INBRIEF

Current Developments in Maine Law

SPRING ISSUE 2017 / *VOL. 29, NO. 2*

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E-discovery: Traps for the Unwary

By: Jonathan W. Brogan Esq.

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We all live in an information exploded age. E-mail, social media, computer files and records, satellite tracking systems, and video are a daily part of all of our lives. Because they are a part of all of our lives, they have now become an integral part of the discovery process and a potential tool for plaintiffs' attorneys with weak cases to try to trap unwary small businesses and even potential defendants in simple automobile or premises liability cases.

More and more potential defendants in litigated matters are receiving, along with a notice of claim, a letter from a plaintiff's attorney asking that a "litigation hold" be placed on all of their electronic information and files. This article will deal with some of the state and federal rules associated with the production of these documents, the potential penalties for not protecting these documents, and the practicalities of electronic discovery in Maine.

The Maine Rules of Civil Procedure and the Federal Rules of Civil Procedure differ substantially, now, on the issue of what is "discoverable." Under the Federal Rules of Civil Procedure, Fed.R.Civ.P. 26(b)(1), the scope of discovery is:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the

> issues at stake in the action, the amount in controversy, the party's relative access to the relevant information, the party's resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

This discovery rule, adopted in 2015, changed what had been the scope of discovery for more than 40 years.

In Maine, however, the old scope of discovery still exists. Maine Rule of Civil Procedure 26(b)(1) states that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter ...and appears reasonably calculated to lead to the discovery of admissible evidence.

Under the Federal Rules, if substantial electronic information is sought, an e-discovery order is usually entered and the division of costs associated with the discovery is evaluated. Unfortunately, in Maine, given the limited resources of our courts, it is a much less regulated process.

Litigation holds are often used in significant products liability or other commercial cases involving large corporations with legal departments and guidelines regarding litigation holds. This article will not address those situations. The article is focused on local businesses and events that may result in litigation. What does the small company do when it receives the boilerplate "litigation hold" letter? Also, what does a non-commercial driver involved in an automobile accident, for which he has insurance, do when he receives the same litigation hold letter?

Under the Federal Rules, the issue of proportionality is important. Although the State Rules have not adopted proportionality, yet, but clearly that issue may be brought to the attention of the Superior Court Judge and the issue of the relevance of the potential plaintiff's attorney's request for extensive personal information on handheld devices or home computers can be addressed. The best way to address it is to first try to protect as much information as possible, document what was done to protect it and do it immediately. Once that information is protected and available, then whether or not it will ever be produced is easier to evaluate.

But what happens when the potential defendant is contacted years after an accident? Maine has a 6 year statute of limitations. Many times the person is not contacted about potential litigation in an accident until years later. As most know, many electronic devices have automatic purging and/or the people who own those devices do their own deletions. That issue is dealt with by both the Federal Rules and the State Rules under Rule 37 and typically it must be shown that there was some intent to deprive the other side of information before any sanctions result.

The more difficult issue is once a person is put on notice what sources of information should be protected. Typically a litigation hold letter is general by nature and is attempting to put as wide a hold on electronic documents as possible. One thinks immediately of cell phone records, computer records, video records (surveillance or otherwise), and social media postings as information that should be requested or segregated so as to protect them from routine or inadvertent destruction. But, in many cases, there are other forms of information that small business owners forget may be the focus of the plaintiff's later motions for sanctions. For instance, many businesses that use motor vehicles have satellite tracking systems. Satellite tracking systems have become more and more sophisticated and offer the subscribers a wealth of information about the vehicles that are being tracked. That information includes the vehicles' locations, their average speeds, whether someone is abusing the vehicle by speeding or otherwise, and specific information at or near the time that a motor vehicle accident has occurred. Small businesses use this information to help them control costs and work with their employees to be safe. Plaintiffs' attorneys use this information to try to extract potential damaging data about the driver's lack of care and the owner's failure to monitor its driver.

Once one determines a satellite tracking system exists, gather all the information available and store it safely. Many times the satellite tracking data is stored in the cloud and destroyed after a period of time (typically one year) to allow other information to be stored. If a small business using a satellite tracking system is not aware of the numerous sources of information that might be available to a plaintiff's attorney, it may simply overlook this electronic data. If it does, a later sanctions request may mean that the jury is instructed that information was destroyed that may have been damaging to the liability defense of the defendant. Needless to say any jury hearing that information was "destroyed" will begin to think that the defendant had something to hide and that the information would have hurt the defense and helped the plaintiff.

Social media is even more difficult to control. Potential defendants have an ability to destroy any defenses in a case with their Facebook postings or tweets. Many times they believe they are protecting themselves by going on social media and explaining "their side of the story." It must be impressed upon

" MANY TIMES [POTENTIAL DEFENDANTS] BELIEVE THEY ARE PROTECTING THEMSELVES BY GOING ON SOCIAL MEDIA AND EXPLAINING "THEIR SIDE OF THE STORY." IT MUST BE IMPRESSED UPON POTENTIAL DEFENDANTS THAT THEY NEED TO STAY OFF SOCIAL MEDIA AND NOT DISCUSS POTENTIAL LITIGATION OR THEIR DEFENSES."

potential defendants that they need to stay off social media and not discuss potential litigation or their defenses. If a "litigation hold" letter is sent to a defendant, then their social media information should be segregated and the defendant should be told that neither he nor any of his employees should be on social media discussing this potential matter or anything about it. If contacted about it, they should simply not respond. If someone makes an accusation that they believe they need to defend, they should abstain.

There are numerous vendors who may be of help in protecting potential electronic information for discovery. They are expensive but can be extremely helpful especially when the information sought is "metadata" or other information that is typically beyond the expertise of insurance professionals, lawyers, or defendants. An analysis of when an electronic discovery vendor is useful should be made between the insurance professional and their attorneys.

In conclusion, the most important thing for potential defendants and insurance professionals to do when confronted with a "litigation hold" letter is to react and respond. Identify the information that may be available, segregate that information immediately, request any information (including cell phone information or other information from outside agencies) as soon as possible and store that information. If there is video, surveillance or otherwise, immediately segregate it. When investigating an accident, identify what video sources are available, whether there were cameras on the motor vehicles or at the area where the alleged slip and fall or other accident took place, and protect it.

If the motor vehicles involved have satellite tracking systems, find out what the satellite tracking systems provide, contact the satellite tracking system providers and get that information and save it.

Computer information should be saved and protected and stored. Find out from the potential defendant what routine destruction systems they have on their computers so that information is not destroyed unwittingly.

Most importantly, if the "litigation hold" letter received is prior to the start of litigation, ask the requesting lawyer to provide more specific requests than are typical. Many times plaintiffs' attorneys imagine they have asked for information that no reasonable person would see within a request. They then use that request to try to elicit sanction orders from the court. Though they are typically unsuccessful, it is easier to simply ask the plaintiffs' lawyers what they are looking for and determine if that request is a reasonable request. E-discovery is a trap for the unwary. Reasonable reaction, and documentation, as a response to a "litigation hold" letter will help prevent sanctions later.

New Associate: Grant J. Henderson

GRANT J. HENDERSON

We are pleased to announce that Grant J. Henderson joined the firm as an associate in May 2017. Grant graduated from Boston University in 2007 where he studied Public Relations and History. Grant was also the Public Relations Chairman and a founding member of Boston University's Lambda Nu chapter of the Pi Kappa Alpha International Fraternity. Prior to law school he worked in the automotive industry both in Massachusetts and California.

Grant graduated from Temple University Beasley School of Law *cum laude* in May 2013. He was a staff editor for the Temple Law Review. Grant also worked as a research assistant and editor for a treatise on International Treaties.

During and after law school, Grant worked for a law firm in Philadelphia specializing in insurance defense. For the last three years, Grant has worked for a large law firm in New Jersey focusing primarily on workers' compensation defense.

Grant's wife Leslie is a native of Cape Elizabeth, Maine. After having lived in Massachusetts, California, Pennsylvania, and New Jersey, he and his wife have relocated to Portland, Maine to be closer to family and friends and to begin a family of their own. In his spare time, Grant enjoys golf, hiking, and running.

Workers' Compensation: Appellate Division Decisions

By: Stephen W. Moriarty, Esq.

STEPHEN W. MORIARTY

Change in Economic Circumstances.

When a determination of incapacity has been made by decree, either party may subsequently file a Petition for Review to establish a different level of entitlement, but to do so the moving party must show a change of circumstances since the prior decree either by introducing comparative medical evidence or by demonstrating a change in economic circumstances. In a recent decision the Appellate Division had an opportunity to comment upon the type of evidence required of an injured worker to sustain the required burden of proof.

In *Belanger v. Miles Memorial Hospital*, Me. W.C.B. No. 17-23 (App. Div. 2017) the employee had sustained a compensable personal injury in 1999, and in a 2003 decree she was awarded ongoing benefits for partial incapacity based upon a presumed ability to earn $800.00 per week. Several years later the employee filed her first Petition for Review, and in a 2012 decree the Board denied the claim on the grounds that the employee had failed to establish a change in either her medical or economic circumstances.

After a few more years had passed the employee tried once again and filed another Petition for Review. Although the ALJ concluded that a change in medical circumstances had not been shown, the ALJ nevertheless found that the employee had proven a change in her economic circumstances. As a result, the imputed earning capacity was reduced from $800.00 to $400.00 per week, and ongoing benefits for partial incapacity at a higher rate were awarded.

On appeal the Appellate Division re-affirmed that the employee bore the burden of proof by showing a change in her economic circumstances in order to overcome the res judicata effect of the previous decree. The Division noted that the ALJ had found as a fact that since the prior decree the employee had performed a work search, had participated in vocational rehabilitation, and had been totally disabled for a closed period of time following surgery. In addition, the ALJ found that the employee had not worked in her customary profession for 10 years, had lost a part-time job, and had grown older and was now 65 years of age. The Division affirmed the ALJ's finding of a change in economic circumstances and ruled that the decision was adequately supported by the record, was not irrational, and had not misapplied the law.

The most noteworthy aspect of this decision is that the Division recognized that the mere passage of time (i.e., the employee was older than she was at the time of the original decree and had not worked in her usual profession for ten years) could be considered among other facts as evidence of a change in economic circumstances. Specifically, the Division held that "These types of factors are relevant to an employee's ability to earn, and thus to her economic circumstances." The natural aging process and the amount of time out of work had not previously been recognized as appropriate criteria for considering a change in economic circumstances. While these two considerations may not necessarily be sufficient, without more, to sustain the required burden of proof, the Appellate Division has now recognized them as among the issues to be taken into account in assessing changed economic circumstances.

In a separate decision the Division muddied the waters with respect to changed economic circumstances in the context of an employer-filed Petition for Review. In *Cortes v. LePage Bakeries, Inc.*, Me. W.C.B. No. 17-22 (App. Div. 2017) the employee had sustained a compensable injury and following surgery returned to work for the pre-injury employer with injury-related restrictions. The employer voluntarily paid ongoing benefits for partial at varying rates.

A portion of the pre-injury average weekly wage consisted of overtime earnings of approximately $200.00 per week. At some point following the employee's return to work the employer essentially abolished the availability of overtime for all of its workers, and the employer filed a Petition for Review claiming that the diminished earnings were unrelated to the injury and were instead the result of a policy change. The ALJ refused

to find a change in economic circumstances, and the Appellate Division agreed.

The Division ruled that the loss of overtime income as the result of a uniformly applied corporate change in overtime policy was not sufficient to enable the employer to meet its burden of proof. It appears that the Division overlooked the change of economic circumstances issue completely and instead held the employer to a stricter standard of having to offer evidence that the employee was capable of earning her pre-injury average weekly wage. Therefore, in spite of the change in company policy, which eliminated overtime, the employer was required to continue to pay partial based upon a standard comparison between the pre-injury average weekly wage and post-injury earnings.

Ambiguous Section 312 Exam Opinions.

In *Levesque v. Daigle Oil Company,* Me. W.C.B. No. 17-21 (App. Div. 2017) the employee sustained a compensable traumatic knee injury in March 2011 and the key issue was whether she had sustained a gradual injury to the same knee one year later while working for a different employer. At the time of the claimed second injury the employee had a pre-existing knee condition resulting from the first injury, and in a written report a Section 312 examiner found that post-2011 work did not aggravate the pre-existing condition in a significant manner. The physician was then deposed and altered his opinion by suggesting that post-2011 work was 20% responsible for the current knee condition and that the degree of contribution could be classified as significant. The ALJ found the examiner's global opinion to be ambiguous and ruled that the occurrence of a second injury had not been established.

The Appellate Division agreed and found that despite the weight to be given to the opinion of a Section 312 examiner, the ALJ was not compelled to find that there had been a new or separate injury. More specifically, where inconsistencies exist either within a report or between a report and deposition testimony, an ALJ is compelled to discern the overall opinion of the examiner. If an opinion is unclear or is susceptible of different interpretations, an ALJ is not required to adopt it. For related decisions, see *Thurlow v. Rite-Aid,* Me. W.C.B. No. 16-23 (App. Div. 2016) and *Oriol v. Portland Housing Authority,* Me. W.C.B. No. 14-35 (App. Div. 2014)

Filing a Protective NOC.

The employee sustained an occupational injury on August 19, 2011 and although there was a minor amount of time lost from work immediately following the employee never made a claim for incapacity benefits. All the same the employer filed a "full denial" NOC. Nearly three years later the employee claimed ongoing incapacity benefits for the first time. The employer did not file a new NOC and instead relied upon its earlier filing.

In *Paradis v. Pine State Trading Company,* Me. W.C.B. No. 17-20 (App. Div. 2017) the ALJ found that the employer had violated the 14-day rule by not having controverted in a timely manner after the employee actually claimed benefits. In accordance with Ch. 1, §1 of the WCB Rules ongoing benefits for total incapacity were awarded by the ALJ.

The Appellate Division affirmed and found that the earlier NOC did not protect the employer once a claim was made. As the Division held:

> The filing of a protective NOC in the absence of a claim for benefits does not discharge an employer's future obligation under the fourteen-day rule.

Because there had been no claim for benefits at the time the NOC was filed, and because a second NOC was not filed when a claim was actually made, the Division found that the ALJ committed no error in finding a violation of the rule and in awarding benefits.

Employers must take particular care to file an NOC whenever a claim for benefits is actually made. After *Paradis,* a purely protective NOC does not carry any legal significance and cannot be relied upon. Inevitably, this decision may result in the filing of more than one NOC, as it is not always clear when an employee has explicitly made a claim for benefits. It is better to err on the side of an additional filing than to assume that an original filing will satisfy the purposes of the rule. The duty to file is triggered whenever the employer has knowledge of a claim for incapacity or death benefits.

Record of Mediation.

It has long been recognized that agreements reached between the parties at mediation are binding and that a Record of Mediation has the same force and effect of a Board decree. *Hoglund v. Aaskov Plumbing & Heating,* 2006 ME 42, 895 A.2d 323. As the Appellate Division has now made clear, it makes no difference whether a claimant was represented or not at the time of the signing of a Record.

In *White v. Maine Turnpike Authority,* Me. W.C.B. No. 17-15 (App. Div. 2017) the employee sustained three different injuries while working for the same employer and entered into an agreement at mediation for payment of benefits for a closed period of total incapacity based upon the most recent of the three injuries. Several years later the employee challenged the legitimacy of the Record of Mediation by filing a Petition for Award. The ALJ held that the Record was valid and that the employer had properly terminated benefits at the conclusion of the agreed-upon closed period. The employee appealed on the grounds that he was unrepresented at the time of mediation and on the grounds that he was not given 21 days advance notice of the termination of benefits.

The Division rejected the appeal and found that there was no evidence of fraud or that the employee was operating under a mistake of fact at the time that the Record was signed. The Division further found that there was nothing in the Act which prohibited an unrepresented claimant from entering into a binding agreement at mediation, and further found that the Board had no authority to nullify such an agreement. Finally, and most importantly, because the parties had agreed to a specific end date for the payment of benefits for the injury in question, the Division found that there was no requirement to provide the employee with advance notice of the termination of benefits. Accordingly, the Record of Mediation was fully valid.

Update on Federal Disability Discrimination Law

By: Christopher C. Taintor, Esq.

CHRISTOPHER C. TAINTOR

Disability discrimination has been a fertile area of litigation for several years. The United States Equal Employment Opportunity Commission reports that in fiscal year 2016, it received more than 28,000 charges which included some allegation of discrimination on the basis of disability – roughly double the number reported in 2005. Although only a fraction of those administrative charges end up in court, the number of lawsuits filed is large, and likely has been fueled by the 2009 amendments to the Americans with Disabilities Act, which were enacted with the avowed purpose of lowering barriers to recovery.

The first half of this year has been no exception. In the past few months federal courts of appeals, where most disability discrimination law is made, have decided several cases touching on significant and frequently-litigated issues. The issue that has received perhaps the most attention is this: how do employers and courts identify a job's "essential functions"? The question is particularly important because the law is settled on one key point – no employer is required to "accommodate" a disabled employee by relieving her of the need to perform a job's essential functions. Stated another way, an accommodation that involves changing a job's essential functions is, per se, not "reasonable." Therefore, if an employer can persuade a court that the function its employee asks to have modified is "essential," it will be entitled to judgment as a matter of law and able to avoid a trial. It is no surprise, then, that this is an issue that gets aggressively litigated.

This article first summarizes the recent "essential function" cases that have been decided in the courts of appeals. Next, it discusses a new First Circuit decision dealing with the question of when a lengthy period of leave is a "reasonable accommodation." Finally, it describes a new federal district court decision that may open the door to expanding employment protections to some transgender individuals under the ADA.

1. "Essential Function" Cases

In *Mason v. United Parcel Service Co.,* 674 Fed. Appx. 943 (6th Cir., Jan. 10, 2017), the plaintiff had lifting restrictions as the result of an injury she sustained while working for UPS. Because the restrictions were permanent, she requested accommodations which would have relieved her of the need to lift "heavy" packages, as well as the need to lift any packages above her shoulders or lower them to foot level. All those tasks were identified as essential parts of her position in the company's job description. The court rejected the argument that the plaintiff should be relieved of the various lifting requirements because, it said, "that would essentially transform the position into another one by eliminating essential functions of the job as it exists." The Mason court then analyzed and rejected the plaintiff's contention that she should be allowed to rely on her co-employees to assist with the lifting she could not do herself. Because the package center where she worked was "leanly staffed" and "require[d] all employees to perform their functions," the court concluded that shifting Mason's duties to others would "significantly disrupt" operations.

Later the same month the Sixth Circuit decided another case, *Williams v. AT&T Mobility Services, LLC,* 847 F.3d 384 (6th Cir. 2017), where it again considered the effect that a requested accommodation might have on a disabled employee's co-workers. The plaintiff was a Customer Sales Representative (CSR) who suffered from depression and anxiety. CSRs worked eight-hour shifts, typically handling 40 to 50 calls per shift. The plaintiff sometimes needed to "log out" and take time to compose herself after very stressful calls. To deal with that stress she requested accommodation in the form of leave from work for treatment, flexible scheduling, and additional breaks during her shifts. The evidence established, though, that "[i]f a CSR is not logged in to her workstation, any calls that would have otherwise gone to her are rerouted to another CSR," and that the consequences of her unscheduled absences included "potential increases in customer wait times and decreases in the quality and speed of customer service," as well as "increased workplace tensions and decreased morale among the CSRs." Because, the court reasoned, "[r]egular, in-person attendance is an essential function ...of most jobs, especially the interactive ones," the accommodations the plaintiff had requested were not reasonable.

Stevens v. Rite Aid Corporation, 851 F.3d 224 (2d Cir. 2017), involved a pharmacist who asked to be accommodated because of his "needle phobia." Rite Aid had made a business decision in 2011 to start requiring pharmacists to perform immunizations. Stevens argued that he could be accommodated by either hiring a nurse or assigning him to a "dual pharmacist" store, so that all immunizations could be performed by a colleague. The court reasoned, however, that "[t]hose steps would be exemptions that would have involved other employees performing Stevens' essential immunization duties." Because "[a] reasonable accommodation can never involve

the elimination of an essential function of a job," the court of appeals held that Rite Aid was not required to grant the plaintiff those exemptions.

In another Sixth Circuit case, *Green v. BakeMark, USA, LLC,* 2017 WL 1147168 (6th Cir. March 27, 2017), the plaintiff was an "operations manager" with supervisory responsibilities, who historically had worked a minimum of 50 hours per week in that position. After suffering an on-the-job injury he asked to be accommodated with a part-time (20 hour a week) schedule. The trial court granted the employer summary judgment, and the court of appeals affirmed. After observing that "Green's own experience working long hours as an operations manager belies any claim that he could perform the essential functions of the position working four hours a day, five days a week," the court noted that "the written job description for operations manager emphasizes the position's full-time nature by stressing the 'supervisory responsibilities' inherent in the position, including 'closely interacting with department associates,'" and found it "difficult to fathom how Green could adequately fulfill his supervisory role if he were there to supervise and interact with the associates only part-time." At best, the court reasoned, "Green's proposed accommodation would have allowed him to perform only some functions of his position, some of the time." Because "the ADA requires more," the court affirmed the entry of summary judgment in the employer's favor.

2. The First Circuit Takes Up the Issue of Extended Leave

Although all federal appellate decisions interpreting the ADA are significant, cases decided by the Court of Appeals for the First Circuit, which includes Maine, directly control cases brought here. Most of the cases handed down by the First Circuit so far this year have broken little ground. One case, however, is worth noting because it deals with the recurring challenge employers face when they are asked to honor requests for extended leave from work.

In *Echevarria v. AstaZeneca Pharm.*, LP, 856 F.3d 119 (1st Cir 2017), one of the questions presented was whether the plaintiff, who had taken a lengthy period of leave due to depression and anxiety, was entitled to another 12 months as an accommodation. The First Circuit held that the requested accommodation was not "facially reasonable." In its analysis of this issue the court quoted at length from a recent decision that had been authored by Justice Neil Gorsuch (the newest member of the Supreme Court) when he was sitting on the Tenth Circuit Court of Appeals, which the court said "nicely captured the dilemma that lengthy leave requests pose for employers." In that case Justice Gorsuch had explained that although leaves of absence can be "reasonable accommodations" in some circumstances, lengthy periods of leave typically do not qualify because "reasonable accommodations – typically things like adding ramps or allowing more flexible working hours – are all about enabling employees to work, not to not work" (and it was not at all clear that the leave requested in *Echevarria* would actually be "effective" to get the plaintiff back to work).

The First Circuit went on to observe in *Echevarria* that "[c]ompliance with a request for a lengthy period of leave imposes obvious burdens on an employer, not the least of which entails somehow covering the absent employee's job responsibilities during the employee's extended leave." The court said that an employee's "facial-reasonableness showing must take these obvious burdens into account." Because the plaintiff had not satisfactorily explained how her employer should be expected to deal with the burdens imposed by her extended absence, the summary judgment entered for her employer was affirmed.

3. New Development: Gender Dysphoria as a Protected Disability

Finally, in *Blatt v. Cabela's Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. May 18, 2017), a court for the first time has ruled that a transgender employee may proceed with a discrimination claim under the ADA. Courts applying Title VII previously have said that sex discrimination laws prohibit anti-transgender discrimination in the workplace. *Blatt* is unique because it says that a transgender employee with gender dysphoria may also be protected by the ADA.

The *Blatt* decision is brief and to the point. Kate Lynn Blatt, a transgender woman, sued Cabela's, claiming that while working there she was subjected to discrimination – she was not permitted to wear a name tag with her female name, or use the women's restroom – and that she was harassed by co-workers. Cabela's moved to dismiss her ADA claims on the ground that Section 12211 of the ADA excludes from coverage "gender identity disorders not resulting from physical impairments." In response, Blatt argued that the ADA's exclusion of gender identity disorders violated her Constitutional right to equal protection of the laws. The judge ruled that the ADA can, in fact, cover gender dysphoria, a condition "which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling." Because Blatt sufficiently alleged that gender dysphoria "substantially limited" her "major life activities" – including interacting with others, and social and occupational functioning – the court denied the employer's motion to dismiss and allowed the ADA claim to go forward.

Although *Blatt* has been described in the press as a "landmark" advance for transgender workers, its practical importance is hard to predict. The court did not question the assumption that the ADA protects only gender dysphoria, and not transgender status generally. It remains to be seen whether other courts will follow *Blatt*, and how broadly they will read it.

Furthermore, the significance of the principle established in *Blatt* will depend on developments elsewhere in the Title VII arena. The EEOC has taken the position that Title VII, which prohibits discrimination on the basis of sex, protects transgender individuals. Several federal courts have agreed, as did the Justice Department until recently. In late July, however, the Justice Department abruptly changed course, and affirmatively urged the Second Circuit Court of Appeals to rule that Title VII does not prohibit discrimination on the basis of sexual orientation. Although the Second Circuit case does not involve a transgender plaintiff, any ruling which broadly excludes sexual orientation from the protection of Title VII could well have the same impact on transgender persons. If the scope of protection under Title VII becomes more limited, then cases like *Blatt*, which afford protection under the ADA, could become increasingly important. At the very least the decision is yet another indication that the protections afforded by the ADA will continue to evolve, and that litigation under the Act will continue to grow.

Recent Decisions From The Law Court

By: Matthew T. Mehalic, Esq., CPCU

MATTHEW T. MEHALIC

On Call Status Does Not Establish That Someone is Acting within Scope of Employment

In *Amy L. Canney v. Strathglass Holdings, LLC,* 2017 ME 64 (April 6, 2017), the Law Court reviewed on appeal summary judgment granted in favor of an employer-landlord arising out of a dog bite injury. The employer-landlord was Strathglass Holdings, LLC that employed an individual, Eric Burns. Burns was an on-call maintenance provider and property manager for the properties owned by Strathglass. Burns owned a pit bull. The pit bull bit minor Nicholai Canney at Burns' home that was leased to Burns by Strathglass as part of his employment. Nicholai was invited to use a pool Burns had in his private yard by Burns' girlfriend's daughter. When Nicholai came over, Burns was fixing a piece of furniture in his home. Burns exited his home with the pit bull. The dog approached Nicholai, glared at him, nipped him, and then bit down on Nicholai's leg. Strathglass was aware that Burns kept a dog at his unit, but was not aware of any dangerous propensities.

Strathglass moved for summary judgment on the grounds that Burns was not acting within the scope of his employment at the time of Nicholai's attack and it was not aware of any dangerous propensities, which the trial court granted.

On appeal the Law Court held that "the fact that Burns was on call at his home when Nicholai was injured does not, by itself, establish that Burns' acts or omissions were within the scope of his employment by Strathglass." *Id.* at ¶ 13. Because the Court determined that Nicholai entered Burns' property purely for recreational purposes with nothing to do with Strathglass' business the evidence did not support a finding that Burns was acting within the scope of his employment. In addition, there was no evidence that indicated that Burns' fenced and private yard was an area where Burns undertook any of his responsibilities for Strathglass. The undisputed facts supported the trial court's determination that Strathglass was not vicariously liable for the dog bite.

No Proximate Causation Where Driver Indicated to Other Driver to Cross Lanes

In *Arthur Murdock v. Martin Thorne et al.,* 2017 ME 136 (June 27, 2017), Plaintiff Arthur Murdock, a former Maine State Police lieutenant filed a lawsuit against Defendant Martin Thorne and the Maine Department of Public Safety ("DPS") alleging negligence and entitlement to underinsured motorist coverage. Summary judgment was entered by the trial court in favor of both Thorne and DPS. Murdock appealed the judgment and the Law Court affirmed the trial court's judgment.

The complaint arose out of a motor vehicle accident taking place as Murdock, while driving a police cruiser, was attempting to make a left hand turn across two lanes of traffic going in the opposite direction. Thorne was stopped and indicated to Murdock with an index finger waive that it was okay for Murdock to cross in front of his vehicle to make the turn. Thorne was in the lane closet to the centerline and there was another lane that Murdock had to cross – the outer lane. As Murdock attempted to cross the outer lane, he was struck by another vehicle that came from behind Thorne's vehicle. The evidentiary record indicated that Murdock did not rely on Thorne's gesture before deciding to cross the outer lane. Instead, the evidentiary record indicated that Murdock made his own independent decision as to whether it was safe to cross the outer lane before proceeding.

On appeal the Law Court stated, "Courts analyzing negligence claims based on a defendant driver's 'wave-on' gesture have generally required plaintiffs to produce evidence of reliance to satisfy the element of causation." *Id.* at ¶ 14 (citations omitted.) "Murdock's testimony regarding his actions after being 'waved-on' by Thorne establishes that while he may have relied on Thorne's gesture to pull his vehicle in front of Thorne's in the inside eastbound lane, he made an independent, albeit flawed, assessment of the traffic conditions in the outside lane before turning and did not rely on the gesture when making the turn across the outside lane toward the parking lot." *Id.* at ¶ 17. Because Murdock did not make a *prima facie* showing

that Thorne's gesture was the proximate cause of his injuries, the Law Court held that Thorne was entitled to summary judgment.

The other issue on appeal was whether DPS was required to provide Uninsured/Underinsured Motorist Coverage for the benefit of Murdock. As a DPS employee at the time of the accident, Murdock was covered under a self-insurance fund administered by the director of the Risk Management Division, which is part of the Department of Administrative and Financial Services. The self-insurance issued at the time of the accident did not provide UM coverage to DPS employees. DPS had argued and the trial court had agreed that because the self-insurance fund covering Murdock was explicitly exempt from provisions of the insurance code mandating that insurance carriers provide UM coverage in auto policies, DPS was not obligated to provide UM coverage. The Law Court did not address this question, however, because any UM claim was predicated on a finding that Thorne was liable to Murdock. ;There is no indication in the Law Court's decision or in the Maine statutes that the trial court was incorrect in its determination that self-insurance funds, such as that covering DPS, are required to provide UM coverage.

No Setoff Under 14 M.R.S.A. § 163 Where Prior Settlement Was For Different Damages

In *Greg Goodwill et al. v. Brian Beaulieu, Jr.*, 2017 ME 138 (June 27, 2017), the Law Court answered whether the judgment entered against Defendant Beaulieu received a setoff under 14 M.R.S.A. § 163 for settlement monies paid by a third-party arising out of the same situation giving rise to the judgment against Defendant Beaulieu. Because the settlement monies paid were for damages different from those damages the trial court awarded against Defendant Beaulieu, the Law Court held that section 163 did not provide an offset.

The case arose out of the sale of a home by Beaulieu to plaintiffs. During the plaintiffs' viewing of Beaulieu's home, they inquired about the functionality of pumps and jets on a hot tub, a fireplace, and an outdoor kitchen. Beaulieu made representations about the functionality. The trial court found that Beaulieu made misrepresentations about the fireplace and outdoor kitchen. The trial court did not find that Beaulieu made misrepresentations about the hot tub and its fixtures. At trial it was determined that a prior settlement reached by plaintiffs with the real estate agency was for misrepresentations pertaining to all fixtures part of the hot tub, the fireplace and the outdoor kitchen. The settlement with the real estate agency "went beyond that for which the court held Beaulieu liable." *Goodwill*, at ¶ 12. Despite the claims against Beaulieu and the real estate agency being the same, the settlement reached with the real estate agency was not for the same injury the court awarded damages for. Therefore, no setoff was appropriate pursuant to section 163.

There was limited evidence in the record about the settlement with the real estate agency. There was zero evidence about how the settlement was allocated. If there had been evidence on the allocation of the settlement with the real estate agency as between the hot tub, fireplace, and outdoor kitchen, it appears that the Law Court and trial court would have been willing to provide a setoff for those damages pertaining to the fireplace and outdoor kitchen.

Claimant Not Entitled to UM Benefits Where Combined Primary and Excess Liability Limits Exceeded UM Coverage Limits

In *Matthew J. Wallace et al. v. State Farm Mutual Automobile Ins. Co.*, 2017 ME 141 (June 29, 2017), the Law Court addressed whether a gap in coverage between the underlying tortfeasor's liability coverage and excess liability coverage meant that the tortfeasor was underinsured pursuant to Maine's uninsured/underinsured motorist. The Superior Court determined on cross motions for summary judgment that the tortfeasor was not underinsured and State Farm, the UM carrier did not have to pay benefits. The Law Court affirmed.

Matthew Wallace was driving a vehicle with passengers Freja Folce and her minor daughter Zoe in a southerly direction on Route 26 in Woodstock. Corey Hill, was driving a vehicle owned by his employer, Twin Pines Construction, Inc., in the opposite direction. Hill lost control, crossed the centerline, and collided with Wallace's vehicle. The accident was caused by Hill's negligence. At the time of the accident Hill was acting within the scope and course of his employment.

The Twin Pines vehicle was insured under a Safety Insurance Company policy providing liability coverage of $50,000 per person and $100,000 per accident. Twin Pines also had an excess policy with Alterra Excess Surplus Insurance Company providing $2,000,000 in excess commercial auto liability coverage. The Alterra excess policy required Twin Pines to maintain $1,000,000 in primary coverage and included that Alterra was liable only "to the extent that it would have been held liable had the insured complied" with that requirement. *Id.* at ¶ 3.

The Wallace vehicle and plaintiffs were insured with State Farm and had UM coverage of $100,000 per person and $300,000 per accident. Wallace also had a separate State Farm policy covering a different vehicle with the same UM coverage limits.

> " ON APPEAL THE LAW COURT STATED, "COURTS ANALYZING NEGLIGENCE CLAIMS BASED ON A DEFENDANT DRIVER'S 'WAVE-ON' GESTURE HAVE GENERALLY REQUIRED PLAINTIFF'S TO PRODUCE EVIDENCE OF RELIANCE TO SATISFY THE ELEMENT OF CAUSATION "

After the plaintiffs filed complaints against Twin Pines, Hill, and State Farm, they settled with Twin Pines. Safety paid its policy limits, $50,000 to both Freja and Zoe. Alterra paid its excess policy limits, $1,000,000 to Wallace and $1,000,000 to Feja. All claims against the defendants, except for State Farm were dismissed with prejudice.

The plaintiffs argued on appeal that Hill was underinsured for any damages of $1,000,000 or less because Alterra's excess coverage did not begin until their damages exceeded $1 million. Plaintiffs' contended that Alterra's excess payments could not be used to offset State Farm's uninsured motorist coverage amount of $100,000 per person and $300,000 per accident. On the other hand, State Farm argued that because plaintiffs' maximum UM coverage was less than the $2.1 million that they received collectively from Twin Pines' liability insurers, there is no underinsured motorist gap and State Farm did not need to pay.

> " THE GOAL OF THE UM STATUTE IS TO PROVIDE AN INJURED INSURED THE SAME RECOVERY WHICH WOULD HAVE BEEN AVAILABLE HAD THE TORTFEASOR BEEN INSURED TO THE SAME EXTENT AS THE INJURY PARTY — NO MORE AND NO LESS "

The Law Court accepted State Farm's argument holding,

> Here, the plaintiffs have recovered far more from the tortfeasor's insurers than the maximum amount of UM coverage provided by the State Farm policies. Accordingly, they have surpassed "the same recovery which would have been available had the tortfeasor been insured to the same extent."

Wallace, at ¶ 14 (citing *Farthing v. Allstate Ins. Co.*, 2010 ME 131, ¶ 8, 10 A.3d 667). This decision presents a unique situation, but does reinforce a pillar of UM law that the goal of the UM statute is to provide an injured insured the same recovery which would have been available had the tortfeasor been insured to the same extent as the injured party – no more and no less.

Entry of Default Precludes Defaulted Party's Ability to Challenge Causation and Raise Affirmative Defenses

In *Dawn H. Haskell et al. v. Grover R. Bragg, Jr.*, 2017 ME 154 (July 13, 2017), the Law Court addressed whether a default entered against a party precluded the defaulted party at the damages hearing from contesting causation of damages and raising affirmative defenses. The Superior Court held that the defaulted party was precluded from contesting causation of damages, but had permitted the defaulted party to introduce evidence of comparative negligence of the plaintiffs. On appeal the Law Court held that the Superior Court was correct in precluding the defaulted party from contesting causation of damage, but was incorrect in allowing the defaulted party to introduce evidence of comparative negligence of the plaintiffs. However, the Law Court found that the Superior Court error was harmless because the court found that neither plaintiff was negligent.

The lawsuit arose out of personal injury and property damage sustained by the plaintiffs. It was alleged that Defendant Donald R. York, Jr. was brought to plaintiffs' home by Defendant Grover B. Bragg, Jr., after York had consumed some combination of crack cocaine, cocaine, heroin, oxycodone, bath salts, and marijuana. "Despite Bragg's awareness of the danger York presented to others in his state of intoxication, Bragg transported York to the [plaintiffs] residence because he did not want York – who was acting 'really crazy' – in his own home." *Id.* at ¶ 5. Evidence presented at the damages hearing indicated that plaintiffs had never met Bragg or York. The evidence indicated that York entered plaintiffs' home and caused damage to property inside, including, but not limited to, windows, lamps, a television, furniture, walls, floors, and beds. York then attacked one of the plaintiffs. Both plaintiffs feared for their lives. The decision indicates that Bragg was present at least initially, but is unclear if he remained at the plaintiffs' residence throughout the entire ordeal.

Bragg was served the summons and complaint, but failed to file an answer until almost two years after service. Default was entered against him in the interim. In the answer Bragg asserted affirmative defenses including comparative negligence. The Law Court, drawing on prior precedent, stated, "The entry of default establishes the defaulting party's liability as set forth in the complaint and precludes that party from litigating any of the elements of liability related to the claim." *Id.* at ¶ 14 (citation omitted.) The Court continued,

> The facts alleged in Haskell and Witham's [the plaintiffs'] complaint were conclusively established by Bragg's default. Those factual findings explicitly included that Bragg was negligent and that his negligence caused Haskell and Witham pain and suffering and damage to their personal property. Thus, the court properly concluded that the allegations in the complaint regarding causation were deemed true when the default was entered and that Bragg was not entitled to challenge those established findings of fact.

Id. at ¶ 17. The evidence submitted at the damages hearing formed the basis of an award of compensatory damages in the amount of $428,071.64, which Bragg was jointly and severally liable for.

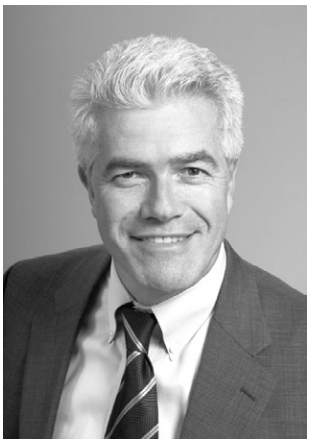
With regard to the Bragg's affirmative defense of comparative negligence, the Court held that "[f]ailing to timely plead an affirmative defense generally results in the waiver of that defense." *Id.* at ¶ 20. Because Bragg's answer was nearly two years late all affirmative defenses were waived. This decision emphasizes the serious repercussions for failing to answer a complaint.

NH&D Recognized by Chambers & Partners

Chambers & Partners USA 2017 has recognized NH&D as a Top Firm in the category Litigation: General Commercial. Additionally the following NH&D attorneys have received the "**Ranked Lawyer"** distinction in the publication:

Emily A. Bloch
Maine Litigation: Medical Malpractice & Insurance

Jonathan W. Brogan
Maine Litigation: Medical Malpractice & Insurance



Mark G. Lavoie
Maine Litigation: Medical Malpractice & Insurance

Russell B. Pierce
Maine Litigation: General Commercial

James D. Poliquin
Maine Litigation: Medical Malpractice & Insurance

Christopher C. Taintor
Maine Litigation: Medical Malpractice & Insurance

Kudos

DAVE HERZER has agreed to serve as co-chair of next year's "Campaign for Justice" fundraising effort together with Attorney William Robitzek. The duo will follow Paul Driscoll and Mary Roy, this year's co-chairs, who assumed the position for Peter DeTroy after his passing a year ago. The year to date fundraising for the Campaign is breaking records in Peter's memory.

NHD was pleased to sponsor "Challenges to Professionalism in a Time of Change", a well-attended and thought-provoking conference in Portsmouth, New Hampshire on June 17 that was spearheaded by the Maine Medical Association for healthcare professionals across northern New England. **EMILY BLOCH** and **NOAH WUESTHOFF** attended on behalf of NHD.

ADRIAN KENDALL has been appointed to the Board of the Maine International Trade Center.

JENNIFER RUSH, was elected by the Maine State Bar Association's Board of Governors to serve as the Chair of the Medical-Legal Committee.

KELLY HOFFMAN spoke before the Maine Medical Group Management Association at a seminar titled "Managers Wearing the HR Hat." Kelly provided guidance to members on topics that included HIPPA privacy, fraud and abuse compliance, licensure defense, and employment litigation concerns.

EMILY BLOCH recently spoke at the Maine Medical Insurance Company of Maine's Seminar for Practice Managers and presented a program on current board of licensure issues of concern.

ADRIAN KENDALL has been appointed by Governor LePage to serve on the Board of Trustees of the Maine Rural Development Authority. The Maine Rural Development Authority focuses on rural areas of Maine that have not experienced the same level of economic development success as other regions of the state, have experienced major economic losses such as plant closings and downsizings, or are economically distressed.

Spring 2017 issue

Return Service Requested

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