NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

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Current Issues Regarding Protection from Harassment and Abuse in Maine

By Kelly M. Hoffman

In the State of Maine, a victim of abuse or harassment may obtain a court order granting the victim protection from his or her harasser or abuser. Protection From Harassment ("PFH") and Protection From Abuse ("PFA") orders are unique in both the way they are obtained and the consequences that may result from such orders. This article will explain how the orders are granted, how they are enforced, and when they may be used in other court proceedings.

A PFH order may be obtained by an individual, a family, or a business. On the other hand, a PFA order may be obtained by an adult plaintiff, or by an adult acting on behalf of a child, against a family or household member or a dating partner. This means that the defendant may be a current or former spouse or domestic partner, a parent of the plaintiff's child, a household member related by blood or marriage, a sexual partner of the plaintiff, or the plaintiff's current or former dating partner, regardless of whether the parties were sexual partners. Additionally, a plaintiff may get a PFA order against a person, other than a family or household member or dating partner, who has stalked or sexually assaulted the plaintiff, even where criminal prosecution has not occurred. Elderly, dependent, or incapacitated adults may also obtain such an order against an extended family member or volunteer caregiver.

A plaintiff may bring a PFH or PFA case in the District Court division covering the victim's residence, the place where the victim is staying to avoid the abuse or harassment, or the defendant's residence. The Maine Legislature has recognized the importance of swift relief in these matters by enabling plaintiffs to seek temporary orders of protection without a hearing. The ability of a victim to obtain a temporary PFA order immediately is viewed as so crucial that when a judge is not available in the court in which a plaintiff has filed for such an order, the court clerk must inform him or her of other courts at which a District Court Judge or Superior Court Justice is available. A full hearing must be held within twenty-one (21) days of the filing of a PFA complaint.

What Must a Victim Prove?

1. Protection From Harassment (PFH)

In order to obtain a PFH order, a plaintiff must prove that it is more likely than not that the defendant harassed the plaintiff. Harassment is considered to be three or more acts of intimidation, confrontation, physical force, or the threat of physical force where the harasser intends to and does cause fear, intimidation, or damage to property. It also includes three or more acts that are made to deter the victim from the exercise of his or her constitutional rights, such as preventing the victim from

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pursuing his or her ordinary activities. Additionally, a lone act that would constitute certain criminal violations, such as harassment, interference with civil or constitutional rights, assault, sexual assault, criminal threatening, terrorizing, stalking, kidnapping, violation of privacy, arson, or criminal mischief is deemed harassment. It is not necessary that the defendant be charged with or convicted of these crimes in order for a court to find that harassment occurred.

Prior to a hearing on a PFH matter, a court may enter a temporary order of protection if a plaintiff demonstrates in the complaint that the plaintiff or his or her employees may be in "immediate and present danger" of physical abuse or extreme emotional distress or that the plaintiff's business property is in immediate and present danger of suffering substantial damage by the defendant. The plaintiff must provide sufficient information in the complaint to substantiate the harassment in order for a temporary PFH order to be granted, but it is not necessary for the plaintiff to have sought law enforcement help or informed the defendant that he or she is seeking a temporary order.

2. Protection From Abuse

Unlike harassment cases, PFA cases generally require a special relationship between the parties. However, sexual assault and stalking victims need not demonstrate the family, household, dating, or caregiving relationship between the parties, as described above, to get a PFA order. PFA orders are issued when a plaintiff demonstrates that it was more likely than not that the defendant abused the plaintiff. Abuse is defined broadly in this context. It includes: attempting to cause or causing injury or unwanted physical contact; sexual assault; attempting to place or placing a plaintiff in fear of injury; threatening, intimidating, or forcing a plaintiff to engage in or abstain from lawful conduct; substantially restricting a plaintiff's movements; threatening to commit or committing a violent crime against a person and thus placing the plaintiff in fear of the crime; and repeatedly and without cause following the plaintiff or being near the plaintiff's home, school, or business. A victim must prove only one such act to establish abuse. Prior to a hearing, the court may issue a temporary order where the plaintiff's complaint establishes an immediate and present danger of abuse. Before a judge acts to deny a request for a temporary PFA order, the judge must first allow the plaintiff to explain why he or she is seeking an order.

What Relief is Available to Victims?

Even before the defendant in a PFH case has any opportunity to be heard, the court may issue a temporary order forbidding the defendant from imposing restraint on the plaintiff's freedom, harassing the plaintiff, entering the plaintiff's property, taking or damaging the plaintiff's property, following the plaintiff, unreasonably being near the plaintiff's home, school, or business, and having any contact with the plaintiff. This same relief also is available in a final order. The court may issue a PFH order, generally effective for up to one (1) year, after either a hearing in which the court finds that the defendant has harassed the plaintiff or if the parties agree to an order, generally without a finding of harassment. The order may also require that the defendant pay the plaintiff compensation for losses suffered or attorneys' fees incurred due to the harassment.

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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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On the other hand, a PFA order may provide even more wide-ranging relief to a victim. A temporary PFA order may forbid the defendant from engaging in the same activities as may be included in a temporary PFH order. Additionally, a defendant specifically may be banned from entering his or her own residence. Also, the order may relate to parental rights and responsibilities of a child(ren). Further, the court may order in a temporary order that the defendant not possess firearms or other dangerous weapons if the complaint shows that the abuse involved weapons, the defendant has injured the plaintiff, the abuse occurred in public, the defendant has violated past orders, or the abuse was of a certain heightened nature. When the court issues such an order, the defendant must relinquish his or her firearms or specified weapons to law enforcement within twenty-four (24) hours or less.

After a hearing demonstrating abuse, or agreement of the parties to a consented order, including a consent agreement without a finding of abuse, the court may issue an order providing any of the relief available to a plaintiff in a temporary PFA order. Additionally, a final order may include an award of parental rights and responsibilities, rights of contact, spousal support, or child support. The order also may grant sole possession of a jointly owned or leased residence to one person, divide the parties' personal property, and award custody of pets. Importantly, the order may require the defendant to receive counseling. It also can terminate any life insurance policy held by the defendant in which plaintiff is the insured. Finally, a PFA order may allocate payment of plaintiff's losses or attorneys' fees to the defendant. PFA orders generally are set for a fixed period of two (2) years or less.

Changes to Orders

A defendant may seek to dissolve a temporary PFH or PFA order prior to a full hearing. The defendant must give the plaintiff merely two (2) days' notice of a hearing on such a matter. Ei-

ther party may move to modify a final PFA order. Prior to the expiration of a PFH or a PFA order, a plaintiff may file a motion for extension of an order and, upon hearing, the court may extend the order.

Consequences of Orders

It is notable that the court may not issue a mutual PFA order. This mandate makes clear that it is the responsibility of the defendant to comply with the provisions of the order, especially as to contact with the plaintiff. For example, a PFA defendant who is shopping and sees the plaintiff must leave the store immediately. Failure to do so could be deemed a violation of an order, even if the defendant was in the store before the plaintiff arrived. Violation of a PFA order by a defendant may be treated as contempt, a misdemeanor crime, or a felony, depending on the conduct involved.

PFH and PFA matters often overlap with criminal and domestic relations cases. PFH and PFA defendants should be wary of testifying in those hearings where the conduct at issue could result in criminal charges. A defendant's freely provided testimony in a protection hearing could later be used in a prosecution of the defendant for criminal conduct. The existence of a protection order generally prevents the use of direct mediation between the parties in other court cases.

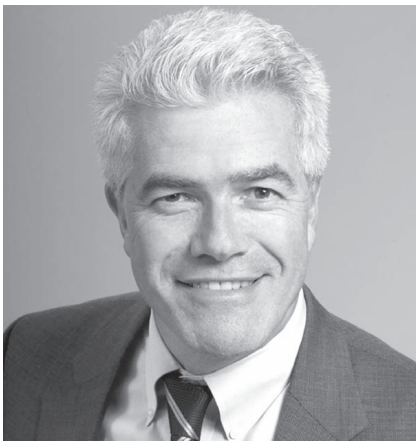
Moreover, the courts take domestic violence seriously, especially as regards its impact on children. In fact, in determining parental rights and responsibilities of a minor child, two of the factors considered by the court are the existence of domestic abuse between the parents and child abuse. Domestic abuse may be demonstrated by a parent in a family matters case through the existence of a PFA order. However, PFA orders are sometimes sought by confused, desperate, or ill-meaning parents, either for themselves or on behalf of their children, when they are in conflict with the other parent. Temporary PFA orders can provide immediate relief to a parent trying to obtain sole rights to a child. Yet, the misuse of the PFA complaint process where abuse does not truly exist is prima facie evidence that the parent seeking the order is unwilling to cooperate with the other parent of the child. This factor is to be considered by the court in determining the best interests of the child in a parental rights or divorce action.

Protection Orders and Domestic Violence

Although Maine's homicide rate is relatively low, half of the murders in Maine are related to domestic violence. While this is not a new phenomenon, it is increasingly part of the public consciousness. Recent high profile murder-suicides and Governor LePage's new public service announcement have highlighted the problem. In her February State of the Judiciary speech, Maine Supreme Court Chief Justice Saufley called for renewed efforts to reduce domestic violence. Specifically, she announced a policy change requiring bail commissioners not to set bail in domestic violence-related cases unless they have reviewed the defendant's criminal history. Currently, proposed legislation in Maine would make that policy law and also would require that bail in domestic violence cases be determined only by judges, rather than bail commissioners.

The present focus on domestic violence may cause the courts, law enforcement, and the general public to look at protection orders, particularly PFA orders, more seriously. The trend may be that protection orders are now given more traction in collateral proceedings. Victims should be aware of this tool and defendants should be ever more wary of casually entering into consent agreements.

For more information about protection orders, Kelly Hoffman may be reached at 774-7000. □



MARK G. LAVOIE

Lavoie recognized as "Star Individual"

Chambers & Partners has recognized Mark Lavoie as the only "Star Individual" in Maine in the areas of Medical Malpractice and Insurance.

Chambers also recognized NHD as among the top 7 law firms in the state, and singled out Peter DeTroy, Ted Kirchner, Russ Pierce, Mark Lavoie, Jim Poliquin, Jonathan Brogan, Emily Bloch, and Chris Taintor for personal achievement and recognition. □

Workers' Compensation: Emotional Injuries Caused by Sexual Harassment in the Workplace

By Katlyn M. Davidson

Dealing with sexual harassment in the workplace and how to manage employees when harassment occurs are surely subjects that have been the focus of great attention and discussion by employers over the years. However, when an employee alleges that he or she sustained an injury due to sexual harassment and seeks workers' compensation benefits for that injury, there is much less authority and guidance as to how to defend or manage these claims in the workers' compensation arena. The Law Court decision of *Knox v. Combined Insurance Company of America*, 542 A.2d 363 (Me. 1988) makes it clear that, as a matter of law, injuries resulting from sexual assaults or sexual harassment fall within the scope of the Workers' Compensation Act. In reaching its decision, the Law Court explained: "We see no reason to draw a distinction between sexual assaults and non-sexual assaults for purposes of coverage under the Act . . . Like other assaults, sexual assaults constitute a violent invasion of a person's bodily integrity, and under the right set of facts, mental or physical injuries from a sexual assault could be compensable injuries under the Act. Likewise, injuries resulting from acts of sexual harassment are not excluded from the Act's coverage solely because of the sexual nature of the harassment." However, the *Knox* decision does not mean that such injuries are automatically compensable; a claimant must still establish a sufficient relationship between the injury and the employment. In other words, the sexual assault or sexual harassment must arise out of and occur in the course of employment in order to be compensable.

An important consideration and potential defense that employers and insurers should look out for when faced with a workers' compensation claim caused by sexual harassment, is the underlying reason or origin of the harassment. Is the harassment motivated by a personal dispute between the employee and the harasser? Did the harasser have a personal motive or animus against the injured employee in carrying out the harassing behavior?

While there does not appear to be legal precedent in Maine that squarely addresses this issue, some other jurisdictions have had the opportunity to do so and have found that an injury resulting from sexual harassment in the workplace does not "arise out of" employment when the harassment is due to a personal motive of the harasser. For example, in the decision of *Anderson v. Save-A-Lot*, LTD, 989 S.W. 2d 277 (Tenn. 1999), the Tennessee Supreme Court considered for the first time whether an employee who was sexually harassed by a supervisor in the course of her employment could recover workers' compensation benefits for her emotional injuries. In *Anderson*, the employee testified that her supervisor routinely followed her around the store, made lewd gestures and remarks to her, including sexual comments about her body, requested that she engage in sexual relations with him, and accused the employee of having sexual relations with other co-workers. As a result of the harassing behavior, the employee developed post-traumatic stress disorder and depression. The Tennessee Supreme Court denied the employee's claim on the basis that the injury did not arise out of her employment, explaining: "On one hand, it is logical to construe [the harasser's] purported activity as seeking to further a personal perverse sexual desire. It is equally logical to interpret [the harasser's] conduct as being motivated by a demented animosity against [the employee] in which he seeks to control and humiliate her. Under any interpretation, *we find that it would be unreasonable to characterize [the harasser's] motivation as anything other than 'purely personal in nature' and not related to furthering the business of the employer.* [The employee] has not made any allegation suggesting that [the harasser] was provoked to act in the best interest of [the employer] . . . ."

KATLYN M. DAVIDSON

Additionally, many jurisdictions that have addressed the compensability of emotional injuries caused by sexual harassment find the situation analogous to injuries caused by assault and often rely on the established standards regarding assault in the workplace. In the context of assaults arising from personal or private matters, the prominent treatise *Larson's Workers' Compensation Law* states the following: "When the animosity or dispute that culminates in an assault is imported into the employment from claimant's domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test." 1 Lex K. Larson, *Larson's Workers' Compensation Law* § 8.02 (Matthew Bender, Rev. Ed. 2011).

In Maine, there is significant legal precedent regarding privately motivated assaults that suggests that a Hearing Officer might reach a similar outcome as the Tennessee decision of *Anderson v. Save-A-Lot* when confronted with the claim of a mental injury caused by sexual harassment that is privately motivated. For example, the Law Court decision of *Johnson v. Drummond, Woodsum, Plimpton & MacMahon*, 490 A.2d 676 (Me. 1985), addressed the situation of a privately motivated assault occurring in the workplace. In *Johnson*, the estranged husband of the employee had been trying to contact her at her workplace. The husband had made several previous attempts in person and by telephone and was continually refused by the employee. On the date in question, the employee's estranged husband appeared at the employer's office and the employee met him in the lobby at which time the estranged husband shot the employee and himself. The employee's claim for workers' compensation benefits was denied by the former Workers' Compensation Commissioner, reasoning that the assault did not occur because the employee was at work. The Law Court affirmed the decision, stating that the assault and injury were "a consequence of her personal life in general and [were] unrelated to her work activity." The Law Court further explained that the acts giving rise to the injury were imported from the employee's private life and were not exacerbated by the employment.

Similarly, in a recent decision from the Workers' Compensation Board, *Walker v. Siano's Pizzeria*, 2011 WL 4796949 (Me. Work. Comp. Bd. 2011), an employee who performed part-time maintenance work for a local restaurant offered to help a co-worker sell her car and made efforts to find a buyer. A dispute arose between the employee and the co-worker when the co-worker refused to pay the employee any money for his efforts after having successfully found a buyer for the co-worker. Tensions persisted between the two and one of the owners of the restaurant, who was also the employees' supervisor, even paid a small sum to the employee to smooth things over. A few months later, the co-worker accused the employee of tampering with her new vehicle. Then, while the employee was working on the outdoor seating area of the restaurant, an individual connected with the co-worker approached the employee and an angry confrontation occurred. The individual struck the employee, causing him to fall and injure his right foot and ankle in the process.

The Hearing Officer denied the employee's claim for workers' compensation benefits, finding that the injury was not caused by the employee's employment but rather was the result of a private dispute. The Hearing Officer reasoned that the employer's involvement, in attempting to pay a small sum to the employee to smooth things over, did not transform the private dispute into an employment matter. Additionally, the employee attempted to argue that the employment with Siano's exacerbated the animosity between the employee and the co-worker because of their continuing contacts. The Hearing Officer rejected this argument, finding no evidence to support the claim and also quoted from the *Larson's* treatise to support his position: "Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor." 1, Lex K. Larson, *Larson's Workers' Compensation Law*, 8-1 (Matthew Bender, Rev. Ed. 2011).

Therefore, when an employee makes a claim for workers' compensation benefits based on a mental injury caused by sexual harassment in the workplace, it is important for employers and insurers to pay attention to the underlying reason for the harassment. If it can be established that the harassment was conducted by the harasser because of a personal motivation or animus against the employee, then there is a good argument that any mental injury caused by the harassment does not arise out of the employee's employment. This defense is already recognized in Maine in the context of physical injuries caused by privately motivated assaults and given this backdrop, along with persuasive authority from other jurisdictions, it may be an easy leap for a Hearing Officer to apply the same reasoning to mental injuries arising out of harassment in the workplace. □

MARK E. DUNLAP

Dunlap listed among best trial lawyers in Maine

Mark Dunlap has been listed by the National Trial Lawyers as among the top trial lawyers in the State of Maine. □

WORKERS' COMPENSATION – LAW COURT DECISIONS

By Stephen W. Moriarty

STEPHEN W. MORIARTY

Rebuttal of retirement presumption

The claimant sustained a compensable injury to his back in 2004 and retired from active employment early the following year. He began to receive nondisability pension benefits, thereby triggering the retirement presumption set forth in §223. He ultimately secured part time employment in 2008, but gave up the position in the following year due to increasing back problems. Ultimately he underwent spinal fusion surgery in late 2009 and sought benefits for a closed period of total incapacity beginning shortly before the surgery and ending approximately one month before the testimonial hearing, by which time he had reached his baseline status.

The hearing officer denied the claim for benefits and in responding to a Motion for Findings of Fact did not elaborate upon the basis of her decision. In requesting findings the Employee agreed that the presumption applied to him, but contended that he had rebutted the presumption by showing that he had no capacity to perform work of any type during the period following his fusion surgery. In *Downing v. Department of Transportation*, 2012 ME 5 (January 24, 2012), the Court's "bottom line" conclusion was that the hearing officer had an affirmative duty under the statute to issue findings and therefore remanded the matter to the Board for further analysis of whether the claimant had successfully rebutted the presumption.

In examining the issue the Court noted that presumption may be overcome by a showing of an inability to perform any suitable work, and that in a previous decision, *Pendexter v. Tilcon of Maine*, Inc., 1999 ME 34, 724 A.2d 618, it had held that the presumption could be rebutted for a period of time following retirement where an injured individual was unable to perform suitable work. Although the Court concluded that the hearing officer had correctly found that the presumption applied to the claim, it held that "nothing in the statute or our decisions precludes a retired employee from having benefits reinstated for a discrete time period when the employee proves that during that time period, he was incapable of performing any suitable work due to the work injury". Given the Court's clear examination of the issue, it is likely that on remand the hearing officer will award total incapacity benefits for the period claimed.

Leased employees and discrimination claims

Employee leasing agencies have been a prominent feature of the Maine and national economies for many years, and such arrangements can present unique challenges to the workers' compensation system in establishing the responsibilities and entitlements of the parties. In such situations a leasing agency hires an individual and assigns him or her to work at a separate company generally known as the "client company" or the "special employer". Although some jurisdictions recognize that both employers may be fully responsible in the workers' compensation context as "joint" or "dual" employers, the Law Court recently rejected the concept of joint liability as between a leasing agency and a client company.

In *Doughty v. Work Opportunities Unlimited*, 2011 ME 126, 33 A.3d 410, Work Opportunities hired the claimant and assigned him to work on a full time basis at a Poland Spring bottling facility. While Poland Spring paid Work Opportunities a fee for the services of the claimant, all income was paid by Work Opportunities. The claimant sustained an uncontested personal injury while working at Poland Spring, and immediately afterward Poland Spring refused to permit him to return based upon unsafe work practices. Ultimately Work Opportunities terminated the claimant following a series of missed medical appointments and various mis-communications.

The claimant filed Petitions for Award against both businesses together with Petitions to Remedy Discrimination. All matters were consolidated for hearing and the following three determinations by the Board were essentially non-controversial:

1. The Petition for Award against Work Opportunities was granted, and benefits were awarded for a closed period of incapacity. No appeal was taken from this decision.
2. The Petition for Award was denied against Poland Spring, and no appeal was taken from this ruling.
3. The Petition to Remedy Discrimination against Work Opportunities was denied. On appeal the Employee argued that he had been discriminated against by asserting a right to treat with a provider of his choice. The hearing officer found

as a fact that the claimant was not terminated on this basis, and the Court did not disturb the hearing officer's decision.

The key ruling, and the central issue on appeal, was the hearing officer's denial of the discrimination claim against Poland Spring.

The hearing officer found that the claimant was not an employee of Poland Spring and that no contract of hire existed between the parties. Accordingly, the anti-discrimination remedies of §353 were not available to the claimant. The hearing officer found that in the absence of a contract of hire the clamant could not prevail in a discrimination claim against the "client company" or "special employer".

In a sharply divided 4-3 opinion the Law Court affirmed the decision of the hearing officer on the grounds that there was no employment relationship with Poland Spring. The Court found that §353 implicitly requires an existing employment relationship, as it provides that discrimination claims may be brought under the Maine Human Rights Act if no such relationship exists and the protections of §353 are unavailable. The Court also noted that §104 immunizes an employee leasing agency or a temporary help services company against civil liability as long as that company has secured workers' compensation coverage for its employees. Therefore, because the claimant was unquestionably an employee of Work Opportunities, a discrimination claim under the Act could not be brought against any other entity.

Some years ago the Court had suggested that the concept of joint or dual employment, under which two employers might be simultaneously responsible under the Act, could possibly apply in Maine. However, the doctrine had never been actually adopted, and in *Doughty* the Court declined to do so. It would be hard to envision a more favorable set of factual circumstances for the recognition of the doctrine, and therefore at this point it may safely be said that there can be only one responsible employer for a workers' compensation claim in Maine. The majority found that any other result would require both the actual employer and the special employer to pay for workers' compensation coverage, which would frustrate the cost-savings purposes of the Act.

The three dissenting justices argued that the claimant satisfied the definition of "employee" set forth in §102(11)(A) and therefore was an employee of Poland Spring within the meaning of the Act. The dissentions also referenced the criteria designed to distinguish employees from independent contractors and would have found the claimant to have been an employee of Poland Spring either under the concept of dual employment or in the capacity of a lent employee. The dissenters found that the Act does not exclude workers assigned by temporary agencies from the statutory definition of "employee", and that the possibility that both Work Opportunities and Poland Spring might have to separately obtain workers' compensation coverage was not an issue of concern.

Multiple injuries

In *Miller v. Spinnaker Coating*, 2011 ME 79, 25 A.3d 954, the Court dealt with the expiration of a durational limit period in the context of a multi-injury case. The Employee sustained three injuries while working for S. D. Warren and a fourth injury while employed by Spinnaker Coating. He was awarded benefits for 65% partial incapacity overall, and a 25% share of responsibility was assigned to each individual injury. As the employer at the time of the last injury, Spinnaker paid all compensation owed to the Employee and was reimbursed by S. D. Warren for its respective share.

The initial S. D. Warren injury occurred in 1992 when the law imposed a 520 week cap on benefits for partial running from the date of injury. In anticipation of the expiration of the cap, S. D. Warren filed a Petition for Review seeking an order authorizing the cessation of payment on the initial injury. Spinnaker correspondingly filed a petition to reduce the benefits owed to the Employee to account for the expiration of the 520 week gap. The hearing officer granted S. D. Warren's Petition for Review and ordered that benefits on account of the 1992 injury cease. She also granted Spinnaker's petition and ordered that the Employee's 65% entitlement to partial be reduced by one-fourth to reflect the expiration of the cap for the first chronologic injury.

On appeal the Employee argued that Spinnaker had a continuing obligation to pay the Employee's full entitlement notwithstanding the expiration of the cap. The Court denied the Employee's appeal and held that it made no difference that the four separate injuries involved the same part of the body, which in this case was the lower back. The Court held that §201(6) required the Board to apportion liability in accordance with the law in effect at the time of each injury but without regard to what part of the body was involved. The Court observed that allowing the Employee to continue to receive 65% partial following the expiration of the cap for the first injury would result in a payment in excess of that to which he was entitled. The Court ruled that by applying the law in effect at the time of the initial 1992 injury, the Board appropriately reduced the overall entitlement by 25% in response to the expiration of the cap. □

TERMINATION DUE TO CAUSE FROM POST-INJURY EMPLOYMENT; NOW WHAT?

By Lindsey Morrill Sands

LINDSEY MORRILL SANDS

A key method to reduce exposure on any claim following a work-related injury is to be able to provide the injured employee with accommodated work. Once an offer of accommodated work is made, an employer can either reduce or discontinue benefits based on actual wages earned in the course of the post-injury employment or, in the event that the offer is rejected, it can discontinue benefits under 39-A M.R.S.A. §214(1)(a). What recourse, however, is available to an employer who offers accommodated work only to have an employee subsequently behave badly resulting in his/her own termination? Unfortunately, there is no clear cut answer on this question and the ambiguity has lead to a stark split in responses between the hearing officers in the state.

The ambiguity starts in the statute. Section 214(1)(D) and (E) discuss the effect of losing post-injury employment "through no fault of the employee" but fail to address in any manner the effect of loss of post-injury employment due to fault. The implication drawn from many practitioners is that there must be an opposite consequence if the employee is terminated *due to fault*. If losing employment through no fault of the employee results in obtaining compensation based on the employee's original average weekly wage, then losing employment due to fault must result in an alternative determination of benefits owed. The Law Court was confronted with this negative implication in *Williams v. Tyson's Food, Inc.*, 2006 ME 66, 900 A.2d 195. Unfortunately, the Law Court was able to dodge any express analysis of the effect of fault by merely affirming the Hearing Officer's finding that the bad act at issue (in *Williams* it was merely perpetual tardiness) did not rise to the level of "fault" necessary to trigger the statue. The Law Court found the Hearing Officer's interpretation of "fault" as being consistent with "misconduct" (as defined in depth under Title 26 unemployment law provisions) to be a reasonable interpretation of the statute. The only hint we get from the Law Court as to what it may have done if fault had been established, comes in the form of dicta: "The Legislature may have intended that some other consequence, short of forfeiture, should attach to those who lose their job through fault."

Given the absence of any further guidance from the legislature or the Law Court, hearing officers have been left to their own devices as to a determination of whether any consequence is appropriate if termination can be proved due to an injured worker's fault. Whether or not an employer will receive any relief in the situation where its attempts to provide accommodated work have been thwarted by a badly behaving employee is entirely dependent on where the case is being heard and which hearing officer is assigned. For example, if heard in Lewiston, the verdict will likely be that termination, even if due to misconduct, has no effect on entitlement to future benefits. Hearing Officer Goodnough has expressly rejected the idea of any consequence associated with termination due to fault in a number of recent cases. In contrast, if heard in Bangor, an employee who is terminated due to misconduct will likely be assigned the same ongoing earning capacity as he had been earning in the accommodated position provided prior to termination. Notably, in the Workers' Compensation Board offices of Augusta and Portland, the outcome of any misconduct case varies dramatically within the same regional office based on which hearing officer is assigned to the case. There is simply no uniform standard. The spectrum ranges from decisions where misconduct creates a rebuttable presumption of earning capacity to decisions where misconduct of an employee is considered completely irrelevant to the analysis of benefits owed.

Given the conflicting analyses and outcomes provided by the Workers' Compensation Board hearing officers, it is clear that the Law Court will need to step in at some point in time to provide clarification as to the appropriate consequence of an employee's termination due to misconduct in post-injury employment. In the meantime, employers would be wise to continue smart employment practices, including record keeping which can evidence misconduct leading to termination. □

New Member: Lindsey Morrill Sands

Norman, Hanson & DeTroy, LLC, is pleased to announce that Lindsey Morrill Sands, who joined the Workers' Compensation Group in May of 2004 as an associate, was made a member of the firm as of January 1, 2012.

Lindsey grew up in New Hampshire and graduated from the University of New Hampshire with her focus on the environmental sciences. After spending a year working in an environment quality laboratory, she enrolled in the University of Kentucky Law School in Lexington, Kentucky. There she served as editor and had an article published in the *Kentucky Law Journal.* After earning her law degree, she spent two years as a Law Clerk to the Honorable Daniel J. Roketenetz, Chief District Administrative Law Judge for the United States Department of Labor. This clerkship introduced Lindsey to the basics of federal workers' compensation law, which proved to be a valuable springboard into her practice today which focuses predominantly on state workers' compensation claims. She represents employers, insurers and occasionally employees in their navigation through Maine's workers' compensation system. She has successfully tried numerous cases before the Maine Workers' Compensation Board and before the Maine Supreme Court.

In addition to practicing in state courts/agencies in Maine, Lindsey is also admitted to practice in the state of New Hampshire and in the U.S. District of Court, District of Maine. She remains an active member of the Maine State Bar Association and the New Hampshire Bar Association. She presently lives in Portland with her husband, yellow lab, and first child, Monte, born February 21, 2012. □

KUDOS

Maine District Court Judge Beth Dobson, wife of **PAUL DRISCOLL,** was presented with the Caroline Duby Glassman award at the winter meeting of the Maine State Bar Association in January. The award is presented annually to a female attorney who has worked to remove barriers and to advance the position of women within the profession and who has worked to educate the bench, the bar, and the public on the status of women in the profession.

DAVE GOLDMAN will be taking over from **DAN CUMMINGS** as a Board member of the Cumberland County Bar Association.

KASS LONGLEY-LEAHY's son, Kevin, has had an exceptional year on the World's Snowboard Cross competition tour having finished 14th overall in the first stop of the 2012 World Cup Tour held at Telluride, Colorado in December and 9th overall in ESPN's X-Games in late January.

At the winter meeting of the Maine State Bar Association **PETER DeTROY** spoke on a panel emphasizing the benefits of diversity and inclusion, and **STEVE MORIARTY** presented a comprehensive summary of developments in the workers' compensation arena over the past year.

DAVE VERY recently presented a seminar regarding tips to avoid litigation at the annual meeting of the Maine Coalition of Home Inspection Professionals. The Coalition was formed in 1999 to foster professionalism within the industry through the use of a code of ethics, standards of practice and continuing education.

STEVE MORIARTY was recognized by the Maine Track Club as the Outstanding Runner of the Year in 2011 for his age group.

LINDSEY MORRILL SANDS and her husband, Mike, welcomed the arrival of their first child and son, Monte, on February 21, 2012. Congratulations and best wishes to all!

DAVE VERY has been appointed as the Maine State Chair of the Claims and Litigation Management Alliance (CLM) for 2012. The CLM is the largest fully inclusive defense organization, comprised of an international nonpartisan alliance of professionals representing corporations, insurance companies, law firms, and service providers who are committed to furthering the highest standards of claims and litigation management. Those who may be interested in becoming a Fellow of the CLM should contact Dave for more information. □

RECENT DECISIONS FROM THE LAW COURT

By David P. Very

DAVID P. VERY

Duty to defend an action for conversion

Victor Ames, a lobster fisherman, sued Edwin Mitchell, a fellow lobster fisherman, and others, alleging an action for conversion based on Mitchell's alleged participation in a fisherman's group that destroyed, converted, molested and rendered useless Ames' lobster traps and fishing gear. Allstate, Mitchell's homeowner's insurer, declined to provide coverage and declined to defend Mitchell. Mitchell then retained his own counsel and was successful in defending himself against the Ames' suit and subsequently brought suit against Allstate seeking reimbursement of his attorney's fees and litigation costs. On Allstate's motion for summary judgment, the Superior Court concluded that the claim for conversion failed to allege property damage that would fall within the policy's coverage and that the intentional acts exclusion applied.

On appeal, in *Mitchell v. Allstate Insurance Company*, 2011 ME 133 (December 22, 2011), the Law Court reiterated that to determine whether an insurer has a duty to defend, the allegations of the underlying complaint must be compared with the coverage provided in the insurance policy. An insurer must provide a defense if there is any *potential* that facts ultimately proved could result in coverage. The Law Court further reiterated that because the duty to defend is broad, any ambiguity in the policy regarding the insurer's duty to defend is resolved against the insurer and policy exclusions are construed strictly against the insurer.

The Law Court indicated that with respect to policy exclusions, an insurer may properly refuse to defend a policyholder if the allegations of the complaint fall entirely within a policy exclusion. The Allstate policy exclusion would apply to Ames' conversion claim against Mitchell if the complaint limited the potential liability to the circumstances where either Mitchell intentionally interfered with property that he knew belonged to Ames or that Mitchell intentionally acted in a way that could reasonably be expected to result in the interference with Ames' property. The Court indicated that an examination of the complaint must be made to determine whether facts could possibly be proved on the complaint that would bring the complaint within the policy's coverage.

The Court stated that it was possible that Mitchell could have intentionally exercised a dominion or control over the goods in such a way that he "accidentally" interfered with Ames' rights by taking, damaging, and holding property in which Ames had a property interest and right to possession. For instance, the Court indicated that Mitchell could have found and taken the traps without knowing that they belonged to Ames and that Mitchell then damaged the traps in this process. The Court then indicated that because Ames could potentially establish a conversion resulting in property damage without proving that Mitchell intended to damage Ames' property, Ames' conversion claim could result in covered liability. Because the liability alleged in the complaint had the potential to result in covered liability, the Court held that Allstate had a duty to defend and, thus, would be responsible for the insured's defense costs.

This decision highlights the great difficulty of an insurer to obtain a ruling that it has no duty to defend a complaint. The complaint was for conversion, a tort that certainly implies a necessary intentional act. Despite that, the Law Court once again reiterated that a court must only look at the claims in the complaint, and without referring to the actual facts not set forth in the complaint, determine whether there are some potential set of facts that could result in covered liability.

Homeowner's coverage for vehicles used to service an insured's residence

In a split decision, the Law Court, in *Cookson v. Liberty Mutual Fire Insurance Company*, 2012 ME 7 (January 24, 2012), addressed the question of what type of motorized vehicles are covered under a homeowner's policy. Mark Cookson purchased a used Case 590M tractor with front bucket and backhoe attachments for approximately $27,000. He used the tractor to dig, move earth, and remove snow from his properties located in West Newfield and Acton. He would drive the tractor on the side of the public road between West Newfield and Acton, an estimated distance of three to four miles. The tractor was destroyed by fire and he presented a claim under his homeowner's policy. The personal property provision in the policy excluded motor vehicles or all other motorized land conveyances from coverage. However, an exception to the exclusion provided, "We do cover vehicles or conveyances not subject to motor vehicle registration which are: a. Used to service an insured's residence." The Superior Court granted Liberty Mutual's motion for summary judgment as the tractor was not covered and Cookson appealed.

On appeal, the majority of the Court held that to interpret the phrase "subject to motor vehicle registration," it would not be concerned with a fact specific analysis of whether the particular vehicle would or would not be registered. Instead, the Court held that the proper test would be to determine whether the vehicle in question fell within the class of vehicles that are of the *type* that are reasonably understood to be subject to motor vehicle registration. The minority of the Court, conversely, stated that one should look to the actual use. The Court then indicated that because this was a large tractor, with a potential for frequent operation on public ways at speeds of up to 25 mph, it would expose an insurer to risks not contemplated by the use of a riding lawnmower or a small residential tractor. As a result, the Court held that this large tractor was a class of vehicles that are the type that are reasonably understood to be subject to motor vehicle registration.

The majority then indicated that with respect to whether the vehicle was used to service an insured's residence, it would look to the usual use of this type of vehicle and not get into an analysis of the facts of exactly what the vehicle was used for. Thus, the Law Court held that Cookson's use of his machine was irrelevant because the machine was an item of heavy construction machinery that is used almost exclusively for commercial construction projects. The Law Court stated that an average homeowner would not purchase an item of heavy construction machinery for approximately $27,000 simply to remove snow and earth from their residence. As a result, the majority held that the vehicle was not covered by the homeowner's insurance policy.

Tolling of the statute of limitations while a defendant is absent from the jurisdiction

The purpose of a statute of limitations is to provide eventual repose for potential defendants and to avoid the necessity of defending stale claims. On the other hand, a "tolling statute" is intended to prevent abuse of the statute of limitations by defendants who, in the absence of a tolling statute, could leave the State for the duration of the limitations period, then return and assert the statute of limitations as a defense to an action. The tolling statute in Maine states in relevant part that if a person is absent from and resides out of the state, after a cause of action has accrued against him, the time of his absence from the state shall not be taken as part of the time limited for the commencement of the action. 14 M.R.S. § 866. The Law Court has previously held that mere absence from the State is not sufficient and must be accompanied by the establishment of a residence outside of the State.

In the majority of jurisdictions, a state's tolling statute is not applied to any stretches of time within the limitations period where the plaintiff, with reasonable effort, could have found and served the defendant even though the defendant was absent from and resided outside the state. The Maine Law Court never had the opportunity to address this issue.

In *Angell v. Hallee*, 2012 ME 10 (January 31, 2012), the Law Court adopted the majority rule and held that the tolling provision would not apply to any period during which the plaintiff could, through reasonable effort, find and serve the defendant by any means other than publication. In terms of the mechanism of the defense and the tolling provision, the Court held that once the defendant has successfully raised the statute of limitations defense, the plaintiff must then make a *prima facie* showing of facts that would support the tolling. The burden would then shift again to the defense to demonstrate that he could have been located and served by the plaintiff with a reasonable effort. The Court indicated that such a determination would obviously involve discovery of the facts that bear upon the statute of limitations and tolling provisions and, thus, on any motion for judgment, there must be adequate opportunity to conduct discovery or otherwise develop evidence. □

THOMAS S. MARJERISON

Marjerison included among "Best Lawyers"

Tom Marjerison was inadvertently omitted from the list of sixteen NHD attorneys who have been named to the 2012 edition of the *Best Lawyers in America*, the oldest and most respected peer review publication in the legal profession. Tom practices in the area of personal injury litigation – defendants. □

Martindale – Hubbell recognizes NHD in a joint venture with *Fortune Magazine*

Martindale – Hubbell has recognized NHD as among the top U.S. law firms of 21 or more attorneys where at least one out of three of their lawyers have achieved the AV Preeminent Peer Review Rating. This rating indicates the rated lawyer has been deemed by his or her peers to have demonstrated the highest level of ethical standards and legal ability. Martindale – Hubbell peer review ratings are driven by the confidential opinions of lawyers and members of the judiciary who provide reviews of lawyers about whom they have professional knowledge. □

NHD attorneys honored by *Benchmark Litigation*

Benchmark Litigation has listed NHD as one of five "highly recommended" firms within the State of Maine, and has honored Jonathan Brogan, Peter DeTroy and Mark Lavoie as "local litigation stars". In addition, both Dave Herzer and Tom Marjerison have been recognized as "future stars". Jim Poliquin and Lance Walker were also specially mentioned as among leading attorneys in insurance coverage matters. □

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Return Service Requested

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