NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
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Current harassment case decisions reflect new liability standards

Employers seek to improve policies and employee training

BY ANNE M. CARNEY
ROBERT W. BOWER, JR.

The standard of vicarious liability adopted in two harassment cases that the U.S. Supreme Court decided last summer is sending shock waves across the country. Employers defending recent sexual, racial and other unlawful harassment claims heard in federal courts are now feeling the effects of the new legal standard created by the decisions of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. –, 141 L Ed 2d 633, 118 S Ct.–, and *Faragher v. City of Boca Raton*, 524 U.S. –, 141 L Ed 2d 662, 118 S Ct –.

The *Ellerth* and *Faragher* decisions create an affirmative defense against vicarious liability, which can be asserted if no tangible adverse employment action has been taken. An employer avoids vicarious liability by proving (1) that the employer exercised reasonable care to prevent and correct promptly any sexual harassment behavior, and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities the employer provided. If the employee has been fired or demoted, no affirmative defense is available.

Courts have found for the employee in a number of cases due to an employer's absence of an anti-harassment policy or failure to implement an existing policy.

In a Fifth Circuit Court decision, *Williamson v. The City of Houston*, (148 F. 3d 462 (5th Cir. 1998), the City was held vicariously liable for sexual harassment of a police officer by her co-worker because it failed to respond to the officer's many verbal complaints about the offensive conduct. The co-worker made constant comments about the officer's body and touched her in sexual and non-sexual ways. The officer asked that the supervisor not assign her to a squad car with the offending co-worker, and that her desk be relocated so she could avoid being near him. Liability was imposed on the City of Houston based on these complaints *even though* the officer did not use the words "sexual harassment" in her verbal complaint, and initially did not follow the City's formal written complaint procedure.

Although Budget Rent-A-Car Systems had a written policy in its employment manual prohibiting racial harassment, Budget could not avoid liability for verbal harassment of an African-American employee by his boss. In *Booker v. Budget Rent-a-Car Systems*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998), the U.S. District Court for the Middle District of Tennessee concluded that Budget would be liable for racial harassment because the company provided no evidence that its policy prohibiting racial harassment was distributed to employees or that Budget had trained its managers to carry out the policy.

In another Fifth Circuit case, the Court upheld a punitive damages award against a retailer in a discrimination claim involving vicarious liability for a supervisor's conduct. Relying on circumstantial evidence, the Court found that the plaintiff's supervisor discriminated against her because of her association with an African-American, her husband. In *Deffenbaugh-Williams v.*

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Wal-Mart Stores, Inc., 156 F. 3d 581 (5th Cir. 1998), the Court held that Wal-Mart was not entitled to raise the affirmative defense against vicarious liability because Wal-Mart's supervisor had fired the plaintiff. Under the standard established in *Faragher* and *Ellerth*, an employer is always vicariously liable for acts of a supervisor which involve a tangible negative employment action.

In three other cases, employers successfully asserted the new affirmative defense. Tandy Corp. had a sexual harassment policy under which an employee could direct complaints to a variety of management-level employees. In *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773 (W.D. Ky. 1998), the U.S. District Court in Kentucky found that the plaintiff's failure to report that her boss spoke to her and touched her in a sexual manner, and threatened her with termination, adequately supported the employer's affirmative defense. The plaintiff testified that she knew about Tandy Corp.'s sexual harassment policy and the complaint procedure available to her.

Saks Fifth Avenue successfully asserted the affirmative defense by establishing that it had an adequate anti-harassment policy in place, which included a report mechanism. In *Fierro v. Saks Fifth Avenue*, 13 F. Supp. 2d 481 (S.D. N.Y.1998), the second element of the affirmative defense, that the employee unreasonably failed to use the employer's complaint procedure, was established exclusively by the employee's testimony that he did not report the harassment because he feared repercussions. In a legal holding that will be helpful to employers, the U.S. District Court in New York found that "generalized fears [of repercussion] can never constitute reasonable grounds for an employee's failure to complain to his or her employer."

Caribbean Restaurants, Inc., an employer in Puerto Rico — a jurisdiction which relies on the same First Circuit legal precedent as Maine — successfully defeated vicarious liability in part by proving that the plaintiff had received a copy of the company's sexual harassment policy and reporting procedure, and signed a receipt to that effect. In *Romero v. Caribbean Restaurants, Inc.*, 14 F. Supp. 2d 185 (D. Puerto Rico 1998), the U.S. District Court also indicated that the employee's reasons for not reporting harassment pursuant to the policy were not sufficient. The employee's objections had to do with fear of reprisal from the harasser, mistrust of the employer, and a feeling of shame associated with the harassment.

In all these cases, employers failed or succeeded in defending harassment claims as a result of management procedures in effect before the Supreme Court adopted the vicarious liability standard in *Faragher* and *Ellerth*. Now employers have the opportunity to develop new or revised management practices — practices that will help prevent new claims from arising and allow employers to successfully assert the affirmative defense in court actions.

We recommend that all employers develop the following procedures and practices:

- An anti-harassment policy which applies to all employees.
- A complaint procedure that all employees can use, regardless of position in the company. The procedure must identify several people to whom harassment can be reported.
- An anti-harassment policy for supervisors, which explains a supervisor's duty to prevent other employees from engaging in harassment and the supervisor's duty to respond to complaints as outlined in the company's complaint procedure. Tell supervisors that their conduct may subject the company to liability.
- A procedure for investigating allegations of harassment and discrimination.
- A disciplinary policy which provides a uniform standard for the company to enforce when allegations of harassment are well founded.
- Training that informs all employees of the policies applying to them, and a mechanism for reminding employees at least once a year of the existence of the policies.
- In reviewing your anti-harassment policy, make sure the complaint procedure applies to every employee, regardless of position within the company. Designate several people to whom harassment can be reported.

Norman Hanson & DeTroy's employment law group has developed policies recommended for companies of various sizes, and we will be pleased to prepare policies for employers or to review existing policies to strengthen an employer's position. The group also provides on-site training in harassment prevention for any size company. Training can be conducted on a company-wide basis, or can be directed to managers whose conduct may subject the company to vicarious liability.

For more information about the U.S. Supreme Court decisions in *Ellerth* and *Faragher*, please see the Fall, 1998 NH&D Newsletter, available on our website, www.nhdlaw.com. If you wish details about our harassment policy review and training services, call or e-mail Robert W. Bower, Jr. or Anne M. Carney. □

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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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Law Court addresses inference of intent in juvenile criminal conduct

By James D. Poliquin

In the recent case *North East Insurance Co. v. Leonard*, 1998 ME 241 (November 9, 1998), the Law Court once again addressed the issue of inferring an intent to injure from certain criminal conduct. The claimant, Ronald Landry, was slashed with a knife during an armed robbery planned and carried out by Timothy Wing, Samantha Leonard and others. Wing actually carried the knife and carried out the attack. Leonard, who was 15 years old at the time, admitted to participation in the robbery and the court therefore determined she had committed the juvenile offense of Class A robbery. The civil action that Landry brought against Leonard alleged only negligence. This Law Court decision involved the consolidated appeals from the underlying case of *Landry v. Leonard* and the declaratory judgment case of *North East v. Leonard*.

The Law Court carefully reviewed prior cases involving the intended injury exclusion in a homeowner's policy to situations in which the insured has been convicted of a crime. The Court acknowledged that commission of a robbery does not necessarily mean that the robber intends the victim to be physically harmed, or that the robber subjectively foresees that injury is almost certain to be a result. Despite the Law Court's conclusion that admission to this juvenile offense did not meet the normal subjective intent requirement that would activate the exclusion, the Law Court found that it was "so highly likely that bodily injury will result that we will deem willing participation in the crime to be the intent or expectation to cause the bodily injury." North East, therefore, had no duty to defend the complaint brought by Landry against Leonard.

JAMES D. POLIQUIN

In *Leonard* the Law Court essentially followed the same approach it applied in *Perreault v. Maine Bonding & Casualty Co.*, 568 A.2d 1100 (Me. 1990), a case involving a criminal conviction for sexual abuse of a minor. Even though the criminal charge in *Perreault* did not require proof of a subjective intent to harm, the Law Court inferred an intent to harm based on the high likelihood that harm would result from the act. In the *Leonard* decision, the Court used the same language as in *Perreault*, finding no duty to defend or indemnify in a civil action against an insured who had admitted to being an accomplice to Class A armed robbery. Since the resolution of the juvenile proceeding established the criminal offense, the plaintiff's phrasing of the complaint in terms of "negligence" did not make any difference.

The Court observed that as a general rule it is against public policy for an insurance carrier to indemnify its insured against his own criminal acts. One should not read too much into this statement, however, because in many cases involving criminal conduct, the Law Court has refused to apply the intended injury exclusion as a matter of law. For example, the insured in *Patrons-Oxford v. Dodge*, 426 A.2d 888 (Me. 1981) was owed a defense despite having been convicted of Class A aggravated assault. The Court in *Dodge* did not even hint that the criminal nature of the conduct was relevant. Generally, most crimes do not involve a subjective intent to injure, or a subjective expectation that injury is practically certain to occur, and most of those cases will continue to present situations in which an insurer has a duty to defend. Still, the Law Court's comment that it is against public policy to obtain indemnification for criminal conduct may provide a substantial benefit to those insurers not using the standard intended injury exclusion found in ISO forms. The *Leonard* decision improves the chances that an intended injury exclusion based on an objective test, and/or an exclusion for any claim based on "criminal conduct," might be enforced in accordance with its literal terms.

It is difficult to predict whether the Law Court will apply this approach to other instances involving criminal conduct where the elements of the crime technically do not fit the intended injury exclusion. One significant aspect of the *Leonard* decision is the application of the *Perreault* approach to a case involving a juvenile's admission to an offense in juvenile court, a setting substantially different from adult criminal court. Juvenile adjudications are not considered convictions of a crime and a juvenile is not entitled to a jury trial. By its apparent reliance on Leonard's admission in a juvenile proceeding, the Law Court implicitly adopts the view that juvenile adjudications will be treated no differently from adult criminal convictions for these purposes. □

Maine's trade secrets law affects claims of advertising injury under CGL policies

By Christopher C. Taintor

As a condition of employment, it has become common for employers to require their employees to enter into agreements that could substantially limit their options for future employment. A post-employment agreement may require an employee promise not to take a job in the same field in a certain geographic area, and for a certain time period after he or she leaves this employer. Or the agreement may prohibit the employee from using information acquired during employment in a way that would benefit himself or a future employer. Commonly, post-employment agreements are structured to accomplish both objectives: to prevent the employee from "competing" and to prohibit him from disclosing "trade secrets," broadly defined.

In Maine, the enforceability of these agreements is governed by a combination of common law and statute. Covenants not to compete generally are governed by common-law contract principles. However, because "the enforcement of an employee's covenant not to compete has the potential for greatly restricting that employee's capacity to support himself in his chosen occupation," such agreements are disfavored, and courts construe them very strictly. *Chapman & Drake v. Harrington*, 545 A.2d 645, 646-47 (Me. 1988). In *Chapman*, the Maine Supreme Judicial Court has said that "protecting the employer simply from business competition is not a legitimate business interest to be advanced by such an agreement." Thus, a covenant not to compete will be enforced only if it is necessary to protect "confidential information" the employee acquires during his employment, or to prevent him from capitalizing on "the goodwill his employer paid him to develop for the employer's business." Even then, limitations imposed by the agreement will be narrowed, both geographically and in terms of time, to allow the former employee the greatest possible latitude to pursue his profession without unfairly harming his former employer.

Maine, along with forty-one other states, has enacted a version of the Uniform Trade Secrets Act (UTSA). The UTSA largely displaces the common law insofar as it governs the misappropriation of "trade secrets," which the Act defines as:

> Information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that:
>
> A. Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
>
> B. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

10 M.R.S.A. §1542(4). Under the UTSA, anyone who "misappropriates" a trade secret can be enjoined from using it, and can be held liable in damages to include "both the actual loss caused by the misappropriation and the unjust enrichment . . . that is not taken into account in computing actual loss." 10 M.R.S.A. §§1543 & 1544. "Misappropriation" may consist of disclosing information that a person knows was meant to be kept confidential, or it may consist of acquiring such information with the knowledge that it should not have been disclosed. 10 M.R.S.A. §1542(2). In other words, the person or organization from whom the trade secret has been taken may sue the person who took it - typically a former employee; the person or organization who has "acquired" it - usually the former employee's new employer, or both.

If the new employer is an existing business in competition with the former employer, it can also be sued in these circumstances for the tort of "interference," on the theory that it wrongfully caused the employee to disclose trade secrets, or to violate the post-employment covenant not to compete. And if the new employer uses information acquired from the employee in a way that tends to mislead the public at the expense of the secret's "owner," that company faces potential legal action, either under the Uniform Deceptive Trade Practices Act, 10 M.R.S.A. §§1211-1216, or under the common-law theory of "unfair competition," or under Section 43(a) of the federal Lanham Act, 15 U.S.C. §1125. When the departing employee's new employer is sued on any one of these grounds, it is often as a co-defendant with the employee himself , who, if he is an officer or director of the new company, may also be an "insured" under the company's insurance policy. In these circumstances, numerous questions may arise regarding coverage afforded by the employer's Commercial General Liability policy.

The standard CGL policy provides coverage for claims of "advertising injury" arising out of, among other things, "misappropriation of business ideas or style of doing business." Because the offense, to be covered, must have been "committed in the course of advertising [the insured's] goods, products or services," the question of whether a claim for misappropriation of trade secrets will trigger coverage depends in part on how the complaint is framed, and in part on a court's view of how closely the insured's advertising activities must be related to the alleged misappropriation. If the complaint alleges only that the insured misappropriated technology relating to the functional aspects of a product, but does not allege that he made misleading representations about the product's misappropriated characteristics, it is fairly easy for a court to say that there is no "advertising injury" alleged, and thus deny coverage.

Christina J. D'Appolonia new member of firm

Attorney Christina D'Appolonia joined Norman Hanson & DeTroy in September and is working with Mark Lavoie and the litigation group on insurance defense issues. Born in Rumford, Maine, Christina grew up and attended schools in the mid-coast town of Thomaston, graduating from Georges Valley High School.

With two older brothers, Chrissy enjoyed a lot of competitive basketball while growing up, and as a student at the University of Maine at Orono, played on the Division 1 women's basketball team. The women's team, either at or near the top of its New England division, traveled throughout the country for games, including Florida, Alaska, and New York.

Following graduation in 1994, and armed with a Bachelor of Arts in English, Chrissy moved to Pittsburgh where she worked for the Cystic Fibrosis Foundation, and, to experience the business side of life, as assistant manager of a retail furrier.

Christina had early chosen a career in law, which dictated her college major in English. On her return to Maine from Pittsburgh, she enrolled in the University of Maine School of Law. During her three years as student at the School of Law, Chrissy served as a member of the Maine Law Review for two years, and as Editor in Chief during her third year. She was a member also of the Women's Law Association. During her second and third years of law school, Chrissy worked at Norman Hanson & DeTroy as an intern in both the litigation and workers' compensation areas.

Christina is a member of the Maine State Bar Association, the Women's Law Section of the MSBA, and the Maine Trial Lawyers Association. She and her husband Sebastian live in Portland where she continues her love for basketball by participating in local women's basketball leagues. □

CHRISTINA J. D'APPOLONIA

See, *Microtech Research v. Nationwide Mut. Ins. Co.*, 40 F.3d 968 (9th Cir. 1994); *Atlantic Mut. Ins. Co. v. Badger Medical Supply Co.*, 528 N.W.2d 486 (Wis. 1995).

At the other end of the spectrum, a claim that an insured misappropriated the plaintiff's "manner of advertising" - for example, a marketing strategy that may be characterized as a trade secret - states a relatively clear claim of "advertising injury." See, *J.A. Brundage Plumbing v. Massachusetts Bay Ins. Co.*, 818 F.Supp. 553 (W.D.N.Y. 1993); *Fluoroware, Inc. v. Chubb Group*, 545 N.W.2d 678 (Minn. App. 1996).

The harder cases are those that fall between these two ends of the spectrum. It may be alleged, for example, that an insured misappropriated a list of customers to whom his "advertising activities" were then directed, or that the insured advertised a product developed with misappropriated technology. In *Sentex Systems, Inc. v. Hartford Acc. & Indem. Co.*, 882 F.Supp. 930 (C.D. Cal. 1995), and *Merchants Co. v. American Motorists Ins. Co.*, 794 F.Supp. 611 (S.D. Miss. 1992), the courts found that allegations of the former kind triggered a duty to defend. More recently, a federal court in Pennsylvania ruled that a CGL insurer had no duty to defend a suit of the latter kind, where it was alleged that the insured had misappropriated design drawings for a product and then advertised the product it produced using those drawings. *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 20 F.Supp.2d 798 (M.D. Pa. 1998). The court reasoned that there might be a duty to defend if the insured had made "false and misleading comparisons" of its products with the products of the competitor from whom it had acquired the drawings. Absent such comparisons, however, the mere allegation that the insured advertised the product did not establish a close enough link between its "misappropriation" and its "advertising activities" to trigger a duty to defend.

The resolution of these "trade secret" cases often will have profound consequences for the parties. Consider, for example, the departing employee who stakes his economic security on the assumption that he will be able to use the knowledge and expertise gained through his employment as the foundation for a start-up enterprise, in competition with his former employer. If the employer can successfully characterize that knowledge or expertise as the by-product of "trade secrets" acquired during the employment relationship, the result of the litigation could be to severely restrict the departing employee's ability to earn a living.

With increases in employee mobility, it is likely that cases based on post-employment agreements will continue to proliferate, and that insurers and courts alike will be called upon to confront the difficult coverage questions posed by these disputes. Until the Maine courts give some guidance in this uncharted area, insurers will have to be especially careful as they evaluate claims of advertising injury against their insureds. □

Briefs/Kudos

STEVE HESSERT moderated an executive level program, Comp Megatrends, at the 1998 Comp Summit at Sugarloaf. The session focused on the insurance market, the workers' compensation culture, and other key issues. STEVE MORIARTY participated as a panel member in a discussion of permanent impairment and specific loss entitlement.

A new Maine law will make it easier for a person to give assets directly after death, bypassing more lengthy probate. Maine's adoption of the "Uniform Transfer on Death Act" became effective last July, allowing an account in a financial institution to be designated "Transferred on Death," when it will be passed to a beneficiary - either a charity or an individual - directly. This option can apply to assets of mutual funds and stock brokerage accounts not normally eligible for beneficiary designations. In estate planning, you may want to ask if your financial institution can now create these registrations.

At the Annual Agency Conference of the Center for Community Dental Health, ANNE CARNEY and RUSS PIERCE spoke on the Americans with Disabilities Act as it relates to dental health care, addressing an audience of dentists, hygenists, and administrators. RUSS PIERCE was elected Secretary of the Board of Directors of the Center for Community Dental Health. Through its clinics in Portland, Saco, Sanford, Lewiston-Auburn and Farmington, the Center provides dental care to low-income families and others who are underserved.

Thirteen NH&D attorneys presented leading edge legal information to clients in our annual October Fall Forum. Some of the concurrent programs covered workers' compensation, employment law, uninsured motorist developments, personal injury claims, and the new insurance fraud laws.

Now that recently-married ADRIAN KENDALL has moved to Cumberland, it brings the percentage of NH&D attorneys making their home in Cumberland to 20%. What is there about Cumberland?

Three years ago long-time staff member DEBORAH BECKER moved to Rhode Island, and we recently were fortunate enough to have Deb rejoin NH&D (she couldn't stay away any longer). She is working with the team of Dave Norman and Russ Pierce.

Help is on the way for small to mid-size industries facing a likely major business snarl on January 1, 2000. The Maine Manufacturing Extension Partnership is offering a free software program that helps identify a company's exposure to the Millenium Bug. The Partnership offers a broad range of help such as getting technical assistance, and obtaining fast-track loans to resolve Y2K problems with machines and computers. The Partnership's 24-hour hotline is 877-637-4925, or it can be e-mailed at y2k@mainemep.org.

JON BROGAN was appointed last fall to a new task force of the Maine State Bar Association: The Future of the Practice of Law. In the education field, Jon has also been appointed to the Board of Directors of Cheverus High School in Portland.

At the Workers' Comp Update sponsored by the Council on Management in December, BILL LACASSE and JOHN KING spoke on Liability and Productivity Hurdles in returning injured workers to the workplace; BOB BOWER addressed the large audience of claims adjusters and human resource professionals on Managing the Cross-over of FMLA, ADA and Workers' Compensation laws.

Attorney DAN CUMMINGS of the corporate group spoke in November at the Maine Credit Union League forum on regulatory compliance issues. Dan covered a wide array of the legal rules which govern how credit unions handle payments and collections for checks.

On February 6, ANNE JORDAN, BOB BOWER and ANNE CARNEY will teach an all day seminar, "Legal Issues in the Fire Service" at the York County Fire Chiefs Annual Fire Attack School. Topics will include Maine's New Criminal Insurance Fraud law, recent developments in fire/arson case law, employment issues, the Americans with Disabilities Act, and sexual harassment in the workplace. Open to all interested members of the public; for signup, call Steven Howe at 676-4100, ext. 2409 during business hours.

The Maine Bar Journal published an in-depth article by STEVE MORIARTY in the November, 1998 edition titled "Workers' Compensation and Employee Immunity: The 'Theoretical Superstructure' Endures." □

Workers' compensation - Law Court decisions

By Stephen W. Moriarty

Offset for severance pay

In *Goff v. CMP*, 1998 ME 269 (Dec. 14, 1998), the employee had injured his ankle on July 9, 1981 and had ultimately injured his back in 1994. Both injuries occurred while working for the same employer. After the second injury, the employee was terminated for reasons unrelated to either injury. The employer paid benefits without prejudice based on the 1994 injury, but took an offset for 42 weeks of severance pay received by the employee pursuant to his employment contract.

The employee filed a Petition for Award for the 1981 injury, and the employer asserted that the non-prejudicial payments for the 1994 injury precluded a further award of benefits based on the 1981 injury. The Board granted the Petition for Award, finding that ankle problems attributable to the 1981 injury prevented the employee from returning to work. However, the Board agreed with the employer that it was entitled to an offset for the full amount of the severance pay, ruling that severance pay was a substitute for earnings.

On appeal, the Law Court agreed with the Board, and held that the employer's voluntary payments without prejudice did not prevent the employee from filing a Petition for Award for the 1981 injury and establishing an entitlement to benefits based on that injury. The Court also rejected the argument that its decision in *Ray v. Carland Construction, Inc.*, 1997 ME 206, 703 A.2d 648 limited the employee's entitlement to those benefits available by the law in effect at the time of the last occupational injury in 1994. In *Goff*, the Court determined that, because the employer had not accepted the compensability of the 1994 injury with prejudice, and because there was no Board determination establishing the compensability of that injury, the *Ray* analysis did not apply. In a footnote to its opinion the Court noted that the holding in *Ray* had been reversed by the legislative enactment of §201(6) of the Act, effective April 1, 1998, and declined to rule whether the *Ray* analysis applied to a claim which was pending on the effective date of the statutory change.

STEPHEN W. MORIARTY

On the severance pay issue, the Court overruled the decision of the Board and held that the entitlement to a set-off must be governed by the law in effect at the time of the 1981 injury. Because there was no statutory entitlement to an off-set in 1981, the Court declined to interpret the former statute to create a right to a set-off. However, the Court specifically did not address whether the employee's severance pay entitlement constituted a "wage continuation plan" within the meaning of current §221. Accordingly, for newer injuries governed by the Workers' Compensation Act of 1992, it remains to be determined whether a severance pay package is to be treated as a wage continuation plan, entitling an employer to an off-set for compensation benefits.

Specific loss benefits

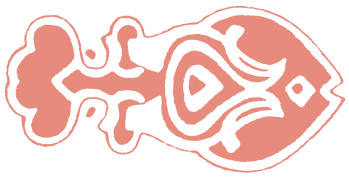
Last year in *Gibbs v. Fraser Paper, Ltd.*, 1997 ME 225, 703 A.2d 1256, the Law Court ruled that specific loss benefits are payable pursuant to Section 212(3) of the Act only where there has been actual loss or amputation of a specified body part, as opposed to loss of use of function. However, in the sole instance of injuries to an eye, the statute is phrased in the alternative. Specific loss benefits may be awarded either for actual loss of an eye, or for loss of eighty percent or more of the vision of the injured eye. The statute is silent as to whether loss of vision should be measured before or after restorative medical care has been rendered.

In *Tracy v. Hershey Creamery Company*, 1998 ME 247 (November 23, 1998), the employee suffered a puncture wound in his eye from a staple which produced an immediate loss of vision estimated at ninety-five percent. In the five months following the injury, the employee underwent three corrective surgical procedures, including implantation of an artificial lens as well as laser treatment. As the result of this medical care, the extent of loss of vision was restored to less than eighty percent. In denying the employee's petition for specific loss benefits, the Workers' Compensation Board held that the extent of loss must be measured after corrective medical care has been rendered, and the Law Court accepted the case for appellate review.

In affirming the decision of the Board, the Court traced the legislative history of the schedule loss and permanent impairment provisions that preceded the adoption of current Section 212. It concluded that benefits for permanent impairment for loss of vision under the predecessor statute were available only after maximum medical improvement had been attained. Although the Court correctly pointed out that neither Section 212(2) (benefits for presumed total incapacity) nor Section 212(3) (specific loss

benefits) expressly refer to the concept of maximum medical improvement, the Court found that the use of the terms "total and permanent loss" and "actual loss" imply that maximum medical improvement must be reached before entitlement to benefits is determined. Accordingly, the Court held that "the determination as to whether an employee's loss of vision exceeds eighty percent for purposes of Paragraph 212(3)(M) should be made when the work-related condition has reached a reasonable medical endpoint." Because the employee's loss of vision was restored to less than eighty percent within several months after the injury, the Court agreed that specific loss benefits could not be awarded. In so ruling, the Court observed that it would contradict legislative intent to award benefits for an 80% loss of vision, when in fact vision had been restored below that threshold.

Injuries to the eye are relatively rare, and this decision may have its greatest impact upon claims for presumed total incapacity under Section 212(2). This section creates a conclusive presumption of total incapacity for 800 weeks following certain described catastrophic injuries. Among the injuries giving rise to the presumption are a permanent and complete paralysis of both legs, arms, or one leg and one arm, as well as a permanent loss of industrial use of the legs, hands, arms, or one leg and one arm. By incorporating the requirement of maximum medical improvement into the provisions of this section (as well as for eye injuries under Section 212(3)(M)), the Court has guaranteed that the conclusive presumption will not be prematurely triggered and can only come into existence where further recovery and restoration of function can no longer be reasonably anticipated.



Employment status

Cases involving disputed issues of employment status typically involve a claimant's assertion that he or she was an "employee" rather than an "independent contractor" at the time of an injury, thereby qualifying that individual for receipt of workers' compensation benefits. A recent unusual case illustrated the reverse situation, in which an individual claimed that she was an independent contractor at the time of an injury to avoid employer immunity, and open the door to recovery of civil damages.

The plaintiff was a high school cross-country coach and sustained a personal injury when she fell while training with the cross-country team. She sued the school district that employed her and sought damages for her injury, claiming that she was an independent contractor at the time of the injury. The school district asserted that she was an employee and that the exclusivity and immunity provisions of the Maine Workers' Compensation Act precluded the plaintiff from bringing suit. The defendant filed a motion for summary judgment seeking a determination that the plaintiff was an employee, and that her personal injury action was barred on grounds of employer immunity.

Facts established in support of the motion showed that the plaintiff was hired to coach the cross-country team for a fixed sum of money, payable in two installments during the course of the cross-country season. As coach, the plaintiff had broad discretion in the conduct of practices and preparation for competitive events, and occasionally furnished items such as stop watches which were used in practices and meets. However, the plaintiff reported to the school district's athletic director and was required to observe a broad variety of rules regarding student eligibility, student conduct, and the times during which practice sessions could be held. In addition, the athletic conference of which the school district was a member established the length of the sports season and the schedule of meets, and imposed numerous regulations about the behavior of students and all others involved in athletic competition. The school district also provided and maintained a practice course on which the cross-country team trained, provided uniforms for team members, and transportation to "away" cross-country meets.

The Kennebec County Superior Court granted the defendant's motion for summary judgment and found that the plaintiff was an employee at the time of her injury, and that the school district was thereby immune from suit. In so ruling, the Court reviewed the various criteria in Section 102(13) of the Act, and although some criteria weighed in favor of independent contractor status, the Court viewed the totality of the relationship between the parties and concluded that the school district exercised essential control and supervision over the activities of the plaintiff. Therefore, because the plaintiff was an employee at the time of her injury, her employer was immune from suit.

The plaintiff appealed, and in *Reaser v. SAD #71*, (Mem 98-151)(November 20, 1998), the Law Court in a short Memorandum Decision upheld the entry of summary judgment on behalf of the defendant. The Court concluded that there were no disputed issues of material fact, that the defendant exercised sufficient control and supervision over the plaintiff in her capacity as coach to establish an employment relationship, and that therefore the defendant was entitled to judg-

ment as a matter of law.

The Court's opinion is consistent with a series of recent decisions which have broadly applied the criteria of Section 102(13) to find employment status. The *Reaser* decision illustrates that a court may find the existence of an employer-employee relationship even where an injured plaintiff claims that such a relationship never existed.

Abuse and penalty proceedings

During a mediation conference, the parties agreed to the compensability of an occupational injury and the employer agreed to begin paying benefits. When benefit payments were delayed, the Board's Supervisor of the Payments Division filed a Petition for Forfeiture on behalf of the employee. As a result, the Abuse Investigation Unit issued an Order directing the parties to submit written position papers by certain dates.

The employee was unrepresented by counsel, and submitted a position paper without providing a copy to the employer. Meanwhile, prior to the deadline for submission of its position statement, the employer sent a letter to the Supervisor of the Payments Division explaining the reasons for the delay in payments. The letter was not intended to be the employer's response to the forfeiture proceeding. However, the Abuse Investigation Unit accepted the letter as the employer's position paper, and, three weeks before the position paper was actually due, issued an order granting the Petition for Forfeiture and assessing penalties against the employer.

In *Wasowski v. Maine Medical Center*, 1998 ME 229 (October 21, 1998), the Law Court vacated the order of the Abuse Investigation Unit and remanded the matter to the Board for further proceedings. The Court observed that the Abuse Investigation Unit failed to observe the provisions of Chapter 15 of the Workers' Compensation Board Rules, which provides that a briefing schedule will issue following the filing of a Petition for Forfeiture. The Court found that the Board "jumped the gun" and erroneously treated the employer's letter to the Supervisor of the Payments Division as its responsive position statement to the Petition for Forfeiture. The Unit's rush to judgment, the Court held, denied the employer the opportunity to submit a position paper as guaranteed by the Board's own rule, and the employer's letter to the Supervisor of the Payments Division should not have been accepted as a position paper.

In order to avoid the confusion that developed in *Wasowski*, employers who communicate with employees of the Board before filing a position paper in response to a Petition for Forfeiture should indicate clearly that the communication is not a substitute for a position paper. Furthermore, the position paper itself should clearly indicate that it is submitted in accordance with the scheduling order issued by the Abuse Investigation Unit, and should be addressed to the Unit and not to the party who filed the Petition for Forfeiture.

Attorneys' fees

In *Webster v. Bath Iron Works*, 1998 ME 222 (October 2, 1998), the employee had suffered occupational injuries in 1988 and 1989, and had filed claims pursuant to both the Maine Workers' Compensation Act and the Longshore and Harbor Workers' Compensation Act. The employee then chose to litigate his claims pursuant to the LHWCA, and following extensive legal activity the parties agreed to a lump sum settlement which was approved by a Federal Administrative Law Judge. In approving the settlement on behalf of the employee, the Administrative Law Judge also approved a substantial award of attorneys' fees.

After having secured federal approval of the settlement, the parties then presented the same settlement to the Workers' Compensation Board, with payments to the employee to be offset against the recovery obtained in the LHWCA settlement. The Board approved the settlement, and also approved an attorney's fee equivalent to ten percent of the settlement proceeds, notwithstanding the fact that legal involvement and activity before the Board had been minimal.

In reversing the Board's decision, the Law Court observed that it had previously recognized a general prohibition against double recovery of workers' compensation benefits obtained from different jurisdictions. The Court then applied the same principle to attorneys' fees, and found that the Legislature never intended that double recovery of attorneys' fees for the same essential work performed in separate jurisdictions should be permitted.

However, recognizing that some services may have been performed exclusively regarding the state claim, the Court remanded the matter to the Board to enable counsel for the employee to show that there were services which were non-duplicative, and for which payment had not been made. It is significant to note however that the Court expressly held that the Board committed legal error in ruling that the fees awarded under the LHWCA were irrelevant to determination of a reasonable fee under the state Act. □

Four significant Law Court decisions

By David P. Very

Release of tortfeasor without consent of UM insurer

Carla Madore died as a result of injuries sustained when her car collided with a truck driven by James Donahue. At the time of the accident, she was insured under an automobile liability policy issued by Maine Mutual Fire Insurance Company. Her estate settled with Mr. Donahue's insurer for the limits of the policy and executed a release of all claims against Mr. Donahue. Mrs. Madore's estate did not obtain the consent of the UM insurer prior to settlement.

Mrs. Madore's estate then demanded that Maine Mutual pay the difference between the $300,000 UM coverage and the $100,000 liability coverage in full settlement of the estate's claim. After settlement negotiations failed, the estate filed a complaint against Maine Mutual alleging breach of contract, bad faith, and a violation of the late payment statute. The Superior Court granted summary judgment to Maine Mutual and the estate appealed.

In *Greenvall v. Maine Mutual Fire Ins. Co.*, 1998 ME 204 (August 6, 1998), the Law Court first found that an insured has the right to bring a direct action against his insurer for UM benefits without first proceeding against the uninsured tortfeasor. The Court noted that a judgment against the tortfeasor is not a condition precedent to recovery under UM coverage, although the insured must demonstrate "legal entitlement" to recover against the tortfeasor in an action against the UM insurer. The Law Court left open the question of whether the tortfeasor is an indispensable party in the insured's action against its insurer to recover pursuant to UM coverage.

The Court then reiterated its holding in *Wescott v. Allstate Insurance*, 397 A.2d 156 (Me. 1979) that an insured does not violate the "no consent to settlement" clause by receiving benefits from tortfeasor's insurer without consent, as long as the insurer's subrogation rights are unaffected by the settlement. (i.e., no release of tortfeasor personally). The Law Court held that where an insured does release the tortfeasor personally, the UM insurer "must demonstrate prejudice as a result of the loss of subrogation rights before the insurer may deny recovery under the policy."

Unfortunately, the Law Court provides no guidance as to what constitutes prejudice. Thus, it appears that this will be a case by case factual determination, taking into account the assets and income of the tortfeasor, and possibly the tortfeasor's potential to earn future income. In essence, the UM insurer must demonstrate that it would have collected money on its subrogation claim to the satisfaction of the Court in order to demonstrate prejudice. Another important question the Court left open is, if the insurer does demonstrate prejudice, what is the result — complete denial of recovery or off-set of the amount insurer could reasonably recover? For example, if a UM carrier could demonstrate that it could collect $10,000 from the tortfeasor, does that demonstration result in a complete denial of any UM claim or does the UM carrier merely get an off-set of $10,000? It is likely that the Superior Courts would grant a UM carrier an off-set rather than completely denying the claim.

The Law Court in *Greenwall* did uphold a judgment in favor of the UM insurer on the insured's late payment claim. The Court noted than an insurer's obligation pursuant to the late payment statute, 24-A M.R.S.A. § 2436(1), arises only after ascertainment of the loss is made. The Court observed that there was no evidence in the record of such ascertainment, either by agreement, or arbitration award, and certainly the claim was disputed.

DAVID P. VERY

Duty of care to protect a rescuer from emotional distress

Great Northern Nekoosa owns and operates the Ripogenus Dam located on the Penobscot River near Millinocket. Tunnels extend through the dam and water through the tunnels is controlled by gates. A temporary maintenance gate was installed upstream in the tunnel to create an air cavity to allow maintenance on the gates. The maintenance gate cannot be removed until the cavity is filled and the water level and pressure on both sides of the maintenance gate are equalized. During a repair project, a valve on one of the temporary maintenance gates failed to allow enough water into the cavity to equalize the pressure. A plan was devised to increase the water flow through the maintenance gate by first attempting to "wedge" the maintenance gate to create an opening at the top of the gate and, if unsuccessful, to cut holes in the maintenance gate to further increase the water flow.

Two divers hired by Great Northern, Albert Harjula and Daniel Sullivan, were informed of the plan. Sullivan

successfully wedged the gate but the water flow did not increase sufficiently to fill the cavity. Sullivan then cut "slots" in the gate but this too failed to increase the water flow. As Sullivan was out of dive time for the day, Harjula made a number of dives to extend the slots to create rectangular holes. Then pieces of Harjula's equipment were apparently being sucked through a hole in the gate, and Harjula asked to be pulled up. When the surface crew began to pull, he yelled through the radio that his feet were stuck in a hole in the gate. The crew continued to pull but could not free him. A call went out for additional divers to help with a rescue.

Sullivan, who was on the surface, said he had to try to rescue his partner and could not just let him die. He was not equipped to make a rescue attempt, he had no radio equipment, he was out of dive time for the day, and he had no plan or method for rescuing Harjula. He too became trapped in the holes in the gate.

Plaintiff Brian Michaud, a diver working on another construction project, received word that Harjula was "stuck" underwater and that Sullivan was going to try to rescue him. Michaud arrived at the site, dove to 50 feet, and saw both divers with their legs trapped in holes in the gate. It was unclear whether the divers were still alive. Michaud was instructed by another diver directing the rescue to attach a chain to each diver's harness so they could pull them out of the holes. Michaud reported that Sullivan was caught up to his knee and the chain would "bust him up." The order was repeated and Michaud attached the chain to both divers' harnesses.

Harjula's harness broke. Sullivan's harness remained attached and the crew pulled while Michaud placed his hands around Sullivan's leg to help pull it from the hole. When the chain was pulled for the final time, Michaud heard a pop and saw Sullivan's lower leg tear from his body. Sullivan's body quickly surfaced and Michaud, still underwater, was surrounded by Sullivan's blood. Michaud was heard screaming over the radio, and when he surfaced a minute later, he was incoherent and in severe shock. Sullivan was pronounced dead in Michaud's presence when they arrived at the hospital. Harjula also died. His body was not recovered until the next morning. Michaud was hospitalized, and was subsequently diagnosed with post-traumatic stress disorder.

Michaud sued Great Northern and its contractor for negligent infliction of emotional distress, alleging that the defendants owed him a duty of care to protect him from psychic injury. There was no claim of physical injury. The Superior Court granted the defendant's motions for summary judgment and Michaud appealed.

In *Michaud v. Great Northern Nekoosa Corp., et al.*, 1998 ME 213 (August 19, 1998), the Law Court first reiterated the distinction between direct and indirect victims with respect to negligent infliction of emotional distress claims. A plaintiff is a "direct victim" if he was the object of the defendant's negligent conduct. In contrast, a plaintiff is an "indirect victim" if the claimed negligence underlying the negligent infliction of emotional distress claim was directed not at him, but at someone closely related to him. The Court stated that Michaud was not a direct victim, since the defendants' alleged negligence was directed at the two divers trapped in the maintenance gate. The Court also noted that Michaud was unable to satisfy the criteria as an indirect victim given the absence of a family relationship with the trapped divers.

Michaud requested that the Court recognize the "rescue doctrine." Under this doctrine, when a defendant creates the peril facing a victim, the defendant will be liable to a rescuer for injuries incurred during the rescue attempt. By negligently creating the peril, a defendant is deemed to have issued an implied invitation to render assistance, and responsibility for harm that results from such invitation is assigned to the defendant. The Law Court observed that while some jurisdictions have adopted the rescue doctrine with respect to claims for physical injuries, no jurisdiction has adopted it in a claim for purely psychic injuries.

In declining to adopt the doctrine, the Law Court declared that in claims for the negligent infliction of emotional distress, it must avoid inappropriately shifting the risk of loss and assigning liability disproportionate to culpability. The Court added that it does not minimize the heroic and selfless acts of a rescuer, but such a person is not a "direct victim" under Maine law. To create a special exception for a rescuer in the context of a claim for emotional distress would expand liability out of proportion with culpability. The Law Court, therefore, affirmed the judgment in favor of the defendants. The Court left open the question of whether it would adopt the "rescue doctrine" in claims for physical injuries, as opposed to psychic injuries.

Peter DeTroy and Terry Fralich of Norman, Hanson & DeTroy represented defendant Great Northern Nekoosa.

Defamatory statement in an IME report.

Is a statement in an IME report criticizing a treating physician defamatory? The Law Court addressed this question in *Selander v. Rossignol*, 1998 ME 216 (September 16, 1998).

Arthur Selander is a chiropractor who, along with his employees, was treating David Beaver following back surgery. Beaver applied for disability benefits from his insurer, who asked Mark Rossignol, a physical therapist, to perform an independent medical examination of Beaver. Rossignol's report to the insurer concluded that Selander's program was inappropriate, largely because it lacked certain important elements of rehabilitative therapy, and was administered by an untrained, unskilled professional. Selander asserted this report was defamatory. Rossignol successfully moved for summary judgment on the ground that the report was conditionally privileged and Selander appealed.

The Law Court stated that a conditional privilege against liability for defamation arises in settings where society has an interest in promoting free, but not absolutely unfettered, speech. The Court noted that an insurer who requests an IME has a legitimate interest in frank communication with the reviewing health care provider, because the results of the examination will likely affect how it responds to the insured's future claims. The Court further observed that insureds and insurers, as well as the general public, have an interest in ensuring that valid claims are paid and fraudulent ones are not. The Court therefore concluded that an independent medical examination is an occasion giving rise to a conditional privilege, and that Rossignol's statements to the insurer were protected by the privilege.

The Court held that once a conditional privilege is established, liability for defamation exists only if the one who made the statement abuses the privilege. An abuse of a privilege occurs when the person making the statement either knows his statement is false, recklessly disregards its truth or falsity, or acts with spite or ill will. The Law Court noted that there were no facts to support an abuse of the privilege and thus affirmed the grant of summary judgment.

Court overturns dismissal of parking ticket

Your tax dollars at work. Wallace C. Doud, a 72-year-old Rockland resident, decided to return a defective microwave oven to an appliance store on Main Street in Rockland. Mr. Doud drove into a handicapped parking space, left the engine running, and entered the store. Doud did not have a special handicap license plate or placard. He asked for and received help from a store employee to carry the oven into the store. During the brief time his vehicle occupied the handicap parking space, he received a parking ticket.

The District Court judge, noting that Mr. Doud, an older man returning a heavy item, used the parking space only for the few minutes necessary to complete his task and that no parking spaces were available in front of the store or within one block, dismissed the action on the grounds that the parking violation constituted a *de minimis* violation. The City of Rockland appealed the decision to the Superior Court, which affirmed. The City then appealed to the Law Court.

In *City of Rockland v. Doud*, 1998 ME 238 (November 2, 1998), the Law Court agreed with the City of Rockland that, while a court has the power to dismiss a criminal violation as *de minimis*, it does not have the power, pursuant to Maine statute, to dismiss as *de minimis* a civil violation, such as a parking ticket. Thus, the Law Court vacated the judgment of dismissal and remanded the case back to District Court. □

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