INBRIEF

Current Developments in Maine Law

SUMMER ISSUE 2015 / *VOL. 27, NO. 6*

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Notable Changes to Maine Employment Laws

By Kelly M. Hoffman, Esq.

In its recently concluded session the Maine Legislature enacted L.D. 921 "An Act To Strengthen the Right of a Victim of Sexual Assault or Domestic Violence To Take Necessary Leave from Employment and To Promote Employee Social Media Privacy." The new bill imposes two significant changes to employment laws that affect all Maine employers of any size and will become effective on October 14, 2015.

1. Employment Leave For Victims of Violence

The first part of the law increases penalties for employers that fail to grant reasonable and necessary leave from work to employees who are victims of domestic violence, sexual assault, stalking, and other acts that would support a court order for protection. 26 M.R.S. § 850. If the Maine Department of Labor ("DOL") receives notice of a violation of the law within six (6) months of the occurrence, the DOL **may** fine noncompliant employers up to $1,000.00 per occurrence. The previous law provided that the DOL could only fine employers no more than $200.00 per occurrence. In addition to fines that may be paid to the DOL, the law further dictates that the employer **must** pay liquidated damages to the employee in an amount equal to three (3) times the amount of total assessed DOL fines.

If the employee is unlawfully terminated, she may choose one of two remedies: either the employee may elect the treble damages discussed above or she can demand re-employment with back wages.

In addition to protections provided by this law, an employee also may be entitled to

KELLY M. HOFFMAN

protected leave under the Maine Family Medical Leave Requirements Law or the federal Family Medical Leave Act if she has sustained a qualifying medical condition as a result of domestic violence or is needed to care for certain family members with such conditions.

An employee who has suffered a serious physical or mental injury as a result of domestic violence also may be disabled for purposes of the Americans with Disabilities Act ("ADA") or the Maine Human Rights Act ("MHRA"). Both laws require employers to provide reasonable accommodations to employees with disabilities. For example, an employer who has an employee with a traumatic brain injury caused by a domestic violence assault would likely be required to provide her with a reasonable accommodation, such as a modified work schedule so that she may attend speech or occupational therapy. The ADA and MHRA also may require an employer to provide an employee with a protected period of leave from work as a reasonable accommodation for a disability even if the employer is not subject to Maine or federal medical leave laws.

The prohibitions against sexual or sex-based harassment in the MHRA and Title VII of the Civil Rights Act of 1964 further may be applicable to situations involving domestic violence arising from workplace relationships. Such harassment may create a hostile work environment in violation of the MHRA or Title VII if it is so severe or pervasive that it alters the employee's terms and conditions of employment. For example, a violation of either law may exist if an employer does not take prompt and sufficient action after an employee makes her employer aware that her ex-boyfriend, a coworker, has emailed sexually suggestive photos of her to other employees and has repeatedly subjected her to derogatory sexual comments.

2. Employee Social Media Privacy

The second part of the Act addresses social media accounts. This portion of the Act will be codified at 26 M.R.S. §§ 615-619. These laws will have widespread day-to-day application because an employer's ability to demand or even request access to an employee's or applicant's social media accounts is restricted. Social media accounts are defined broadly to include e-mail, videos, blogs, texts, text messages, podcasts, and websites. An employer cannot demand or request passwords or other access to any social media accounts and cannot make employment decisions based on an employee's or applicant's refusal to provide such access. An employer likewise cannot require an employee or applicant to alter her settings so that a third-party is able to view the contents of a personal social media account. An employer further cannot require an employee or applicant to "friend" anyone (including the employer or its agent).

However, the law does not limit the employer's ability to establish and enforce lawful workplace policies addressing the use of the employer's electronic equipment, including a requirement that employees disclose their user name, password, or other information to access the employer-issued electronic devices, such as cell phones and computers, or to access employer-provided software or e-mail accounts.

The law does provide a few exceptions. Employers are allowed to require that employees disclose personal social media account information that employers reasonably believe to be relevant to an investigation of allegations of employee misconduct or a workplace-related violation of applicable laws, rules, or regulations. This provision applies only when not otherwise prohibited by law, as long as the information disclosed is accessed and used solely to the extent necessary for purposes of that investigation or a related proceeding.

As to banking and securities laws, another exception provides that employers may comply with a duty to screen employees or applicants before hiring or to monitor or retain employee communications that is established by a self-regulatory organization as defined by the federal Securities Exchange Act of 1934. This exception applies to the extent necessary to supervise communications of regulated financial institutions of insurance or securities licensees for banking-related, insurance-related or securities-related business purposes.

An employer who violates these new statutory provisions is subject to a fine imposed by the Department of Labor of not less than $100.00 for the first violation, not less than $250.00 for the second violation, and not less than $500.00 for each subsequent violation.

All employers should review their personnel policies to ensure consistency with this new law and may contact employment counsel, including those at Norman, Hanson & DeTroy, for further guidance with these matters.

Maine Legislature Approves Significant Increase in Maine Estate Tax Exemption Level

KATHRYN M. LONGLEY-LEAHY

By: Kathryn M. Longley-Leahy, Esq.

Effective January 1, 2016, the Maine estate tax exemption will more than double from its current $2,000,000 level to the applicable federal estate tax exemption, currently $5,430,000, indexed annually for inflation. With this significant increase in the Maine estate tax exemption, Maine estate tax exposure will be effectively eliminated for each Maine resident and non-resident owning property in Maine whose available estate tax exemption as of the date of death, is less than $5,430,000, as indexed.

While Maine's new estate tax legislation falls short of including the additional benefit available under federal estate tax law that allows a surviving spouse to add to his/her available estate tax exemption the 'unused' exemption of the first deceased spouse[1]), and continues to bring back into the Maine taxable estate the value of reportable gifts made within one (1) year of the Maine decedent's date of death, Maine's new estate tax legislation raises the Maine estate tax exemption to historic levels, thereby eliminating Maine estate taxation for the vast majority of Maine taxpayers.

Given the multitude of fluctuations in federal and Maine estate tax laws over the last few decades, many estate plans, particularly those for married couples, have already incorporated planning mechanisms to absorb potential changes in federal and state estate tax laws by creating certain trusts, funded directly or indirectly via disclaimer provisions, to ensure that estate tax exemption available to each individual is fully utilized; however, if the trusts were created solely to minimize estate taxes, such "exemption" trusts may no longer be necessary. Following any life or legislative change, one needs to be diligent in confirming that existing estate planning documents continue to reflect current estate planning objectives. The estate planning group at Norman, Hanson & DeTroy is always available to provide assistance should you have any questions, concerns or simply want to confirm that your current estate planning documents continue to reflect your current planning objectives.

"MAINE'S NEW ESTATE LAW LEGISLATION RAISES THE MAINE ESTATE TAX EXEMPTION TO HISTORIC LEVELS, THEREBY ELIMINATING MAINE ESTATE TAXATION FOR THE VAST MAJORITY OF MAINE TAXPAYERS."

[1]Under federal estate tax law, if the 2015 estate of the first deceased spouse uses only $2,000,000 of his/her $5,430,000 federal exemption, the surviving spouse's estate can add the $3,430,000 "unused" amount of the first deceased spouse's $5,430,000 federal exemption (e.g. $,5430,000 - $2,000,000, or $3,430,000) to the federal estate tax exemption available to the estate of the surviving spouse. Assuming the full $5,430,000 federal estate tax exemption is available to the surviving spouse, the surviving spouse's 2015 federal estate tax exemption would increase to $8,430,000 (e.g. $5,430,000 + $3,430,000 = $8,430,000).

Workers' Compensation– Law Court and Appellate Division Decisions

STEPHEN W. MORIARTY

By: Stephen W. Moriarty, Esq.

Court overturns penalty for lack of coverage.

After nearly 5 years of litigation, the Maine Supreme Court has brought an end to an epic legal struggle between the Board's Abuse Investigation Unit and an insured Maine employer regarding workers' compensation coverage for its employees. The litigation was complex and a number of contested issues were ultimately not decided by the Court. However, the Court correctly and clearly ruled on the central issue of compliance with the Act's coverage requirements.

As is well known, §§401 and 403 require all private employers to secure the payment of compensation benefits by obtaining insurance coverage for their employees. In *Workers' Compensation Board Abuse Investigation Unit v. Nate Holyoke Builders, Inc.*, 2015 ME 99 (August 4, 2015), the Court addressed the statutory mandate in the context of an employer which simultaneously hired employees and retained independent contractors. The employer was a construction company which classified its workers either as employees or independent contractors and obtained predeterminations of independent contractor status from the Board for all workers so classified. During the period of time in question, the employer maintained workers' compensation insurance coverage through a standard and required policy which guaranteed payment of benefits to any worker initially designated as an independent contractor but who may ultimately be found to have been an actual employee. Thus, the workers' compensation premium charged to the employer included those workers classified as employees, but did not include those workers for whom the employer had obtained a predetermination of independent contractor status.

The AIU conducted an audit and then filed a complaint against the employer alleging that it had failed to secure coverage for all of its employees. At hearing it was determined that 9 individuals had been misclassified as independent contractors and a $30,000 civil penalty was imposed. The employer appealed to the Appellate Division, and the Division (Decision No. 14-11) ruled that the workers had been misclassified but that the Board lacked specific authority to impose a penalty. As a result, the AIU appealed to the Law Court on the penalty issue and the employer appealed on the issue of whether it had in fact secured coverage in compliance with the Act.

The Court turned to the plain language of Sections 401 and 403 and held that the Act "does not require an employer to correctly classify workers for payroll purposes and to pay workers' compensation premiums based on those classifications." The coverage requirements of the Act were satisfied by the purchasing of insurance coverage which would pay benefits to all workers entitled to receive them, regardless of pre-injury classification. The Court observed that the Act "does not require an employer to obtain a policy with premiums based on all workers, including those initially deemed to be independent contractors."

Because the employer's coverage guaranteed the payment of all benefits to injured workers as required by the Act, the employer was found to have complied with the coverage requirement provisions. Accordingly, the Court vacated both the penalty and the finding that the employer had violated the coverage obligations of the Act.

At its regular meeting of September 8, 2015 the Workers' Compensation Board of Directors discussed the implications of the decision. The Executive Director announced plans to meet with the Superintendent of Insurance to discuss whether any changes in Bureau of Insurance rules or policy language approved by the Bureau should be implemented to address this unique situation.

Jim Poliquin of NH&D represented the employer at hearing and throughout the appellate process.

Pre-existing condition and ongoing entitlement.

The employee suffered from a pre-existing condition in his cervical spine which was asymptomatic and presumably unknown. On July 4, 2013 he aggravated his neck while pulling a heavy tarp over the payload area of his flatbed trailer. Within two weeks he underwent an extensive cervical and upper thoracic fusion procedure and on December 11, 2013 was released to return to work within restrictions. However, the employer was unable to accommodate the limitations and the employee remained out of work.

The hearing officer found that the employment had contributed to the employee's disability in a significant manner, and that therefore he had suffered a compensable

personal injury on July 4, 2013. He was awarded benefits for total incapacity between July 5 and December 11, 2013 while recovering from surgery. However, the hearing officer refused to award any ongoing benefits for any degree of incapacity on the grounds that the restrictions after December 2013 were the same as those which would have been imposed if the pre-existing condition of the cervical spine had been diagnosed prior to the injury. Following denial of a Motion for Findings of Fact, the employee appealed to the Appellate Division.

In *Cross v. LLP Transport, LLC,* App. Div. Dec. No. 15-23, the Division noted that the employee had satisfied the standards of §201(4) for the recognition of a compensable injury and that the ongoing medical restrictions must be considered work-related. Therefore, in the view of the Division, the inability to work due to those restrictions established entitlement to partial incapacity benefits as a matter of law. The panel found that for purposes of §201(4) it made no difference that the restrictions following recovery from surgery were the same as those which would have been imposed if the pre-existing condition had been known prior to the injury. Having found that the employee had established that he was partially disabled resulting from the injury, the panel remanded the matter to the Board for a determination of the employee's ability to earn and the extent of entitlement to partial following his release to return to work with restrictions.

Limitation of employer responsibilities under §217.

There has been relatively little apellate litigation regarding the vocational rehabilitation provisions of the Act and the associated responsibilities of an employer. In a recent decision the Appellate Division had an opportunity to address the issue of payment for the costs of post-injury higher education. In *Deroche v. Ethan Allen*, App. Div. Dec. No. 15-21, the employee had sustained occupational injuries in 2007 and 2008, and was ultimately laid off in 2009. Shortly following her lay off she began taking courses at the University of Maine – Rumford and ultimately obtained an associate's degree in May 2012. In September of that year she enrolled in a bachelor's degree program at the University of Maine – Augusta.

In November 2012 the employee filed an Application for Evaluation of Employment Rehabilitation Services pursuant to §217, and over the employer's objection the application was granted. A vocational counselor was appointed to conduct an evaluation, and prepared a report in May 2013. He did not recommend a college education, but instead proposed acquisition of specialized software and working with a job developer to obtain new employment.

In August 2013 the employee received her bachelor's degree and was immediately hired by a new employer in a position that paid higher than her pre-injury average weekly wage.

In April 2014 the employee filed a Petition to Determine Entitlement to Rehabilitation Services pursuant to §217(2), seeking reimbursement for the costs of tuition for her final two years at the University. The matter was submitted for decision based upon a stipulation of facts.

The presiding hearing officer ruled that the employee was entitled to the services which had originally been outlined by the plan, but denied the request for tuition reimbursement. In so ruling, the hearing officer noted that further education was not recommended by the plan and that §217 does not provide for direct reimbursement by an employer to an employee for services which are actually covered by a plan. Most importantly, the hearing officer found that §217 does not extend to retroactive payment for expenses incurred by an employee before plan development has taken place, and this portion of the decision was appealed.

On appeal the Division examined the plain language of §217 and ruled that "no matter how commendable or wise" the employee's decision was to continue her education, the employer was not statutorily liable for costs incurred before the development of a plan. Instead, the Division found that §217 requires an employer to either accept or decline payment for services recommended by a plan, with the possibility of reimbursement to the Employment Rehabilitation Fund if the plan is implemented and successful. The Division upheld the ruling of the hearing officer and observed that "costs incurred before the

"THE PANEL FOUND THAT FOR PURPOSES OF §201 (4) IT MADE NO DIFFERENCE THAT THE RESTRICTIONS FOLLOWING RECOVERY FROM SURGERY WERE THE SAME AS THOSE WHICH WOULD HAVE BEEN IMPOSED IF THE PRE-EXISTING CONDITION HAD BEEN KNOWN PRIOR TO THE INJURY."

development of the plan are simply beyond the ambit of section 217."

Section 201(5) and entitlement to partial.

The employee sustained an occupational left knee injury in 2007 and returned to work following corrective surgery. Although he eventually began to develop problems in the right knee, it was established by a consent decree that the right knee condition was not work-related.

In 2012 limitations were imposed based upon both knees and the employee's hours were reduced to half-time. In June of that year he was initially placed on administrative leave and then eventually on medical leave. In early November, 2012 he underwent surgery for the non-occupational right knee, and was terminated at that time.

In *Parks v. The Home Depot U.S.A., Inc.*, App. Div. Dec. No. 15-20 the employee filed a Petition for Restoration and sought ongoing benefits commencing at the point at which he went out of work in June, 2012. The presiding hearing officer granted the petition and awarded benefits for 100% partial from June, 2012 to the present and continuing.

On appeal the employer challenged the award of ongoing benefits on the grounds of lack of work search evidence following the right knee surgery and upon the hearing officer's failure to apply the provisions of §201(5). That section provides that disability attributable to a subsequent nonwork-related injury or disease is not compensable.

The Division upheld the award of 100% benefits from June through November, 2012 on the basis that the employee had submitted work search evidence and on the grounds that the parties had anticipated that the employee would return to work at some point during this timeframe. The Law Court had upheld the "work search" rule in *Monaghan v. Jordan's Meats*, 2007 ME 100, 928 A.2d 786, and the Division held as follows:

> An award of 100% partial during a short period of time when employment is expected to continue is not inconsistent with the rationale set forth in *Monaghan.*

Accordingly, the award of benefits at a 100% rate for the closed period from June through November, 2012 was upheld.

However, the Division vacated the ongoing award of 100% benefits commencing on the date of the right knee surgery. Because the right knee condition was unrelated to the left knee injury, §201(5) required a reduction of benefits to account for the contributory effect of the non-occupational condition. The employee offered no work search evidence following his recuperation from surgery, and the Division found that he was not relieved of his burden of proof by virtue of the subsequent non-occupational injury.

Accordingly, the matter was remanded to the Board for a new determination of the nature and extent of incapacity solely due to the occupational injury to the left knee.

Steve Hessert of Norman, Hanson & DeTroy represented the employer at hearing and before the Appellate Division.

Workers' Compensation Appeals: Which Decision is Reviewed?

By: Stephen W. Moriarty, Esq.

As is well-known, the Appellate Division of the Workers' Compensation Board was re-established effective January 1, 2013, and as a result all parties have an automatic and direct right of appeal to the Division from any decision of a hearing officer. All appeals must proceed through the Appellate Division before a possible appeal to the Law Court may be initiated.

In accordance with §321-B(3), the Division may reverse or modify a decree of a hearing officer from which an appeal is taken. Following the issuance of a decision from the Division, the parties may seek an appeal to the Law Court by filing a Petition for Appellate Review, but the Court has full discretion to either grant or deny the petition. In other words, unlike the Appellate Division, there is no guaranteed right of appeal to the Law Court, and the Court as a matter of practice accepts only a relatively small number of workers' compensation cases which involve unique issues of statutory interpretation.

In the event that the Court grants a Petition for Appellate Review, two decisions will previously have been rendered on the claim: the first from the presiding hearing officer and the second from the Appellate Division. These two underlying decisions may be in conflict with each other on a number of legal and factual issues, and some uncertainty has existed as to which of the two decisions the Court will actually review on appeal if a case is accepted. That question has now been answered.

In *Workers' Compensation Board Abuse Investigation Unit v. Holyoke Builders, Inc.*, 2015 ME 99 (August 4, 2015) (discussed elsewhere in this edition) the Court took the opportunity to review the legal background of the appellate structure of the Act. The Court decided to adhere to its previous practice when the Appellate Division of the former Workers' Compensation Commission was in existence from 1981 to 1993. During that time it was the practice of the Court to review the decision of the Workers' Compensation Commissioner and not that of the Appellate

Division. In *Holyoke* the Court decided that when it grants a Petition for Appellate Review, it will consider only the decision of the hearing officer and will not review the decision of the Division.

In a concurring opinion Chief Justice Saufley requested legislative clarification of the appellate procedures in this unique context. The Chief Justice wrote that "it seems logical that the legal interpretation of the three-person Appellate Division, not the individual hearing officer, would be reviewed on appeal by the Law Court, with appropriate deference given to the Appellate Division in the event that a statute…is ambiguous." She encouraged the Legislature to consider amending the statute to expressly indicate whether the decision of the Appellate Division or the presiding hearing officer should be the "operative decision" in an appeal before the Court.

The *Holyoke* decision raises an interesting legal issue, which cannot yet be answered. To be specific, if the Appellate Division interprets the law in a particular manner differently from the hearing officer, what weight or precedential value does a decision of the Division carry? When the Court reviews a hearing officer's decision, it may not "reach" a determination made by the Division in its role as the intermediate appellate body. Until this issue is clarified by the Court or by statutory change, it is recommended that employers cite and rely upon decisions of the Division when it is in their interests to do so. Hearing Officers may be likely to rely upon a legal conclusion reached by the Division when that conclusion is not modified or overturned in an appeal to the Court.

2015 Fall Forum & Client Reception

November 20, 2015

Portland Regency Hotel • 20 Milk Street

Fall Forum 2-4

Client Reception 4-7

The forum will be followed by our client reception at the hotel, and we cordially invite all interested clients to join us. Please mark your calendars, and look for your invitation and topic announcements in the mail. This year the firm will be celebrating its 40th Anniversary.

We hope to see you there!

"IN THE EVENT THAT THE COURT GRANTS A PETITION FOR APPELLATE REVIEW, TWO DECISIONS WILL PREVIOUSLY HAVE BEEN RENDERED ON THE CLAIM: THE FIRST FROM THE PRESIDING HEARING OFFICER AND THE SECOND FROM THE APPELLATE DIVISION.

IN *HOLYOKE* THE COURT DECIDED THAT... IT WILL CONSIDER ONLY THE DECISION OF THE HEARING OFFICER AND WILL NOT REVIEW THE DECISION OF THE DIVISION."

Workers' Compensation– Legislation Enacted in 2015

By: Kevin M Gillis, Esq.

KEVIN M. GILLIS

The first session of the 127th Maine Legislature resulted in a number of proposals in the area of workers' compensation, but only 3 bills of significance were enacted. No bill was enacted which will significantly affect benefits or system costs. The legislation enacted becomes effective on October 15, 2015. The following is a summary of legislation enacted in 2015.

Bills Enacted

LD 125- Cancer Presumption for State Fire Marshall Investigators

This bill extends to investigators employed by the Office of the State Fire Marshall's Office the presumption under Section 328-B, that certain cancers suffered by firefighters under certain conditions, arise out of employment. The rationale for the bill is that these investigators are exposed to the same substances as the substances to which firefighters are exposed.

LD 1119

This bill will result in a variety of procedural changes, most of which are minor. The following are the key provisions of the bill:

- The legislation will allow employers to report wages on a wage statement in the manner in which wages are paid to the employee, so that wages may be reported on an other than weekly basis if the employee is not paid weekly.
- The bill will also change the title of "Hearing Officer" to "Administrative Law Judge", but that change will not affect their functions or compensation, or the manner in which they are selected and employed by the Workers' Compensation Board.
- The bill provides that employers are not required to report lost time occasioned by attendance at medical appointments after 14 days of incapacity have occurred, if the lost time does not cause wage loss. It will continue to be required that lost time be reported in these circumstances (even if the employee is paid while attending the appointment) when less than 14 days of incapacity have occurred, because it is not until after 14 days of incapacity have occurred that the first 7 days of incapacity become compensable under the "waiting period" provided by Section 204. This lost time is arguably "counted" toward the first 14 days of incapacity, although it has never been determined legally whether lost time for attending a medical appointment is equivalent to incapacity under the statute.

LD 958-Permissable Investments by Self-Insurers

This bill modifies Section 403(9) of Title 39-A, pertaining to investments allowed by self-insurers, which was last amended in 2013. The bill fine tunes the 2013 changes with respect to the percentages of investment portfolio which may be invested in corporate and municipal bonds, in single issuers of corporate and municipal bonds, in corporate bonds from a single industry, and in government agency bonds. The policy underlying the legislation is investment diversification and risk aversion.

Recent Decisions From The Law Court

By: Matthew T. Mehalic, Esq.

MATTHEW T. MEHALIC

Duty of Care Owed By National Fraternity To Social Invitee

In *Elizabeth Brown v. Delta Tau Delta et al.*, 2015 ME 75 (June 18, 2015), the Law Court affirmed in part and reversed in part a summary judgment order in favor of Delta Tau Delta ("DTD") and Delta Tau Delta National Housing Corporation ("DTDNHC") arising out of a premises liability claim at the University of Maine's Orono campus.

The action arose out of Brown's claims that while she was a social invitee at the Gamma Nu fraternity house during an invite-only party, she was sexually assaulted by one of the fraternity members. Brown filed a complaint against the fraternity member, DTD and DTDNHC. DTD is the national fraternity and Gamma Nu is the local chapter. DTDNHC holds property for DTD and leases the fraternity house to Gamma Nu.

The fraternity member settled with Brown. After the settlement, amendments of the complaint by Brown, and summary judgment on some of the claims asserted against DTD and DTDNHC, what remained were claims of negligence, negligent infliction of emotional distress, and premises liability. The Superior Court granted summary judgment in favor of DTD and DTDNHC finding that neither owed Brown a duty of care.

On appeal the Law Court found that there was no duty of care in regards to the general negligence claim because no special relationship existed between Brown and either DTD or DTDNHC. The Court also held that because the facts did not lend themselves to bystander liability, the negligent infliction of emotional distress claim could not be sustained. The Court framed the issue of the case as to "whether, based on the factual record, the national fraternity has a duty to exercise reasonable care for the safety of its local chapter's social invitees during functions sponsored by the local chapter and held at the DTD fraternity house."

Addressing the issue on appeal, the Law Court pointed to its recognition in prior decisions of an university's and academy's duty to reasonably warn and advise students of steps they could take to improve their personal safety, as the student is a business invitee. The Court then looked to other jurisdictions that had addressed the precise issue presented. The Court ultimately relied on general principles of duty, "with particular emphasis on the undisputed facts relevant to foreseeability, control, and the relationship of the parties, in determining whether a duty founded on premises liability" existed between DTD and its local chapter's social invitees.

In reviewing the undisputed facts and elements of liability, the Court held that a national fraternity knows, or should know, that social events in a fraternity house present the potential for sexual assaults and therefore, foreseeability was present. In addition, the fact that DTD had a policy recognizing the dangers of alcohol and sexual abuse supported the foreseeability determination. The facts also established that DTD had authority to control and actual control over its members.

In regards to the relationship prong, the Court found that through DTD's comprehensive articles and bylaws and defined power structure, DTD reached into the "day-to-day affairs of its local chapters and created a close, mutually beneficial relationship with

"THE COURT ULTIMATELY RELIED ON GENERAL PRINCIPLES OF DUTY, "WITH PARTICULAR EMPHASIS ON THE UNDISPUTED FACTS RELEVANT TO FORESEEABILITY, CONTROL, AND THE RELATIONSHIP OF THE PARTIES, IN DETERMINING WHETHER A DUTY FOUNDED ON PREMISES LIABILITY" EXISTED."

its individual members."

Therefore, the Court held that foreseeability, control, and relationship factors sufficiently existed to impose upon DTD a duty founded on premises liability. By allowing Gamma Nu to lease a property from it, DTD handed over a building to house fraternity members and in doing so should have anticipated that alcohol would be consumed and parties would take place, as well as potential problems such as involved in Brown's claims. The Court concluded that "DTD had a duty to exercise reasonable care and take reasonable steps to provide premises that are reasonably safe and reasonably free from the potential of sexual misconduct by its members, for all social invitees to chapter-sponsored events." Despite this holding the Court did not impose liability on DTD. Instead, it remanded in order for a factfinder to determine whether DTD breached this duty of care.

Prior Bad Acts Admissible In Sexual Assault

In *Melanie Steadman v. Steven Pagels*, 2015 ME 122 (July 1, 2015), the Law Court affirmed judgment against Steven Pagels for the sexual assault and battery, intentional infliction of emotional discuss, and negligent infliction of emotional distress of his daughter. The trial court had awarded both compensatory and punitive damages against Pagels. One of the issues on appeal was whether the trial court had improperly admitted evidence of prior bad acts of Pagels under Maine Rule of Evidence 404(b). The principle contention was that the evidence was admitted and used to prove the character of Pagels and the likelihood that he would commit the allegations against him. The prior bad acts concerned other sexual assaults and unwanted sexual advances by Pagels.

Prior to trial the court had indicated that it would allow the evidence, but would not admit it contrary to M.R.Evid. 404(b) which at the time prohibited such evidence "to show that the person acted in conformity therewith." The rule also provided an exception to allow admission for other permissible purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." The Law Court held that evidence of prior bad acts was not admitted by the trial court for an impermissible purpose and affirmed the judgment. The reason the prior bad acts were admitted was to show motive and opportunity in the trial.

This decision gives the opportunity to highlight the new Rule 404, which was effective January 1, 2015. The new rule does not provide an exception as did the former version utilized in the Steadman v. Pagels decision. Despite the lack of an express exception, the "Maine Restyling Note – November 2014," provides,

> This does not mean that such evidence is not admissible for limited "non-character" purposes. However, the Maine Rule does not list some permissible non-character uses lest it be inferred that these are the only non-character purposes for which the evidence may be admitted."

Therefore, despite the amendment to the Rule and removal of the express exception, the exception is still contemplated and may be even broader in scope under the amendment. Prior bad acts are something that should be closely considered when conducting preliminary investigation of claims.

NHD Wins Historic Jury Verdict

On July 23, 2015, Norman, Hanson & DeTroy, led by trial attorneys **PETER DETROY, DEVIN DEANE, RUSS PIERCE, and SADIE JONES**, obtained a $14.5 million jury verdict in United States District Court in favor of their clients, Michael Geilenfeld, St. Joseph's Family, and Hearts with Haiti, Inc. Mr. Geilenfeld, a former brother with Mother Teresa's Missionary Brothers of Charity, is the founder and executive director of St. Joseph's Family, which operates a network of nonprofit institutions that serve disabled and disadvantaged Haitian children, and Hearts with Haiti is a U.S.-based non-profit that serves as a major fundraising organization for St. Joseph's Family and the children in its care. The verdict was the culmination of nearly three years of litigation against Paul Kendrick of Freeport, Maine for his numerous internet statements, which falsely accused Mr. Geilenfeld and others at St. Joseph's Family of abusing children and Hearts with Haiti of supporting an organization that abused children. Mr. Kendrick's targeted defamation dismantled Mr. Geilenfeld's, St. Joseph's Family's, and Hearts with Haiti's fundraising networks in the United States and Canada and cost them nearly $4 million in lost donations—all in the aftermath of the devastating Haitian earthquake in 2010 that destroyed two of the three children's homes and schools they operate. After a three-week jury trial in Portland, Maine, the ten-member jury returned unanimous verdicts for Mr. Geilenfeld, St. Joseph Family, and Hearts with Haiti. The trial and $14.5 million verdict, which represents the largest defamation verdict and one of the largest jury verdicts in Maine's history, received a lot of local and national media attention—including the New York Times, which quoted Peter DeTroy's successful closing argument and theme of the case: "The computer keyboard is a lot mightier than the pen and the sword . . . . [H]alf-truths, exaggerations, distortions and outright falsehoods spread via electronic communication can eviscerate one's reputation and one's life work."

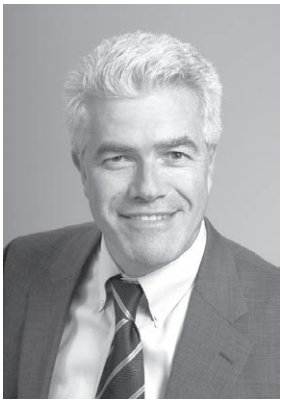
NHD Sponsors Local Road Races

For the second consecutive year NHD was a co-sponsor of Maine's largest and most popular road race, the Beach to Beacon 10 kilometer, held in early August. This year marked the 17th anniversary of the race, which attracted over 6,500 runners. This year's beneficiary of the race was the Good Shepherd Food-Bank, an organization established in 1981 which has grown to become Maine's largest hunger relief organization. Good Shepherd serves a network of local food banks on a statewide basis to meet the needs of Maine families facing hunger and food shortage. **Ted Kirchner, Steve Moriarty and J. D. Hadiaris** competed in the race.

In mid-September the firm co-sponsored the Lake Auburn Half Marathon and 5 kilometer road race, now in its third year. The non-profit event raises money for the Moving ME Forward Foundation, which is dedicated to supporting youth programs and promoting healthy families in the greater Lewiston – Auburn area. **Steve Moriarty** competed in the half marathon and took first place in his age division.

NHD Attorneys Designated as "Lawyer of the Year"

Norman, Hanson & DeTroy is proud to announce that three of its attorneys have been designated by Best Lawyers as the "Lawyer of the Year" for 2016 for the greater Portland area. We congratulate the following attorneys for having achieved this impressive recognition.



Mark G. Lavoie
Personal Injury Litigation – Defendants

Stephen W. Moriarty
Worker's Compensation – Employers

James D. Poliquin
Appellate Practice

NHD Attorneys Listed in "Best Lawyers"

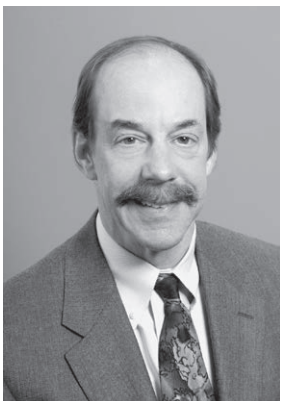
Norman, Hanson & DeTroy is proud to announce that seventeen of its attorneys have been named to the 2016 edition of The Best Lawyers in America, the oldest and most respected peer review publication in the legal provision. First published in 1983, Best Lawyers is based on an exhaustive annual peer-review survey comprising nearly 4 million confidential evaluations by some of the top attorneys in the country. The Best Lawyers lists appear regularly in Corporate Counsel Magazine, and is published with collaboration with U. S. News & World Report.

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

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

Peter J. DeTroy
Multiple Practice Areas
Arbitration
Bet-the-Company Litigation
Commercial Litigation
Criminal Defense: Non-White Collar
Criminal Defense: White-Collar
Mediation
Personal Injury Litigation – Defendants
Personal Injury Litigation – Plaintiffs

Paul F. Driscoll
Litigation – Real Estate
Real Estate Law



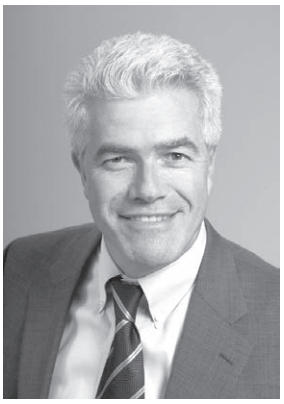
John W. Geismar
Tax Law

Kevin M. Gillis
Worker's Compensation Law – Employers

David L. Herzer, Jr
Insurance Law
Personal Injury Litigation – Defendants
Professional Malpractice Law – Defendants

Stephen Hessert
Worker's Compensation Law – Employers

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



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

Thomas S. Marjerison
Personal Injury Litigation – Defendants

Stephen W. Moriarty
Worker's Compensation Law – Employers

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

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

Daniel P. Riley
Administrative/Regulatory Law
Governmental Relations Practice

Roderick R. Rovzar
Corporate Law
Real Estate Law

John R. Veilleux
Insurance Law
Personal Injury Litigation – Defendants

Kudos

At the annual Comp Summit Seminar held in late August and early September, **STEVE MORIARTY** and **LINDSEY SANDS** presented "The Comp Summit Gateway", an introductory program to assist those employer and insurer representatives who are new to the system to become familiar with defenses and procedures. **DORIS RYGALSKI** co-chaired a panel addressing Social Security Disability, Medicare, and Workers' Compensation Settlements.

KEVIN GILLIS did triple duty, participating in a panel discussion addressing the distinction between employees and independent contractors, and also as a panel member in the concluding session known as the "Think Tank" which explored innovations and developments in compensation practice around the country. Kevin also represented an employer in a live argument before a seven-member panel of the Appellate Division in a complex case involving multiple legal issues.

DARYA HAAG and her husband Christian welcomed their first child, Joseph, on June 20, 2015. In addition, Darya has been elected to serve on the Board of Directors of the Portland Chamber Music Festival, a non-profit organization that enhances the cultural life of southern Maine by bringing nationally recognized artists of the highest caliber to Portland to present a wide range of classical and contemporary chamber music.

STEVE HESSERT spoke at a workers' compensation NBI seminar in Portland on August 12 on the topics on how to investigate and prepare defenses to a workers' compensation claim and how to evaluate a WC claim for settlement. On September 17, at an American Law Firm Association program for nationally self-insured employers held in Denver, Colorado, Steve presented on the topic of how to evaluate and improve an employer's relationship with its TPA together with the national claims managers for Tyson Foods and Sysco Corp.

TOM MARJERISON and **JOHN VEILLEUX** with the support of NHD as a sponsor and a donor of legal services put together a plan to construct a non-profit ice hockey rink to be known as Casco Bay Arena and situated in Falmouth. In collaboration with Casco Bay Hockey (of which John is the President) as the anchor tenant, Casco Bay Arena construction began in the fall of 2014 and will be completed in October. The Arena will hold its grand opening on October 23 – 25, 2015. Funding for the two million dollar project was made possible by significant individual and business donations. More information about the Arena and its construction and admission can be found at www.cascobayarena.com. The facility will also host box lacrosse, indoor soccer, flag football, and other recreational activities.

In mid-September, **PAUL DRISCOLL** was one of 357 riders who completed the 2015 Bike Maine ride, which covered 375 miles in southern and western Maine over the course of six days. Paul is one of approximately 30 riders who have completed the ride each year since 2013. Bike Maine brings riders from Maine and from the northeast together to compete in the event in order to promote bicycling safety, health, exercise, and public awareness.

Summer 2015 issue

Return Service Requested

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