and, at the same time, strengthened Hawthorne's case, thereby significantly infringing

upon the Smith's rights to have the facts determined by a jury. The Court noted that because the jury was told only that the panel found that any acts or omissions by Hawthorne did not cause harm to Smith, the jury could have been misled into believing that the panel found that Hawthorne was not negligent even though the panel unanimously found that she was.

As a result, the Law Court concluded that the application of the statute by the trial court, which denied the Plaintiff's request to admit the panel's findings on negligence and comparative negligence and allowed in evidence only the panel's findings on causation, was unconstitutional and denied Smith his right to a jury trial under the Maine Constitution. The Law Court thus remanded this case to the Superior Court for a new trial where all of the panel's findings would be presented to the jury.

Three justices dissented. The dissent noted that the fact that other states have not chosen to adopt a similar stan-

dard should not bear on the Court's consideration of the statute's constitutionality. The Legislature's decision, the dissent noted, to bar the introduction into evidence of a favorable panel finding in a split finding case is supported by determination of public policy involving a subject of great public concern. The dissent noted that the majority's reworking of the statute undermines the inducement to settle non-meritorious medical malpractice claims that the statute was intended to achieve.

The dissent further noted that the right to a jury trial relates to the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure. Because this legislative decision does not substantially undermine a fundamental and essential aspect of the jury trial process, the dissent stated that it had not been demonstrated that the legislature acted beyond its reach in violation of the constitution. □

Briefs/Kudos

Norman, Hanson & DeTroy is committed to encouraging Maine's high school students to realize their full potential, with a particular focus on increasing Maine's college graduation rate. **DAN CUMMINGS** is active in this effort by serving as Chair of the Board of Directors of Project Opportunity, a Maine not-for-profit corporation dedicated to encouraging students of Telstar Regional High School in Bethel to consider and pursue post-secondary education options.

ADRIAN KENDALL has continued Norman, Hanson & DeTroy's commitment to educational outreach by speaking in April at both Greely High School in Cumberland and Massabesic High School in Waterboro on the importance of pursuing higher education and foreign languages in career choices. Just last month, Norman, Hanson & DeTroy sponsored a table of students at the World

Affairs Council of Maine's annual World Quest competition.

In May, Norman, Hanson & DeTroy co-sponsored the visit of Dr. Wolfgang Vorwerk, German Consul General in Boston, to Colby and Bates Colleges, the University of Southern Maine and Greely High School. The visit also included a lunch meeting with Maine's political and business leaders in conjunction with the Maine International Trade Center. Adrian serves as the Northern New England Representative of the German Consulate General, Boston.

DON BERTSCH has been hired as the firm's Library Coordinator. Don is a graduate of Northeastern University and received his Master of Arts in Library Science from the University of Denver. He has extensive experience both as a college-level library director and as a legal librarian.

BOB BOWER and **STEVE MORIARTY** spoke at a recent workers' compensation seminar sponsored by the Maine Bar Association, the first such seminar offered by the Association in eight years. Bob addressed the topic of Medicare set aside trusts, and Steve presented on the Legal Year in Review and moderated a panel of hearing officers.

BOB MOSES has joined the firm as Office Services Clerk, having recently worked in a similar position with the Roman Catholic Diocese in Portland.

Finally, we regret to announce the passing of **RACHEL FINNE**, former legal secretary to Jim Poliquin, and former managing editor of this Newsletter. We extend our condolences to her husband, Wladislaw and to all the members of her family. □

Workers' Compensation and *ex parte* contact with physicians

BY DORIS V.R. CHAMPAGNE

Although the Maine Workers' Compensation Act does not address the specific issue of whether employers and insurance carriers can have *ex parte* communications with a treating physician, a review of the applicable statutes and rules promulgated by the Workers' Compensation Board suggest that it probably is not a good idea, even through a nurse case manager. For the purposes of this article, *ex parte* communication is oral or verbal communication with a treating provider outside the presence, and without the consent, of the employee and/or his legal representative.

In Maine, an employer/insurer's right to access medical information on an injured employee is addressed in 39-A M.R.S.A. § 208. That provision states, in relevant part, that "[a]uthorization from the employee for release of medical information by health care providers to the employer is not required if the information pertains to treatment of an injury or disease that is claimed to be compensable under this Act." There is no Maine case law interpreting this provision. However, the language of § 208 seems clear: no authorization from the employee is required if the release of "medical information" pertains to treatment for the work-related condition being alleged. The question is: does the phrase "release of medical information" include *ex parte* oral communication with a treating physician, or is it limited to a request for written materials in the doctor's file?

On this point, the plain language of § 208 is not clear at all, and the Act does not provide a definition for what is meant by "medical information." The Board, however, appears to take the more limited approach. It promulgated

W.C.B. Rule ch. 12, § 18, which expressly states that only "focused" written records are allowed in the "Limited Authorization" issued by the Board. Given that the Board's rules are generally upheld by the Maine Supreme Court, it is probably safe to assume that *ex parte* communication would likely be deemed inappropriate in this state in workers' compensation cases.

It is noteworthy that, insofar as attorneys are concerned, the Professional Ethics Commission has specifically determined that—in the civil, personal-injury setting—it was not a violation of the Maine Bar Rules for defense counsels to discuss a plaintiff's medical condition or treatment with the plaintiff's treating physician without his or her permission. *See* Comm'n on Professional Ethics of Maine State Board of Bar Overseers Op. 82 (11/4/82). The Commission warned, however, that, though "the Maine Bar Rules themselves do not prohibit such *ex parte* contact with plaintiff's treating physician, counsel should realize that the propriety of such conduct as a matter of law is a question which has not been decided by the Maine Supreme Judicial Court, and courts in other jurisdictions are sharply divided on this question of law." *Id.* Although not a violation of the Maine Bar Rules, therefore, the Ethics Commission clearly limited the decision to its review of the Bar Rules and recognized that a similar result might not be found when the courts interpret other statutes and/or rules. As with Maine attorneys, the Maine Insurance Bureau has not issued any professional ethics rules proscribing *ex parte* communication between insurance adjusters and treating providers either. Consequently, insurance adjusters are



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subject to the same uncertainties faced by attorneys.

Another consideration insofar as *ex parte* communication is concerned is the physician-patient privilege under Maine Rule of Evidence 503(b), a civil evidentiary rule that allows the patient/employee to prevent the disclosure of communications between the patient/employee and his or her physician/psychotherapist. The rule allows the patient to prevent his or her physician, psychotherapist, and other persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, *including members of the patient's family*, from disclosing confidential information. The privilege is expressly recognized by the Maine Workers' Compensation Act, which states that the rules of privilege must be observed by the Workers' Compensation Board. 39-A M.R.S.A. § 309(2).

Applying the Rule 503 to the workers' compensation setting, the employee is the one who owns this privilege, and he or she alone has the right to waive it. By filing a workers' compensation claim, the applicable workers' compensation provisions cited above

suggest that the privilege is waived to the extent the information relates to the work injury or the condition alleged. However, because the Workers' Compensation Board Rule also indicates that "medical information" is limited to written medical reports and diagnostics, unauthorized *ex parte* communication with an employee's physician is probably a violation of the Rule 503(b) privilege and, consequently, § 309(2). This means that, if the health care provider talks to anyone without the employee's consent in Maine, he or she will likely be found to have violated this rule, even if the discussion relates to the work injury.

In such a case, the Maine's Supreme Court has already specifically determined that patients have a right of action against the health care provider for breaching the confidentiality rule. See *Seider v. Board of Examiners of Psychologists*, 2000 ME 206, 762 A.2d 551 (finding that a psychologist violated a patient's confidentiality rights by disclosing more information than was needed when responding to a subpoena); *Brand v. Seider*, 1997 ME 176, 697 A.2d 846 (indicating that a patient has a cause of action for professional negligence against a psychologist because psychologist breached confidentiality rules). Consequently, if a healthcare provider talks with employers or insurers in a workers' compensation case without the employee's consent, he or she may be subject to a suit for breaching an employee's confidentiality.

It is unclear whether the Law Court would recognize a suit against insurers and/or employers for causing, or inducing, treating doctors to violate the confidentiality rule. However, suits against insurers have been brought in at least two other states, with varying results. The West Virginia Supreme Court found that unauthorized, *ex parte* communication between an employer and the treating physician of a workers' compensation claimant regarding confidential physician/patient information is prohibited. If this confidential relationship is breached, cause of action arises against third parties, i.e. insurers,

defense counsels, etc, who induce a physician to breach his or her fiduciary relationship. *Morris v. Consolidated Coal Co.*, 446 S.E.2d 648 (W.Va. 1994).

A suit against an insurer was also attempted in Missouri. In *Sievers v. Liberty Mutual Ins. Co.*, 851 S.W.2d 529 (Mo. 1992), an employee brought an action against the insurer because its counsel conversed with her psychologist outside of her presence and without her express approval. The court stated that *ex parte* oral communication is discouraged in Missouri, but there was simply no cause of action for the intentional interference with the physician/patient privilege in that state. Consequently, it affirmed the lower court's grant of a summary judgment in the insurer's favor. Again, there is no case law on this precise issue in Maine, but given the split in authority, the lack of judicial guidance requires that insurers and employers exercise caution when considering whether to speak to a treating doctor about an injured employee.

A review of other jurisdictions revealed that fourteen states have actually considered the appropriateness of *ex parte* communication with treating providers. Out of the fourteen states, six allowed *ex parte* communication and eight prohibit it. The states that allow such communication include Alabama, Florida, Iowa, Louisiana, Oregon, and Washington. These states vary in the degree to which, and the circumstances under, the *ex parte* communication may be had, but the bases for allowing it are generally the existence of express statutory authorization allowing such contact or a judicial finding that the patient-physician privilege is waived once the workers' compensation claim is filed. It is noteworthy that

most of these states also warn that authority for *ex parte* communication is restricted to information pertaining to the injury alleged. It is not an invitation to have an open-door conversation about all of the employee's medical conditions.

The eight states that prohibit unauthorized *ex parte* communication include Arizona, Illinois, Mississippi, New Mexico, North Carolina, Pennsylvania, and West Virginia. These states do not allow it primarily because of public policy concerns. They are concerned that nonconsensual *ex parte* interviews with the employee's treating physician would have a chilling effect on the physician-patient relationship, which would impede the prospects of successful treatment and delay an employee's return to work. A number of states also mention that *ex parte* communication is inappropriate because it is not specifically authorized by the Act in question (which is a stance often taken by Maine's own Supreme Court in deciding worker's compensation issues) and/or such communication is, unnecessary, producing no better or greater evidence than that which is obtainable through traditional means of discovery, i.e., subpoenas, authorized releases, oral depositions, and live testimony. Some of these jurisdictions also mention that *ex parte* communication is offensive because there is no control or safeguard as to what information is disclosed and that it impermissibly places the privilege in the hands of another, i.e. the doctor rather than the patient.

In summary, it is unclear whether *ex parte* communication with a treating physician is authorized in Maine in workers' compensation cases. However, a reading of the plain language of § 208, the applicable rules, and the sharply divided rulings from other jurisdictions, suggests that *ex parte* communication is unwise and should be avoided, unless the employee or his legal representative expressly authorizes the contact. □



Workers' Compensation- Law Court decision

BY STEPHEN W. MORIARTY

Mediation and changed circumstances

It has long been recognized that agreements reached at mediation are binding upon the parties and are fully enforceable. *Bureau v. Staffing Network, Inc.*, 678 A.2d 583 (Me. 1996). In a recent decision, the Law Court clarified the burden borne by an employer seeking to modify a level of entitlement previously agreed-upon at mediation.

In *Hoglund v. Aaskov Plumbing & Heating*, 2006 ME 42 (April 26, 2006), the claimant had sustained a personal injury to his knee on April 5, 2001, and received voluntary workers' compensation benefits. Ultimately, at mediation the employer agreed to pay benefits "at a rate of total" on an ongoing basis, with an offset for unemployment benefits. In the following year, the employer served a 21-day letter upon the employee giving notice of a discontinuance of benefits, and the employee responded with a Petition for Review and Motion for Provisional Order. A Hearing Officer issued a Provisional Order ruling that a compensation payment scheme had been established by virtue of the written record of mediation and that accordingly the employer could not take action to reduce benefits by means of a 21-day letter. The Hearing Officer ruled that the

employer's only option was to file a Petition for Review pursuant to §205(9)(B)(2).

The employer then filed a review, and a hearing was held before a successor Hearing Officer. The mediation agreement was interpreted to provide for partial at a 100% rate, and the Hearing Officer ruled that the employer was required to establish a change in circumstances since the mediation by either comparative medical evidence or a change in economic conditions. The employer's Petition for Review was denied.

On appeal, the Court rejected the employer's argument that it was entitled to a full hearing on the extent of the employee's disability. Noting that the Legislature intended mediation to take the place of litigation as much as possible, the Court held that allowing a de novo hearing on disability would discourage efforts toward resolution at mediation. Therefore, since the extent of disability had been established at mediation, the Court held that the employer was compelled to show that the claimant's medical or economic circumstances had changed since the time of mediation in order to reduce or discontinue benefits. The Court upheld the Hearing Officer's finding that the employer failed to meet its burden.



STEPHEN W. MORIARTY

This decision raises significant concerns regarding the long-term consequences of agreements reached at mediation. While the Court recognized that "there are legitimate concerns about the preclusive effect of agreements that represent a compromise", the Court nevertheless held that "these concerns can be addressed by careful drafting in the report of mediation". As a result, employers and insurers must recognize that agreements entered into at mediation will have long-term effects, and that the written record must therefore be as explicit and unambiguous as possible. □

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