

MassDLA

Newsletter
December 2011



Message from the President: Anthony J. Sbarra, Jr.



Attacking the Judiciary - Transcending Politics

The Massachusetts Defense Lawyers Association is not political at all. That is how it should be. These notes are not intended to change that, nor are they intended to praise or criticize a political party in general or a candidate specifically. That being said, sentiments expressed on the national stage recently cannot go without comment.

While sitting in an Atlanta hotel room late last Thursday night, I watched a rerun of the Republican Presidential Debate which had taken place in Iowa earlier that evening. I confess to being a fan of all political debates; I watch most of them irrespective of whether they feature Republican or Democratic candidates.

In This Issue

Message from the President

Article by Mike P. Sams &
Kimberly A. Alley

Article by Peter F. Herzog

Blast from the Past!

Brown Bag Lunch Seminar

Directors 2011-12

MassDLA Past Presidents

MassDLA Defense Lawyers
of the Year

Join a Committee!

Upcoming Events:

1.18.2012

Brown Bag Lunch

Noon

@ Morrison Mahoney LLP

see more info below

2.09.2012

Winter Social

5:30 - 8:00

@ BC Club

VISIT THE NEW
SITE! www.MASSDLA.org

The debate moved along rather uneventfully at first. We have all heard most of the questions and answers already. I expected the rest of the debate to follow suit and prepared to go to sleep. Then the debate took an unexpected and disturbing turn (the network had promised "unexpected" questions).

A panel member began questioning former Speaker Newt Gingrich about the state of the federal judiciary. She wanted him to explain his plan to grant subpoena power to members of Congress. She was not asking about the power to subpoena witnesses, rather, she was focused on Mr. Gingrich's idea that Congress should now be in the business of issuing subpoenas to federal judges. The purpose of this new type of congressional inquiry is, per Mr. Gingrich, to question these judges about decisions that he and like minded members of Congress do not like. As an aside, Mr. Gingrich has also advocated the elimination of the entire 9th Circuit Court of Appeals. The reason? He doesn't much like their opinions either.

The questioner prefaced her remarks by citing to prominent and conservative attorneys general who had commented negatively about these positions. For instance, former U.S. Attorney General Michael Mukasey, who served under President George W. Bush, called Gingrich's comments "dangerous, ridiculous, totally irresponsible, outrageous (and) off-the-wall."

Mr. Gingrich defended his ideas, urging that federal judges had become "legislators in dark robes." According to USA Today, he has further stated that as president, he would reserve the right "to ignore any Supreme Court decision he disputed." During the debate, needless to say, the familiar concept of an independent judiciary was not part of his defense. Instead, his reply was "[a]s a historian, I may understand this better than lawyers."

Far more distressing, however, was that no other candidate challenged his proposal for either the congressional subpoena plan or the destruction of one of our Courts of Appeals. Each candidate had the opportunity to defend the judiciary; not one did (Ron Paul did think that the subpoenas might run afoul of separation of powers concerns).

This is not a "conservative" or "liberal" issue. The country's judicial system is always under some criticism. Many times this is not only justified but required. The debate discussions were not, however, measured comments delivered in a thoughtful manner. Gingrich's opinions were all but ignored, with no other candidate taking the risk to challenge them. No one stated that these views are an affront to all who value justice and the rule of law, let alone the necessity of an independent judiciary. As lawyers, we need to do so.

**MassDLA President
Tony Sbarra
Hermes, Netburn, O'Connor & Spearing, P.C.**

265 Franklin Street

**Boston, MA 02110
asbarra@hermesnetburn.com
(617) 210-7755**



~ This Month's Article #1~

**Bite Your Tongue When It Comes To The Company Your
Employees Keep
Employer Liability For "Associational" Discrimination**

**By Michael P. Sams and Kimberly A. Alley
Kenny & Sams, P. C.
45 School Street
Boston, MA 02108**

Offensive bosses beware! A Caucasian employer's use of egregious racial slurs toward a Caucasian employee recently prompted the Massachusetts Commission Against Discrimination ("MCAD") to issue a decision which opens the gates for employment discrimination claims by employees who ordinarily lack protected class standing to assert a discrimination claim. In *Grzych v. American Reclamation Corp.*, the MCAD recognized a Caucasian employee's right to assert an "associational" race discrimination claim based on his relationship with his African American fiancé.

In *Grzych*, the MCAD ordered a construction company owner to pay damages and the maximum allowable civil penalty for a slew of derogatory comments made to a Caucasian employee based on his engagement to a member of a recognized protected class. Although the comments at issue were incredibly offensive, a Caucasian individual's right to file suit and collect damages in such an instance had not been

previously recognized in the employment context. Specifically, the construction company respondent and its offensive owner were ordered to pay a total of \$60,000 after he called his Caucasian employee a "n***** lover" and "fat n*****," among other racially offensive names. The employer did not deny the statements. Instead, he offered evidence that he loaned the employee money in an effort to negate any offensive intent behind the comments and suggest that these comments were without malice and part of ordinary construction work banter. The offended employee disagreed, and so did the MCAD.

Relying on two prior MCAD decisions acknowledging associational discrimination in a 1982 religion bias case and 1996 housing matter, as well as on decisions from two other jurisdictions, the MCAD determined that the employee's relationship with his Jamaican fiancé constituted a sufficient basis to allow him to pursue a discrimination charge as a member of a protected class under an "associational" discrimination theory. This satisfied the first prong of the employee's racial harassment claim. Successfully proving an employment racial discrimination claim requires evidence that: 1) the employee was a member of a protected class, 2) the employee was the target of speech or conduct based on his membership in the protected class, 3) the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and 4) the harassment was carried out by one with a supervisory relationship to the employee. The first "standing" element traditionally poses a very difficult hurdle for the claimant in a race discrimination claim between same race parties. However, MCAD's recognition of "associational" discrimination eliminates this obstacle.

The Grzych conclusion extends well beyond the severe facts of that case. It effectively lowers the bar for employees asserting discrimination claims by recognizing claimant standing despite the absence of actual gender, racial, religious, sexual orientation or other diversity between the parties. Although this form of discrimination has not been recognized by the Commonwealth's courts, this decision brings judicial recognition of "associational" discrimination one step closer.

Work place banter offers employees a ripe opportunity to assert "associational" employment discrimination claims. Minimize your exposure to liability and bite your tongue about the company your employees keep. Not only might your comments be offensive - they now may be actionable.

~ This Month's Article #2~

The District of Massachusetts Limits Applicability Of Peer Review Privilege

by Peter F. Herzog

Introduction

The Commonwealth of Massachusetts, under G. L. c. 111 § 204(a), recognizes a medical peer review privilege by which "the proceedings, reports and records of a medical peer review committee shall be confidential and . . . shall not be subject to subpoena or discovery, or introduced into evidence, in any judicial or administrative proceeding. Health care providers routinely rely on this privilege to protect from disclosure physician performance evaluations and other documents otherwise discoverable in judicial and administrative proceedings. On July 15, 2011, the U.S. District Court for the District of Massachusetts ruled in *Gargiulo v. Baystate Health Inc., et al.* (Case No. 11-CV-30017, U.S.M.J. Kenneth P. Neiman) that the medical peer review privilege did not protect from disclosure the performance records of a surgical resident and her similarly situated peers in a federal anti-discrimination lawsuit brought against a health care provider.

Background

Baystate Health, Inc. and Baystate Medical Center, Inc. (collectively "Baystate") employed Dr. Debra Gargiulo as a surgical resident beginning in 2005. Dr. Gargiulo initially received positive performance reviews; however, her reviews became progressively worse after two years in the program. In early 2008, Dr. Gargiulo took a medical leave of absence due to apparent post-traumatic stress disorder, and was told she could return to Baystate only on a remediation plan. Approximately one year later, Baystate informed Dr. Gargiulo that she could not return to complete her residency. Due to Baystate's actions, Dr. Gargiulo filed suit in the U.S. District Court for the District of Massachusetts under diversity jurisdiction, given that Baystate is a Massachusetts resident, and Dr. Gargiulo is an Ohio resident. She alleged state law age and disability discrimination claims, as well as federal law claims under the Americans with Disabilities Act and Age Discrimination in Employment Act.

Dr. Gargiulo moved the court to compel Baystate to produce her records, performance evaluations and reports, as well as those of her similarly situated peers. Baystate opposed the production on the grounds that (i) Massachusetts peer review privilege protected the requested documents from disclosure, and (ii) in the alternative, the court should recognize a federal common law peer review privilege. Dr. Gargiulo argued that Baystate should produce her performance evaluations because the medical peer review privilege does not apply in the context of federal discrimination claims.

Discussion

The Choice of Law Issue

Under Federal Rule of Evidence 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Thus, the court first explored whether federal or state privilege law applied to Dr. Gargiulo's claim for the performance evaluations. Baystate contended that the court should apply state privilege law, pursuant to *Gill v. Gulfstream Park Racing Ass'n, Inc.*, 399 F.3d 391, 401 (1st Cir. 2005), because the court exercised diversity jurisdiction over Dr. Gargiulo's suit.

The court rejected Baystate's argument, noting that Dr. Gargiulo also brought substantive federal claims under the Americans with Disabilities Act and Age Discrimination in Employment Act. The court found that, in addition to diversity jurisdiction, Dr. Gargiulo's claims satisfied federal question jurisdiction. Thus, "the court [was] disinclined to promote form over substance in order to address the present dispute," and it ruled that any privilege would be governed by federal law, pursuant to FRE 501. In finding that federal law controlled, the court relied on the rule that "when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule." Having resolved this threshold issue, the court next turned to Baystate's argument that it should adopt

a federal common law peer review privilege.

The Court Rejects A Federal Peer Review Privilege

The court rejected Baystate's argument that it adopt a federal common law peer review privilege in this case. First, it noted that neither the First Circuit nor the District of Massachusetts had ever adopted such a privilege. Second, the court looked to the First Circuit's two-prong test, articulated in *In re. Hampers*, 651 F.2d 19, 22 (1st Cir. 1981), to determine whether to recognize a state privilege under federal common law.

The first prong of *Hampers* required the court to determine whether Massachusetts recognizes such a privilege. The court assumed, *arguendo*, that Massachusetts courts would recognize the peer review privilege in this case. Thus, the court turned to the second prong, which requires the court to determine whether the state's asserted privilege is "inherently meritorious." The court found that the privilege was not inherently meritorious because the federal interest in promoting disclosure of evidence in discrimination cases outweighed the state interest in promoting candor in the medical review process. It reasoned that:

- the few federal courts recognizing such a privilege have done so only in the context of medical malpractice claims;
- the Supreme Court has cautioned courts against recognizing privileges broadly; thus, extending the privilege beyond medical malpractice claims would "cut too broad a swath";
- Congress did not specifically create an evidentiary rule protecting peer review documents;
- there exists a strong federal interest in fighting discrimination.

Based on these issues, the court concluded that "[w]hile it is important to promote candor and confidentiality in the review process . . . the privilege ought not be used as a shield against violations of federal discrimination law."

Accordingly, the court ordered Baystate to produce the performance evaluations to Dr. Gargiulo.

Implications For The Future

Gargiulo will impact future employment discrimination cases in a medical context. First, plaintiffs in these cases will now be sure to include federal law claims in any lawsuit brought against an employer health care provider. Second, the decision encourages forum shopping, as these plaintiffs will make every effort to bring suit in federal court to compel disclosure of materials otherwise protected under state law peer review privilege. This ruling,

however, does not completely erode the purpose of the medical peer review privilege. The Gargiulo court expressly limited the application of this rule to discrimination cases, and recognized that the peer review privilege continues to protect such information from disclosure in the context of medical malpractice claims.

Hospitals and medical staff should be aware of the Gargiulo decision, and recognize that federal courts may grant employees discovery of peer review records in federal discrimination claims.



Blast from the Past!

In a new section of our newsletter, we are celebrating our past. Attached is a copy of our "Issue Update" from March 1998 which includes notes from

Past President John J. Ryan, Jr. and an article on the discoverability of an insurer's claim file by Christopher G. Betke and Jonathan D. Sweet.

[CLICK HERE](#) for MDLA ISSUE UPDATE March 1998



**MassDLA's Associates Division
invites you to attend**

BROWN BAG LUNCH SEMINAR

Taking a Deposition: Tips, Tricks and Tools of the Trade

Presented by the MassDLA Associate's Division

Presenters: Noel Dumas and Rebecca Dalpe

January 18, 2012
12:00
at the law offices of
Morrison Mahoney, LLP
250 Summer Street
Boston, MA

This is a brown-bag-lunch event.
Please bring your lunch and a colleague!
This event is complimentary for MassDLA members and MassDLA member
firms.

Contact Javier Flores at jflores@cmjlaw.com
to register and for more information.



Officers 2011-2012

President

Anthony J. Sbarra, Jr.
Hermes, Netburn, O'Connor & Spearing, P.C.

President Elect

Michael Sams
Kenney & Sams, P.C.

Secretary

Martin Rooney
Curley & Curley P.C.

Treasurer

Janet Pezzulich
LECLAIR RYAN

Immediate Past President

Holly M. Polglase
Hermes, Netburn, O'Connor & Spearing, P.C.

**DRI State Representative
Emily Coughlin
Coughlin Betke LLP**



Directors 2010-2011

**Chad Brouillard
Foster & Eldridge LLP**

**John P. Connelly
Hinckley, Allen & Snyder LLP**

**Brian Cullen
Law Office of Thomas M. Niarchos**

**Javier F. Flores
Cooley Manion Jones LLP**

**Grace Garcia, Esq.
Morrison, Mahoney LLP**

**Christopher Long
Murphy and Riley**

**Scott Machanic
Cunningham Machanic Cetlin Johnson & Harney**

**Matthew Moschella
Sherin & Lodgen, LLP**

**Denise Murphy
Rubin and Rudman LLP**

**Steven O'Brien
Long & Leahy**

**Janet Pezzulich
LeClair Ryan**

**Michael Riseberg
Adler Pollock & Sheehan P.C.**

**Martin Rooney
Curley & Curley**

**Jeff Rotella
Adler Pollock & Sheehan P.C.**

**Michelle Schaffer
Campbell Campbell Edwards & Conroy**

**Craig Waksler
McGivney & Kluger**

Directors 2011-2012

**Chad Brouillard
Foster & Eldridge LLP**

**John Connelly
Hinckley Allen & Snyder LL**

**Brian Cullen
Law Office of Thomas M. Niarchos**

**Javier F. Flores
Cooley Manion Jones LLP**

**Grace Garcia, Esq.
Morrison, Mahoney LLP**

**Christopher Long
Murphy and Riley**

**Scott Machanic
Cunningham Machanic Cetlin Johnson & Harney**

**Matthew Moschella
Sherin & Lodgen, LLP**

Mark W. Murphy, Esq.
Langlois, Wilkins, Furtado & Metcalf, P.C.

Steven O'Brien
Long & Leahy

Janet Pezzulich
LeClair Ryan

Michael Riseberg
Adler Pollock & Sheehan P.C.

Martin Rooney
Curley & Curley

Jeff Rotella
Adler Pollock & Sheehan P.C.



MassDLA PAST PRESIDENTS

2010 - 2011
Holly M. Polglase
Hermes, Netburn, O'Connor & Spearing, P.C.

2009-2010
Emily G. Coughlin
Coughlin & Betke, LLP

2008-2009
Mark W. Murphy
Litchfield Cavo

2007-2008
Susan Donnelly Murphy
Murphy & Riley, P.C.

2006-2007
Christopher A. Kenney

Kenney & Sams, P.C.

2005-2006

**Michael Giunta
Leclair Ryan**

2004-2005

**J. Kenneth Griffin
Griffin & Goulka**

2003-2004

**Eileen P. Kavanagh
Litchfield Cavo**

2002-2003

**Barbara Hayes Buell
Smith & Duggan, LLP**

2001-2002

**Robert A. Curley, Jr.
Curley & Curley, P.C.**

2000-2001

**Brian P. Voke
Campbell, Campbell, Edwards
& Conroy, P.C.**

1999-2000

**Christopher A. Duggan
Smith & Duggan**

1998-1999

**Paul P. O'Connor
Milton, Laurence & Dixon**

1997-1998

**John J. Ryan, Jr.
Ryan, Coughlin & Betke, LLP**

1996-1997

**Francis J. Lynch, III
Lynch & Lynch**

1995-1996

**Patricia Angell Barbalunga
Moriarty, Donoghue &
Leja, P.C.**

1994-1995

**Daniel J. Griffin, Jr.
Martin, Magnuson, McCarthy
& Kenney**

1993-1994

**James M. Campbell
Campbell, Campbell, Edwards
& Conroy, P.C.**

1992-1993

**Thomas E. Peisch
Conn, Kavanaugh, Rosenthal,
Peisch & Ford, LLP**

1991-1992

**Lee Stephen McPhee
Morrison Mahoney, LLP**

1990-1991

**Peter J. Black
Meehan, Boyle, Black &
Fitzgerald, P.C.**

1989-1990

**Scott J. Tucker
Tucker, Heifetz & Satzman,
LLP**



**MassDLA DEFENSE LAWYERS OF
THE YEAR**

2011
Thomas Federico
2010
Scott Tucker
2009
Donald W. Goodrich
2008
J. Kenneth Griffin
2007
John J. Ryan, Jr.
2006
John S. Donovan, Jr.
2005
John P. Ryan
2004
Robert A. Curley
2003
Francis J. Lynch
2002
Patricia A. Barbalunga
2001
Richard P. Campbell
1998
John P. Fitzgerald
1997
William J. Dailey
1995
Raymond J. Kenney, Jr.
1994
John A. Wickstrom
1993
Lee Stephen MacPhee



Join a Committee!

Contact a Committee Chair to join...

Insurance and Bad Faith Law _Michael Riseberg
mriseberg@apslaw.com

Construction Law
Grace Garcia
GGarcia@morrisonmahoney.com

Employment Law _Co-chairs:
Daniel Blake
daniel.blake@leclairryan.com
Janet Pezzulich
janet.pezzulich@leclairryan.com

Products Liability
Holly Polglase
hpolglase@hermesnetburn.com

Professional Liability Law
Christopher Betke
cbetke@coughlinbetke.com

