

## NEWSSTAND

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### **The Supreme Judicial Court of Massachusetts Upholds \$2 Million Verdict Against Wal-Mart for Gender-based Discrimination**

In *Haddad v. Wal-Mart Stores, Inc.*, SJC-10261, 2009 WL 3153155 (Mass. Oct. 5, 2009), the Supreme Judicial Court of Massachusetts (“SJC”) upheld a gender discrimination jury verdict of \$972,774 in compensatory damages and \$1 million in punitive damages against Wal-Mart Stores, Inc. (“Wal-Mart”). The plaintiff, Cynthia Haddad, worked as a pharmacist at Wal-Mart for approximately ten years, and consistently received excellent evaluations. In March 2003, she accepted a temporary transfer to a pharmacy manager position. From the time of her transfer until her termination, however, she was paid at an hourly rate considerably lower than any male pharmacy manager in the region. Although she was told she would receive the additional hourly pay, she never did. She also did not receive a pharmacy manager bonus. Ultimately, after numerous complaints, she received a check for the pharmacy manager bonus two months after the rest of the managers, but she never received her additional hourly pay. Less than a week after receiving the bonus, the plaintiff was terminated for a prescription that was fraudulently written by a pharmacy technician while the plaintiff was on duty. After her termination, the plaintiff brought suit against Wal-Mart alleging unequal compensation and termination of employment based on gender in violation of Massachusetts law. Following a jury trial, Wal-Mart was found liable for \$972,774 in compensatory damages and \$1 million in punitive damages. The motion judge, however, vacated the award of punitive damages.

In reversing the lower court’s decision regarding the award of punitive damages, the SJC concluded that there was sufficient evidence for the jury to conclude that Wal-Mart’s proffered motive for the plaintiff’s termination was a pretext and that the defendant acted with a discriminatory animus. In determining whether sufficient evidence existed to uphold the award of punitive damages, the court first took issue with the reason given for the plaintiff’s termination. Wal-Mart told the plaintiff that she was terminated because she left the pharmacy area unsecured and the pharmacy technician unattended, allowing the technician to fraudulently write a prescription. The court, however, noted that a male pharmacist who was on duty when a fraudulent prescription was filled was neither questioned nor disciplined. In addition, the same male pharmacist testified that he commonly left the pharmacy area unsecured to talk to customers, go to the restroom or get a snack. Moreover, Wal-Mart gave inconsistent reasons for the plaintiff’s termination and the plaintiff’s “exit interview” forms were dated the day prior to her actual termination.

In reviewing the amount awarded by the jury for front pay, the court stated that “[w]hile the award of \$733,307 represents a significant dollar figure for front pay, the evidence supported such an award.” Although Wal-Mart argued that the nineteen-year award of front pay was excessive, the court noted that the award was at the lower end of the plaintiff’s expert’s estimate. Regarding the jury’s punitive damages award, the court began by noting that the standard for awarding punitive damages is “if a defendant knows that it acted unlawfully by interfering with the legally protected rights of the plaintiff, such ‘reckless indifference’ to the rights of others constitutes conduct warranting ‘condemnation and deterrence’ ...and could be sufficient to support an award of punitive damages.” Although recognizing that there was no evidence that Wal-Mart knowingly or intentionally violated the plaintiff’s rights, there was evidence that it had policies prohibiting harassment from which a jury could infer gender discrimination was not legally permitted. In addition, there was sufficient evidence of “reprehensible or recklessly indifferent conduct” because Wal-Mart refused to pay the plaintiff’s hourly pay differential, and fired her for a single infraction while male pharmacists were not investigated for similar or more serious infractions. Finally, the court held that the award of \$1 million in punitive damages was not excessive in light of the amount of compensatory damages.

### **Employer May Terminate Husband After Discharging Wife**

In *Pleau v. Centrix, Inc.*, No. 08-4895-Cv, 2009 WL 2603396 (2d Cir. Aug. 26, 2009), the United States Court of Appeals, Second Circuit, recently held that an employer has the right to terminate one of its employees when the employer believes that the employee can no longer perform his/her duties effectively after the termination of his/her spouse. In *Pleau*, the plaintiff, John Pleau, brought a claim against his employer, Centrix, Inc. (“Centrix”), for marital status discrimination under the Connecticut Fair Employment Practices Act (“CFEPA”), and age discrimination under both the Age Discrimination in Employment Act of 1967 (“ADEA”) and CFEPA. With respect to his marital status claim, the plaintiff alleged that the defendant’s reason for terminating him was tied to its unfair presumption that a married individual would not be able to separate the termination of his spouse, who worked for the same employer, from his responsibilities to his employer. After recognizing that no Connecticut case specifically addressed the viability of a marital status stereotyping claim, the court held that the employer’s decision “does not imply an unlawful stereotype about married individuals as compared with those who are single, divorced, or widowed.” As such, the court concluded the plaintiff’s marital status discrimination claim was without merit.

In addition, the court dismissed the plaintiff’s age discrimination claim. The basis of the plaintiff’s age discrimination claim was that he, his wife, and a number of other employees over the age of forty were either terminated or left Centrix during the period in question. The court began its analysis by affirming the district court’s holding that the plaintiff had met the “minimal” burden of proof for a *prima facie* case of age discrimination, but that the defendant offered a legitimate, non-discriminatory reason for the termination. More specifically, the defendant terminated the plaintiff because of its concern that he would no longer perform effectively after the termination of his wife. The court then held that there was insufficient evidence to support the conclusion that the plaintiff’s termination was motivated by age

discrimination. In doing so, the court rejected the plaintiff's use of statistical evidence because, aside from the termination of the plaintiff, his wife, and a third employee, there was no evidence regarding the circumstances under which the remaining employees over the age of forty left defendant's employ. Thus, the statistical evidence advanced by the plaintiff had little probative value.

### **Employers Not Required To Engage In Interactive Process Under The ADA Where No Accommodation Exists**

In *McBride v. BIC Consumer Products Manufacturing Co.*, No. 07-5689-cv, 2009 WL 3163218 (2d Cir. Oct. 5, 2009), the United States Court of Appeals, Second Circuit, recently held that "an employer's failure to engage in a sufficient interactive process does not form the basis of a claim under the [American Disabilities Act of 1990 ("ADA")] and evidence thereof does not allow a plaintiff to avoid summary judgment unless she also establishes that, as least with the aide of some accommodation, she was qualified for the position at issue." In *McBride*, the plaintiff alleged that BIC Consumer Products Manufacturing Co. ("BIC") violated the ADA by terminating her employment rather than reasonably accommodating her disability. The plaintiff, a utility operator in the cartridge assembly area of BIC's ink department, became ill and suffered from a respiratory ailment, as well as panic and anxiety attacks. After she was placed on medical leave, she began treatment under the care of a variety of medical and psychiatric practitioners. After nearly a year on medical leave, she was cleared to return to work with certain restrictions. The restrictions included, among others things, the "complete avoidance of chemical, solvent or ink fumes, as well as any other hydrocarbon fumes." Upon her return to work, the plaintiff's supervisor offered her a respirator to allow her to properly breathe while at the same time avoiding any of the fumes that were present at her prior position. The plaintiff, however, rejected the offer. Neither party discussed any additional accommodations and, approximately a month later, the plaintiff was terminated on the grounds that she refused to accept the defendant's proposed accommodation and failed to propose any alternative accommodation that would have allowed her to return to work.

Subsequently, the plaintiff filed an action against BIC alleging that it violated the ADA by failing to accommodate her. Through the course of discovery, the defendant revealed a variety of positions that were vacant at the time the plaintiff was terminated. However, nearly all of the positions required extensive experience in the field, proficiency in the use of particular software, or a college degree. In addition, each of the available secretarial positions required at least three years of experience. The only other available position, quality assurance technician, would have required the plaintiff to be exposed to chemical fumes, a situation that violated her medical restrictions. In light of these facts, the district court granted summary judgment in favor of the defendant because there was no accommodation that the defendant could have pursued to allow the plaintiff to continue her employment.

On appeal, the Second Circuit began by stating that "[o]ur only inquiry . . . concerns whether [the plaintiff] made a sufficient showing that, with a reasonable accommodation, she could perform the essential functions of the relevant job and that [the defendant] failed to make the

appropriate accommodations.” In concluding that the plaintiff failed to make such a showing, the court reasoned that the plaintiff “provided no evidence that there existed any potential accommodation that would have allowed her to continue to work, regardless of the form such an accommodation would have taken.” The court first recognized that the plaintiff failed to identify any accommodation that would have allowed her to perform the essential functions of her pre-disability position. In addition, the court noted that she also failed to identify a suitable position to which she could have been transferred. More specifically, the plaintiff “presented no evidence that, at or about the time of her termination, there existed a vacant position at BIC for which she was qualified and reassignment to which would not have involved her promotion.” Similarly, the court rejected the plaintiff’s argument that the defendant’s failure to engage in a sufficient interactive process should excuse her failure to identify an accommodation that would have allowed her to continue her employment. Although recognizing that the ADA imposes liability for a discriminatory refusal to undertake a feasible accommodation, the court concluded that liability is not imposed where, even if possible accommodations were explored, no accommodation existed. Thus, the court held that the defendant was not liable for failing to engage in a sufficient interactive process because the plaintiff presented no evidence that an accommodation was possible.

### **The Ninth Circuit Distinguishes Physical Tests From Medical Exams Under ADA**

In *Indergard v. Georgia-Pacific Corp.*, No. 08-35268, 2009 WL 3068162 (9th Cir. June 4, 2009), the plaintiff, a worker in Georgia Pacific Corporation’s (“GP”) mill facility, appealed the district court’s decision in favor of GP in her action for damages under the Americans with Disabilities Act (“ADA”). In *Indergard*, the plaintiff took medical leave to undergo surgery for work-related and non-work-related injuries to her knees. After her orthopedic surgeon authorized her to return to work, GP required her to undergo a physical capacity evaluation (“PCE”). In order to conduct the PCE, a physical therapist visited the GP facility and conducted a job analysis of the plaintiff’s prior position, Consumer Napkin Operator, and the position which she was entitled to under the collective bargaining agreement, Napkin Adjuster. Among the lifting requirements for the positions were a sixty-five pound lift and carry for the Consumer Napkin Operator position and a seventy-five pound lift for the Napkin Adjuster position. In light of these requirements, the physical therapist determined that the plaintiff’s injuries prevented him from conducting the PCE. Even after the plaintiff’s orthopedic surgeon removed the permanent restrictions and allowed her to undergo the PCE, she was unable to perform the lifting requirements and was informed that she could not return to either position. Because no other positions were available, she was terminated. After her termination, the plaintiff brought suit against the defendant and alleged, *inter alia*, that GP relied on the PCE to “remove and/or deny” her return to employment. In response, GP argued that the PCE was not a medical examination and, therefore, it did not violate the ADA. Further, it argued that even if the PCE was a medical exam, it was job-related and a business necessity which is expressly allowed by the ADA. The magistrate judge agreed with GP that the PCE was not a medical examination, a decision adopted by the district court.

In reviewing the district court's decision, the Court of Appeals began its analysis by recognizing that an employer may not require a current employee to undergo a medical examination unless it is shown to be job-related and consistent with business necessity. More specifically, employers are permitted to make inquiries or require medical examinations "when there is a need to determine whether the employee is still able to perform the essential function of his or her job." Using the *EEOC Enforcement Guidance* as a guidepost, the Ninth Circuit concluded that the PCE was a medical examination because the occupational therapist who conducted the PCE measured the plaintiff's heart rate and recorded an observation about her breathing after a treadmill test. In the court's opinion, "[m]easuring [the plaintiff's] heart rate and recording observations about her breathing and aerobic fitness ... was not only unnecessary to determine whether she could perform the task, but is also the kind of examination that the *EEOC Enforcement Guidance* identifies as inappropriate to include in a non-medical physical agility or fitness test." The court emphasized that the plaintiff's heart rate was taken before and after the treadmill test, and including the results in the report to GP was unnecessary for the purpose of determining whether the plaintiff was physically capable of performing her job duties. Further, after applying the seven factor test used by the EEOC Enforcement Guidance, the court concluded that the factors established that the PCE was a medical examination. The court then stated that "[t]he purpose of the PCE may very well have been to determine whether [the plaintiff] was capable of returning to work", but "[t]he substance of the PCE ... clearly sought 'information about [the plaintiff's] physical or mental impairments or health.'" As such, the Court of Appeals vacated the district court's decision and remanded the matter to determine whether the PCE was job related and consistent with business necessity.

### **Complaints Regarding Supervisor's Affair Are Not Protected Activity Under Title VII**

In *Anderson v. Oklahoma State University Board of Regents*, No. 08-6249, 2009 WL 2488158 (10th Cir. Aug. 17, 2009), the United States Court of Appeals, Tenth Circuit, held that preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination. In *Anderson*, the plaintiff complained to his employer that he believed his supervisor was having an affair with a female employee. He claimed that after he reported the affair he was not included in managerial meetings and felt excluded from involvement in department matters. Subsequently, the plaintiff was terminated as part of a reduction-in-force ("RIF"). After his termination, the plaintiff alleged that he was terminated from his employment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII").

The district court ruled that the plaintiff's action of complaining about his supervisor's affair and the alleged favoritism the supervisor showed to that employee was not protected opposition to discrimination under Title VII. In affirming the district court's decision, the Court of Appeals stated that "preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination." The court reasoned that "Title VII's reference to 'sex' means a class delineated by gender, rather than sexual affiliations." Therefore, the court concluded that the plaintiff's complaints about his supervisor's affair and favoritism did not constitute opposition to an employment practice made unlawful by Title VII.

## Higher Standard Of Proof Required To Establish ADEA Claim When Employee Is Terminated During RIF

In *Geiger v. Tower Automotive*, 579 F.3d 614 (6th Cir. 2009), the United States Court of Appeals, Sixth Circuit, reviewed the standard to evaluate Age Discrimination in Employment Act (“ADEA”) claims in light of the Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009). In *Geiger*, the plaintiff alleged that he was the victim of age discrimination after he was terminated as part of a reduction-in-force (“RIF”). The plaintiff, a Maintenance, Repair, and Operations Buyer (“MRO”), was terminated when his employer reduced the number of MRO positions from 21 to 6. Prior to the RIF, an MRO was assigned to a single facility. After the consolidation, each MRO was responsible for a geographic region.

In analyzing the plaintiff’s ADEA claim, the court looked to the recently decided *Gross* decision. The court concluded that “*Gross* overrules [Sixth Circuit] ADEA precedent to the extent that cases applied Title VII’s burden-shifting framework if the plaintiff produce[s] direct evidence of age discrimination.” Instead, in cases where direct evidence is involved, “the correct standard for ADEA claims [is] whether the plaintiff has proven ‘by a preponderance of the evidence ... that age was a ‘but-for’ cause of the alleged employer decision.’” After concluding that the plaintiff failed to present any direct evidence of age discrimination, the court then analyzed the plaintiff’s claim under the circumstantial evidence standard.

The court recognized that “the *McDonnell Douglas* framework can still be used to analyze ADEA claims based on circumstantial evidence.” In accord with the *McDonnell Douglas* framework, the court noted that the plaintiff had to establish, *inter alia*, that he was replaced by someone outside of the protected class. The court then concluded that the plaintiff had not actually been replaced. More specifically, the employee that was selected to perform the plaintiff’s duties had to perform her own duties in addition to the plaintiff’s duties. Moreover, the remainder of the plaintiff’s duties were absorbed by hourly employees. Thus, the RIF consolidated the plaintiff’s duties with employees who were already employed at Centrix.

Lastly, because the plaintiff’s termination occurred in the context of a RIF, the court stated that the plaintiff had to meet a “heightened standard” of proof to establish his *prima facie* case. Instead of the “minimal” standard usually applied, the plaintiff was required to provide “additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.” The court then held that the plaintiff had not met this burden because the record supported the defendant’s claim that it selected the better candidate for the position. Specifically, the employee selected had a better skill set for the position, interviewed more impressively, and performed well in her implementation of the company’s policies and procedures. Therefore, the preference of the candidate selected was not actionable because it was not motivated by discriminatory animus.

## **Defendant Established *Faragher/Ellerth* Defense With More Than Reasonable Action**

In *Roby v. CWI, Inc.*, 579 F.3d 779 (7th Cir. 2009), the Court of Appeals, Seventh Circuit, concluded that the defendant was protected from liability from the plaintiff's hostile work environment claim by the *Faragher/Ellerth* affirmative defenses. In *Roby*, the plaintiff, a cashier at the defendant's store, alleged that she was sexually harassed by her supervisor after he began making sexually suggestive remarks to her. At the time the defendant learned of the plaintiff's allegations, it promptly began investigating the matter. During the investigation, the interviewees were instructed that the investigation was confidential. In addition, while the investigation was conducted, the defendant attempted to rework the store schedule to ensure that at least one of the other managers would be in the store during all working hours to make the plaintiff feel more comfortable. However, given the small number of employees at the store, the defendant could not prevent the plaintiff and the harasser from sometimes having overlapping schedules.

At the conclusion of the investigation, the defendant found that the harasser's conduct did not rise to the level of unlawful harassment, but did find that his conduct was inappropriate and he received a three-page written warning and was required to undergo anti-harassment policy training. After her harasser was not terminated, the plaintiff requested that she never be scheduled to work at the same time as him. As stated above, her request could not be accommodated because of the store's small size. After going on leave, the plaintiff never returned to work and never informed the defendant that she did not want to work there anymore. Subsequently, she filed a claim against the defendant alleging that she was sexually harassed.

On appeal from the district court's grant of summary judgment in favor of the defendant, the court began its analysis by determining whether a tangible employment action occurred. This inquiry was necessary because the defendant would be entitled to assert the *Faragher/Ellerth* affirmative defense if no tangible employment action occurred. More specifically, the defendant would be free of liability if it could demonstrate that it exercised reasonable care to prevent and correct any harassing behavior, and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities to avoid harm. In rejecting the plaintiff's claim that a tangible employment action occurred because she was terminated, the court noted that the plaintiff was merely put on leave and was supposed to make arrangements to return to work. Moreover, the defendant kept the plaintiff on the weekly schedule for several months. In the court's opinion, "[t]his [was] a far cry from termination." Alternatively, the plaintiff alleged that she was constructively discharged. The court, however, disagreed and held that there was insufficient evidence of constructive discharge. The court reasoned that the plaintiff had not presented any evidence indicating that her working conditions were so intolerable that she had to quit. The court pointed out that the plaintiff presented no evidence of threats to her or her employment "that would lead a reasonable person to believe that she needed to quit her job to protect herself." As such, the defendant was entitled to raise the *Faragher/Ellerth* affirmative defense.

The court began its analysis of the defendant's affirmative defense by first concluding that the defendant presented evidence demonstrating it exercised reasonable care to prevent the harasser's conduct. Specifically, the defendant performed an investigation, instructed interviewees that the information was confidential, fired an employee who breached the

confidentiality, and disciplined the harasser by issuing him a written reprimand and ordering him to attend education and retraining classes. In addition, the defendant attempted to rework the schedule so that another supervisor would be present and minimize the plaintiff's shifts with the harasser, even allowing the plaintiff to skip a shift and take time off. The court concluded that "[a]ll of these steps were more than reasonable attempts to correct the problem." Finally, in holding that the defendant demonstrated that the plaintiff failed to take advantage of the corrective opportunities, the court reasoned that the plaintiff was aware of the harassment policy and failed to immediately report the harassing conduct for at least five months. Based on these facts, the court held that no rational jury could conclude that the plaintiff's actions were reasonable.