

*South Shore Chamber of Commerce*

**Overview of Developments  
In Employment Law 2009-2010**

*March 4, 2010  
Marriott Quincy  
Presented by  
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## Overview

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- II. Gender Discrimination
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## Overview

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# I. AGE DISCRIMINATION

## Age Discrimination

### **Gross v. FBL Financial Services, 129 S. Ct. 2343 (June 18, 2009).**

A plaintiff claiming disparate treatment under the ADEA must establish by a preponderance of evidence that age was the “but-for” cause of the adverse employment action challenged. Even when a plaintiff has produced some evidence that age was one motivating factor in an employer’s decision; the burden of persuasion does not shift to the employer to show that it would have taken the same action regardless of age.

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## Age Discrimination

### **Gross v. FBL Financial Services, 129 S. Ct. 2343 (June 18, 2009).**

- A male employee claimed that his reassignment at age 54 to a different position and the transfer of many of his responsibilities to a new position created for a woman in her early 40s violated the ADEA
- At trial, he presented evidence suggesting that the company was motivated at least in part by his age.
- The company maintained that the reassignment was part of a larger corporate restructuring and his new assignment was better suited to his skills.

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## Age Discrimination

### **Gross v. FBL Financial Services, 129 S. Ct. 2343 (June 18, 2009).**

- The trial court instructed the jury that age was a motivating factor if it “played a part or a role” in the demotion decision.
- The Eighth Circuit held that a new trial was required because the trial court failed to properly instruct the jury about the *Price Waterhouse* burden-shifting standard for mixed-motive cases.

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## Age Discrimination

### **Gross v. FBL Financial Services, 129 S. Ct. 2343 (June 18, 2009).**

- He needed to show direct evidence that “an illegitimate criterion actually motivated the adverse employment action” in order to shift the burden to the employer to show that “it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor.”

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## Age Discrimination

### **Gross v. FBL Financial Services, 129 S. Ct. 2343 (June 18, 2009).**

- The Supreme Court held that, unlike Title VII of the 1964 Civil Rights Act, the ADEA does not specifically provide that an employee may prove discrimination by showing simply that age was a motivating factor.
- Congress “neglected to add such a provision to the ADEA” when it amended Title VII in 1991 to add Section 2000e-2(m).
- The ADEA prohibits employment discrimination “because of” the individual's age which means “by reason of” or “on account of”.

## Age Discrimination

### **14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (April 1, 2009).**

A collective bargaining agreement (CBA) that clearly and unmistakably waives the employees' right to sue under the Age Discrimination in Employment Act (ADEA) is enforceable.

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## Age Discrimination

### **14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (April 1, 2009).**

- A collective bargaining agreement between the union and a multiemployer bargaining association provided that all claims of discrimination were subject to arbitration under the bargaining agreement “as the sole and exclusive remedy for violations”.
- After workers filed an ADEA claim, the company filed a motion to compel arbitration citing the provision in the contract.

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## Age Discrimination

### **14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (April 1, 2009).**

- The Second Circuit held that “a union-mandated arbitration agreement purporting to waive a covered worker's rights to a federal forum with respect to statutory rights is unenforceable”.
- The Supreme Court held that a collective bargaining agreement that “clearly and unmistakably” requires employees to arbitrate claims under the Age Discrimination in Employment Act is enforceable as a matter of federal law.

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## Age Discrimination

### **14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (April 1, 2009).**

- The “broad sweep” of the National Labor Relations Act makes collective bargaining agreements and arbitration provisions enforceable, and nothing in the text of the ADEA prohibits arbitration of discrimination claims.

## Age Discrimination

### **Velez v. Thermo King de Puerto Rico, Inc. 585 F.3d 441 (1st Cir. 2009).**

The McDonnell Douglas burden-shifting paradigm for analyzing claims based on indirect evidence still applies under the Age Discrimination in Employment Act. The First Circuit reinstated an ADEA suit by a former manufacturing company employee who was fired at age 56 for alleged misconduct.

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## Age Discrimination

### **Velez v. Thermo King de Puerto Rico, Inc. 585 F.3d 441 (1st Cir. 2009).**

There existed an issue for the jury as to whether the Company's asserted nondiscriminatory reasons for firing him—unauthorized receipt of gifts from suppliers and alleged theft and sale of company property—were pretexts for age discrimination. Evidence of the Company's shifting explanations for firing the employee and the fact that younger workers were not fired for comparable misconduct created a triable issue that the company was motivated by the plaintiff's age.

## Age Discrimination

### **Correa-Ruiz v. Fortuno, 573 F.3d 1 (1st Cir. 2009).**

A Puerto Rico law requiring police officers to retire at age 55 provided they had completed 30 years of service did not violate the Age Discrimination in Employment Act or the U.S. Constitution's due process clause. The law which resulted in the forced retirement of more than 23 former police officer plaintiffs, fell within an exemption to the ADEA allowing state and local governments to set mandatory retirement ages for public safety officers. The ADEA's 1996 amendment expressly permits a state or locality "to enact laws lowering the mandatory requirement age for police officers and firefighters... so long as they complied with the requirements set out in the amendment."

## II. GENDER DISCRIMINATION

## Gender Discrimination

### **Haddad v. Walmart 455 Mass. 91 (2009).**

Punitive damages in discrimination cases can only be awarded for "egregious" behavior. A punitive damage award requires a heightened standard beyond mere liability and a knowing violation of the statute. These damages are only granted where the defendant's conduct is so outrageous that it warrants punishment, not just compensation.

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## Gender Discrimination

### **Haddad v. Walmart 455 Mass. 91 (2009).**

- Cynthia Haddad worked at Wal-Mart for 10 years as a pharmacist and had received consistently excellent evaluations. She also worked as an acting pharmacy manager for 13 months prior to her April 2004 firing.
- Haddad complained during her tenure as acting pharmacy manager that she was paid less per hour than male pharmacy managers and that she had been denied approximately \$7,000 in bonuses paid to male managers.

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## Gender Discrimination

### **Haddad v. Walmart 455 Mass. 91 (2009).**

- Wal-Mart paid Haddad the requested bonus but fired her one day later, claiming she had violated company rules nearly two years earlier by leaving a pharmacy technician unsupervised while she took a break. The pharmacy technician admitted to falsifying a prescription during Haddad's absence.
- Haddad sued the company alleging it had discriminated against her because of her sex with respect to wages and then fired her in retaliation for complaining of the pay disparity.

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## Gender Discrimination

### **Haddad v. Walmart 455 Mass. 91 (2009).**

- A jury awarded Haddad \$972,774 in compensatory damages and \$1 million in punitive damages; the trial court vacated the punitive damages award but denied Wal-Mart's request for a new trial or for a reduced award.
- The Supreme Judicial Court held that Cynthia Haddad had shown sufficient evidence of Wal-Mart's egregious and outrageous conduct to support the \$1 million award and rejected the company's contention that the punitive damages award was excessive.

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## Gender Discrimination

### **Haddad v. Walmart 455 Mass. 91 (2009).**

- Haddad showed that she was appointed as acting pharmacy manager to facilitate the hiring of an unlicensed male pharmacist who, despite being under criminal investigation for narcotics losses, was paid more than Haddad.
- In addition, Haddad's evidence of Wal-Mart's refusal to pay her the hourly pay differential it paid male pharmacists and that it had fired her after a “sham” investigation for a single infraction when male pharmacists were neither investigated nor disciplined for similar infractions, was “reprehensible or recklessly indifferent conduct” sufficient to support the punitive damages award.

## Gender Discrimination

### **Chadwick v. Wellpoint, Inc., 561 F.3d 38 (1st Cir. 2009).**

- Supervisor remarks to a working mother with young children about her childcare responsibilities and subsequent failure to promote enable a reasonable jury to find that she was not selected for a promotion based on societal stereotypes about women, work, and child care.

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## Gender Discrimination

### **Chadwick v. Wellpoint, Inc., 561 F.3d 38 (1st Cir. 2009).**

- If the work performance of an employee actually suffers due to any personal obligation or interest, the employer is free to respond accordingly.
- However, the employer cannot make assumptions about such responsibilities on the basis of gender.

## Gender Discrimination

### **Fantini v. Salem State College, et al., 557 F.3d 22 (1st Cir. 2009).**

There is no individual employee liability under Title VII. Although Title VII includes “any agent of such person” in the definition of employer, it is inconceivable that Congress intended for such agents to be subject to liability for engaging in the proscribed discriminatory acts where it has also limited such liability solely to employers with fifteen or more employees.

### III. PREGNANCY DISCRIMINATION

### Pregnancy Discrimination

#### **AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (May 18, 2009).**

A pension plan, which bases calculations on a bona fide seniority system, and which treats pregnancy leave, taken before the addition of the Pregnancy Discrimination Act (PDA) to Title VII, differently than other kinds of medical leave, does not amount to sex and pregnancy discrimination under Title VII because the PDA does not apply retroactively.

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## Pregnancy Discrimination

### **AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (May 18, 2009).**

- Former employees of AT&T took pregnancy leave before the PDA was added to Title VII
- Under the company's policy, they were granted a maximum 30 days of service credit while employees on leave for other temporary disabilities received full service credit.

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## Pregnancy Discrimination

### **AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (May 18, 2009).**

- AT&T's policy of granting limited service credit for pregnancy leave was lawful prior to the April 1979 effective date of the Pregnancy Discrimination Act (PDA), which amended Title VII to provide that pregnancy bias is unlawful sex discrimination; however, AT&T subsequently changed its policy to give full service credit for pregnancy leaves.
- AT&T calculated the women's pensions based on their altered seniority dates, never restoring the service credit they had lost because of pregnancy leaves.

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## Pregnancy Discrimination

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### **AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (May 18, 2009).**

- The Supreme Court found that because AT&T's pension payments accorded with a bona fide seniority system's terms, they were not unlawful under Title VII § 703(h).
- Nothing in the PDA required AT&T to retroactively grant service credit to employees who had taken pregnancy leave under the company's previous policy.

## IV. SEXUAL HARASSMENT

## Sexual Harassment

### **Dahms v. Cognex Corp., 455 Mass. 190 (2009).**

In a sexual harassment case, evidence of a plaintiff's dress and conduct is not admissible per se, but a judge may allow such evidence where the probative value of it outweighs the prejudice. Evidence of a plaintiff's dress, speech, and conduct was relevant in her state law sexual harassment case against her employer because it was probative of whether she was subjectively offended by her work environment or by her supervisor's conduct and was not admitted as character evidence; and her attorney raised the issues during opening statements and while questioning the company's chief executive officer.

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## Sexual Harassment

### **Dahms v. Cognex Corp., 455 Mass. 190 (2009).**

- Dahms sued for quid pro quo and hostile environment harassment, retaliation, assault, battery, and intentional infliction of emotional distress.
- She claimed her supervisor sexually harassed her and the employer failed to properly investigate or end the harassment and retaliated when she complained.
- She alleged the supervisor with whom she was friendly, and sometimes drove to work, tried to force his way into her hotel room during a business trip to Japan and more than once referenced the influence he had over her pay and promotions.

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## Sexual Harassment

### **Dahms v. Cognex Corp., 455 Mass. 190 (2009).**

- She also alleged that the CEO of the company blamed her for the harassment, telling her, “You're partially at fault for this. You dress provocatively. You turn men on.”
- The judge rejected Dahms's motion to exclude evidence pertaining to her alleged “sexual behavior, general sexual predisposition, and ‘wild' nature” and admitted proof regarding her manner of dress, speech, and conduct.
- The judge agreed to a proposed hostile environment instruction that Dahms could not prevail if she was “a willing and active participant in the conduct of which she complains.”

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## Sexual Harassment

### **Dahms v. Cognex Corp., 455 Mass. 190 (2009).**

- In assessing whether a hostile work environment has been established, it is necessary to consider the totality of the circumstances. “By claiming that she had been unwillingly subjected to such an environment, Dahms made relevant her own behavior in the workplace and with coworkers.”
- Proof relating to “Dahms's language, apparel, and conduct,” as described by Cognex employees, “was probative of whether she was subjectively offended by her work environment.”

## Sexual Harassment

### **Visnick v. Caulfield, 73 Mass. App. Ct. 809 (2009).**

Where (1) a former employee wrote a letter to her former employer claiming that her former supervisor, had sexually harassed her and (2) after her subsequent EEOC proceeding was settled through mediation, the former employee was sued by her former supervisor over comments made by her in the letter and during the administrative proceeding, the complaint should have been dismissed on the ground that the former employee's statements were not actionable because of the absolute litigation privilege. As long as a litigant's statements are made in good faith, the law protects them from liability.

## Sexual Harassment

### **Astra USA, Inc. v. Bildman et al., 455 Mass. 116 (2009).**

A former executive of a Massachusetts-based company, who was fired for his widespread and pervasive sexual harassment of female employees, had to forfeit \$6.8 million in salary and bonuses he earned during the period of his misconduct. The law of New York, where the company was incorporated, required the disloyal employee to forfeit his compensation even if he otherwise performed valuable services for the principal.

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## Sexual Harassment

### **Astra USA, Inc. v. Bildman et al., 455 Mass. 116 (2009).**

- Bildman, a chief executive of a Massachusetts-based pharmaceutical company, was terminated in 1996 after allegations of widespread and pervasive sexual harassment of female employees by senior management became public.
- Astra USA, headquartered in Westborough, Mass, was a subsidiary of AstraZeneca PLC, a New York corporation.

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## Sexual Harassment

### **Astra USA, Inc. v. Bildman et al., 455 Mass. 116 (2009).**

- Astra USA signed a consent decree with the Equal Employment Opportunity Commission, agreeing to pay \$9.85 million to an estimated 80 employees who were harassed or pressured to cover up harassment.
- Bildman was also accused of serious financial and other improprieties; he pled guilty in 1998 to three counts of filing false federal tax returns, while charges of fraud and conspiracy were dismissed.

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## Sexual Harassment

### **Astra USA, Inc. v. Bildman et al., 455 Mass. 116 (2009).**

- In 2002, a New York state court concluded that New York state law governed the issue of forfeiture but that Astra was not entitled to recover any money because the total of Bildman's compensation did not exceed the value of his benefit to the company through 1996.
- The SJC disagreed, finding that New York law required the disloyal employee to forfeit his compensation even if he otherwise performed valuable services for the principal.

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## Sexual Harassment

### **Astra USA, Inc. v. Bildman et al., 455 Mass. 116 (2009).**

- The court found that the lower court erred in deciding that the forfeiture did not apply to compensation already paid, in stating that the law generally applied only to low-level employees, and in reasoning that it was unfair in light of Bildman's substantial services to the company.
- The court found that reliance on Massachusetts equity law was misplaced, and that “Under Massachusetts law, the value of the disloyal employee's faithful service is determinative; under New York law, it is irrelevant.”

## Sexual Harassment

### **Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 554 F.3d 164 (1st Cir. 2009).**

A plaintiff's sexual harassment claim was not defeated by her failure to file a complaint with the company's HR department. The employer was liable for \$965,999, including punitive damages, because it failed to establish that a secretary in its human resources department unreasonably failed to report alleged sexual harassment.

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## Sexual Harassment

### **Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 554 F.3d 164 (1st Cir. 2009).**

A reasonable jury could conclude that her failure to report was based on "more than ordinary fear or embarrassment" and was therefore reasonable where there was a significant age difference between the harasser and the employee; and there was evidence that the person in HR to which the employee would have to report the harassment was friends with the harasser.

## V. SEXUAL ORIENTATION HARASSMENT

### Sexual Orientation Harassment

#### **Prowel v. Wise Business Forums, Inc., 579 F.3d 285 (3rd Cir. 2009).**

Although federal law does not prohibit sexual orientation harassment or discrimination, an “effeminate” gay male employee presented sufficient evidence of sex bias under a sex stereotyping theory for his Title VII claim to be submitted to a jury. The court held that a jury should decide if the co-workers' actions constituted gender stereotyping, which is unlawful under Title VII of the 1964 Civil Rights Act, rather than sexual orientation bias, which is not illegal under Title VII.

## VI. EQUAL PAY

### Equal Pay

#### **Mikula v. Allegheny County, 583 F.3d 181 (3rd Cir. 2009).**

The Third Circuit changed its previous position and held that an employee timely filed a claim for sex discrimination in pay in violation of Title VII of the 1964 Civil Rights Act, as amended by the Lilly Ledbetter Fair Pay Act. The court found that the employee's Title VII pay discrimination claim was timely as to paychecks she received after the 300 day period prior to her filing a charge with the Equal Employment Opportunity Commission, "if they reflect a 'periodic implementation' of a previously made intentionally discriminatory employment decision or 'other practice.'"

## VII. RACE DISCRIMINATION

### Race Discrimination

#### **Ricci v. DeStefano, 129 S. Ct. 2658 (June 29, 2009).**

A party facing a disparate-impact suit can avoid liability based on the strong basis in evidence that it would have been subject to disparate treatment liability had it acted otherwise; a mere showing of racially disparate impact is not a strong basis in evidence.

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## Race Discrimination

### **Ricci v. DeStefano, 129 S. Ct. 2658 (June 29, 2009).**

- The City of New Haven, Conn., administered an examination to determine which firefighters qualified for promotion to fill vacant lieutenant and captain positions.
- The results of the tests showed that white candidates had outperformed minority candidates, so the 8 vacant lieutenant positions, which were to be filled by the top 10 candidates, would all be filled by whites.

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## Race Discrimination

### **Ricci v. DeStefano, 129 S. Ct. 2658 (June 29, 2009).**

- Fearing lawsuits, the City threw out the results based on the statistical racial disparity.
- The plaintiffs were 17 white and 1 Hispanic firefighters who passed the test, but did not get promoted.
- The Court said an employer's fear of litigation by racial minorities cannot justify intentional race discrimination against white employees absent a “strong basis in evidence” for believing racial minorities could prevail on a “disparate impact” claim.

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## Race Discrimination

### **Ricci v. DeStefano, 129 S. Ct. 2658 (June 29, 2009).**

- Even though black firefighters were significantly less successful on the promotional exams at issue, New Haven could not show it would have been liable to minority firefighters under a disparate impact theory, the court decided, saying there was no evidence the test was not job-related or that a particular less discriminatory alternative was available.

## Race Discrimination

### **Augis v. MCAD, 75 Mass. App. Ct. 398 (2009).**

Where the Massachusetts Commission Against Discrimination found that an employer engaged in racial discrimination, a court order confirming the MCAD award should be affirmed where the employer has presented no substantive or procedural basis for reversal. The MCAD's interpretation of its own regulations should be respected if rational, and adhered to consistently.

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## Race Discrimination

### **Augis v. MCAD, 75 Mass. App. Ct. 398 (2009).**

- Hearing Officer could exclude supervisors testimony as a discovery sanction
- Employer could be liable based on a single incident of discrimination

## Race Discrimination

### **Windross v. Barton Protective Services, Inc., 586 F.3d 98 (1st Cir. 2009).**

An African American security officer who alleged that he was fired because of his race or color could not establish that the employer discriminated against him or offered a pretextual explanation for his discharge. The employee could not support his bias claims under a Massachusetts anti-discrimination law because much of the information he relied on was time-barred under Massachusetts General Laws ch. 151B.

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## Race Discrimination

### **Windross v. Barton Protective Services, Inc., 586 F.3d 98 (1st Cir. 2009).**

The Massachusetts statute he relied on required that a charge of discrimination be filed within 300 days of any act of discrimination, and any lawsuit based on the discrimination was to be filed within three years of its occurrence. The employee also failed to show that the employer's stated reason for his discharge—that he refused to meet with a company manager—was a pretext for unlawful discrimination.

## VIII. NATIONAL ORIGIN

## National Origin

### **Poon v. Massachusetts Institute of Technology, 74 Mass. App. Ct. 185 (2009).**

Where a scientist concentrating in the field of bioengineering, brought suit claiming the employer's failure to promote him was discriminatory based on his national origin, the employer was properly awarded summary judgment based on the employee's inability to show that the employer's stated reason for not promoting the employee was pretextual. The employee introduced evidence of inconsistent explanations and the application of a heightened, subjective standard to his application.

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## National Origin

### **Poon v. Massachusetts Institute of Technology, 74 Mass. App. Ct. 185 (2009).**

The court found a consistent theme to the employer's assertions: the employee must possess programmatic leadership qualities and thorough integration with the work of his unit, as well as extraordinary scientific stature. Therefore, the evidence was not sufficient to generate a genuine issue of false explanation by the employer. The finding of pretext would require a speculative leap well beyond the length of a reasonable inference.

## IX. RELIGIOUS DISCRIMINATION

### Religious Discrimination

#### **Abraham v. Woods Hole Oceanographic Institute, 553 F.3d 114 (1st Cir. 2009).**

Where a former employee argued that equitable tolling principles should have precluded a judgment for the employer, the court found no basis for reversal, as the employee failed to exercise diligence in meeting any of the filing deadlines for his religious discrimination claim. Before filing a Title VII claim, an employee must first exhaust administrative remedies, *i.e.*, filing of an administrative charge before the EEOC.

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## Religious Discrimination

### **Abraham v. Woods Hole Oceanographic Institute, 553 F.3d 114 (1st Cir. 2009).**

After filing the administrative complaint, the employee may sue in federal court only if the EEOC dismisses the administrative charge or if it does not bring a civil suit or enter into a conciliation agreement within 180 days of the filing of the administrative charge. The employee must wait for a right-to-sue letter, and then the employee has ninety (90) days to file a complaint in federal court.

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## Religious Discrimination

### **Abraham v. Woods Hole Oceanographic Institute, 553 F.3d 114 (1st Cir. 2009).**

The employee alleged he never received the EEOC First Dismissal Notice because before receiving said notice, he moved from Queens, New York to Lynchburg, Virginia and never filed a change of address with the EEOC. The court found that the employee's lack of diligence in filing a change of address with the EEOC as required was sufficient to reject his equitable tolling claim.

## X. DISABILITY DISCRIMINATION

### Disability Discrimination

#### **Rederford v. U.S. Airways, Inc., 589 F.3d 30 (1st Cir. 2009).**

The Americans with Disabilities Act claims of a former US Airways Inc. customer service representative were discharged in the airline's 2003 bankruptcy proceedings. An ADA cause of action is a "claim" covered by the federal bankruptcy code. Because front pay can be ordered as an alternative to reinstatement, the right to that remedy, like the other remedies, is within the jurisdiction of the bankruptcy court and is disallowed.

## Disability Discrimination

### **Thornton v. United Parcel Service, 587 F.3d 27 (1st Cir. 2009).**

A former employee failed to file charges relating to any alleged continuing acts of disability discrimination occurring after his 2001 discrimination charge with a state agency and which were not included in any subsequent charge. He had failed to exhaust all his administrative remedies, as required by the ADA, for any continuing acts of disability bias he alleged occurred after he had filed his charge with the Massachusetts Commission Against Discrimination (MCAD).

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## Disability Discrimination

### **Thornton v. United Parcel Service, 587 F.3d 27 (1st Cir. 2009).**

He also had failed to show either that he was disabled or that he had experienced an adverse employment action on his remaining ADA claims. The “scope of the investigation” rule, although it allows claims to be brought if they would reasonably have been uncovered during an administrative investigation, does not “provide a plaintiff with an unlimited license to extend his claim endlessly beyond the bounds and parameters” of the administrative charge.

## Disability Discrimination

### **DeCaro v. Hasbro, Inc., 580 F.3d 55 (1st Cir. 2009).**

A federal trial court did not err by giving a jury instruction which allowed jurors to consider whether an employee's statements in his application for Social Security Disability Insurance benefits and his receipt of such benefits were admissions of the employee that he was not able to perform the functions of his job with or without a reasonable accommodation. The jury instruction also made clear that the employee's statements were not fatal to his claim that he was able to perform the job functions. Therefore, the instruction was a proper recitation of the law, and was not prejudicial.

## Disability Discrimination

### **Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145 (1st Cir. 2009).**

Discharge is not the only adverse employment action that would satisfy an element in a plaintiff's disability discrimination claim. An employee with multiple sclerosis removed from a work calendar because of the restaurant-employer's alleged safety concerns produced sufficient evidence of pretext to raise a jury issue of disability discrimination under a Massachusetts civil rights law.

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## Disability Discrimination

### **Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145 (1st Cir. 2009).**

The employer's removal of the employee from its work schedule after an MS “flare up” at work and its failure to schedule an independent medical evaluation (IME) that it claimed was necessary before the employee could return to work would allow a reasonable jury to find the employee was effectively fired.

## Disability Discrimination

### **Everett v. The 357 Corp., 453 Mass. 585 (2009).**

Where (1) a former employee alleged that the defendant employer discriminated against him by not permitting him to return to work as a commercial truck driver after his discharge from a psychiatric hospital in 1996 and (2) a jury found that the employer had acted lawfully in 1996-1997, but had discriminated against the plaintiff by refusing to reinstate him in 1999, the Supreme Judicial Court concluded that the former employee’s 1999 claims should not have been allowed to go to the jury because he did not file a complaint with the Massachusetts Commission Against Discrimination related to those claims.

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## Disability Discrimination

### **Everett v. The 357 Corp., 453 Mass. 585 (2009).**

The employee who was fired after being diagnosed with paranoid schizophrenia could not keep the more than \$1 million in damages and attorneys' fees he was awarded when a jury found he was not rehired a few years later because of disabilities discrimination. The alleged bias was a separate, discrete act that was not identified in the administrative charge he filed in connection with his discharge from his truck driver position.

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## Disability Discrimination

### **Everett v. The 357 Corp., 453 Mass. 585 (2009).**

The jury's verdict in favor of the employee could not stand because any claim based on the companies' 1999 failure to rehire him should not have been before the jury. The employee failed to satisfy the administrative prerequisites necessary to bringing a claim on that employment action under the ADA and Massachusetts General Laws Chapter 151B.

## XI. RETALIATION

### Retaliation

#### **Bergeron v. Cabral, 560 F.3d 1 (1st Cir. 2009).**

A defendant sheriff was entitled to qualified immunity in connection with her decision to strip plaintiff's of their commissions as deputy sheriffs, allegedly in retaliation for their support of her opponent during an election in violation of the First Amendment. Stripping the officers of their commissions was an adverse employment action. There was a genuine issue of material fact as to whether this was due to their political affiliation, in violation of the First Amendment.

## Retaliation

### **Bonds v. Boston School Committee, Mass. Super. Ct., No. 06-0965 (2009).**

An employer can be held liable for retaliation by denying an employee subsequent promotions and eliminating some of his duties. After an employee complained of the employer's violation of anti-discrimination law by removing him from his position as a teacher of an advanced placement economics class in 2003 and later denying him a promotion, the employer was found to have retaliated by denying him subsequent promotions and eliminating some of his duties. A Massachusetts jury awarded \$341,000 to the employee.

## **XII. POLITICAL DISCRIMINATION**

## Political Discrimination

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### **Negron v. Almeda v. Santiago, 579 F.3d 45 (1st Cir. 2009).**

Employees may be reinstated to a successor entity when the original entity no longer exists but has transferred its assets to the successor entity. A group of employees prevailed in court for their political discrimination claim in a wrongful termination lawsuit, but by that time, the employer no longer existed. The court held that because the assets had been transferred to the successor entity, the successor could properly be substituted as a party to the litigation.

## XIII. FMLA ELIGIBILITY

## FMLA Eligibility

### **Nagle v. Acton-Boxborough Regional School District, 576 F.3d 1 (1st Cir. 2009).**

A part-time school district employee in Massachusetts who allegedly was told that she could take leave under the Family and Medical Leave Act to care for her sick husband but had not worked enough hours to qualify is not entitled to equitable estoppel that would bar the school district from challenging her eligibility.

*Continued on next page*

## FMLA Eligibility

### **Nagle v. Acton-Boxborough Regional School District, 576 F.3d 1 (1st Cir. 2009).**

Under First Circuit precedent, if the employee were suing a private employer, she “would be entitled to a trial” on whether she reasonably relied to her detriment on her employer's alleged misrepresentation. However, federal courts have held that government parties are subject to estoppel only in “exceptional situations,” and therefore the employee should not have relied only on the alleged oral statements.

## FMLA Eligibility

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### **Daugherty v. Wabash Center, Inc., 577 F.3d 747 (7th Cir. 2009).**

An employer may terminate employees—even when on FMLA leave—if the employer discovers misconduct that would justify termination had leave not been taken. An employer did not violate the Family and Medical Leave Act when it fired a vice president who refused during an approved medical leave of absence to turn in his keys and computer passwords. After the employee departed on leave, the employer discovered evidence of serious misconduct that justified terminating his employment.

## XIV. FMLA NOTICE

## FMLA Notice

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### **Scobey v. Nucor Steel-Ark., 580 F.3d 781 (8th Cir. 2009).**

An employee who telephoned his employer several times in an inebriated state to report that he wouldn't be coming to work failed to give proper notice of his need for a medical leave under the Family and Medical Leave Act and could not show that his suspension and demotion for absenteeism were unlawful. The employee told company representatives that he was having a “nervous breakdown” and “wanted to get some help,” but in the context of the employee’s history of drunken behavior and shifting explanations for absenteeism, his comments did not alert the company to any possible duty under the FMLA.

## **XV. WAGE AND HOUR**

## Wage and Hour

### **Powell v. Dassault Systemes Enovia Corp., No. 07-11033-MLW, 2009 WL 3176790 (D. Mass. 2009).**

An employee's separation agreement can be a valid release of his claims under M.G.L.c149 § 148,150 ("the Wage Act"). The Wage Act only prohibits employees from disclaiming rights that have not been established under the Wage Act. Where the employee's Wage Act claims were established on the date of his discharge, and he subsequently executed a valid release of any employment claims, the release could be enforced against his pre-existing Wage Act claims.

## Wage and Hour

### **Stanton v. Lighthouse Financial Services, Inc., 621 F. Supp. 2d 5 (D. Mass. 2009).**

Even highly compensated or managerial employees are not precluded from coverage under the Massachusetts Weekly Wage Act even though they qualify as "employers". Where a co-founder and president of a company sued for his Wage Act claims arising under a salary deferral agreement, nothing precluded him from coverage under the Act.

## Wage and Hour

### **DiFiore v. American Airlines, Inc., 454 Mass. 486 (2009).**

Fees that are designated as service charges do not need to be charged by the employer to constitute as “service charges” that must be remitted to the service employee pursuant to the Wage Act, but may be imposed by any person or entity. The intent of the Act is to ensure that service employees receive all proceeds from service charges. An employer airline unlawfully deprived skycaps of tips by instituting a \$2 per bag service charge. The employer’s policy change led to a dramatic drop in tips because passengers mistakenly thought that skycaps received the service charge.

## Wage and Hour

### **Electronic Data Systems Corp. v. Attorney General, 454 Mass. 63 (2009).**

An employer violated the Massachusetts Weekly Wage Act when it refused to pay a fired employee for his unused vacation time. The Wage Act does not require employers to provide their employees with paid vacation, but if an employee is discharged from employment by an employer that does provide paid vacation, the value of the vacation benefit earned up to that date and that would still be available if the employee remained at the job must be paid in full on the day of his discharge.

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## Wage and Hour

### **Electronic Data Systems Corp. v. Attorney General, 454 Mass. 63 (2009).**

- Tessicini worked for EDS until his job was eliminated in April 2005. Tessicini had more than 20 years of credited service with EDS and was entitled to take five weeks of paid vacation during calendar year 2005. When his job was eliminated April 8, the employee had used only one day of his 2005 vacation allotment.

*Continued on next page*

## Wage and Hour

### **Electronic Data Systems Corp. v. Attorney General, 454 Mass. 63 (2009).**

- EDS maintained a written policy providing that “vacation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time (unless otherwise required by state law).”
- EDS did not pay Tessicini for his unused vacation pay, and the former employee filed a complaint with the state attorney general.

*Continued on next page*

## Wage and Hour

### **Electronic Data Systems Corp. v. Attorney General, 454 Mass. 63 (2009).**

- Mass. Gen. Laws ch. 149, §148, requires periodic payment of employees' earned "wages," and specifically mandates that "any employee discharged from such employment shall be paid in full on the day of his discharge." Section 148 also provides that "the word 'wages' shall include any holiday or vacation payments due an employee under an oral or written agreement."

*Continued on next page*

## Wage and Hour

### **Electronic Data Systems Corp. v. Attorney General, 454 Mass. 63 (2009).**

- The Supreme Judicial Court upheld the determination by the state attorney general that unpaid vacation pay was part of the earned "wages" that EDS was required to pay Tessicini when it discharged him.

## XVI. EMPLOYEE HANDBOOKS

### Employee Handbooks

**Buttrick v. Intercity Alarms, LLC, 2009 Mass. App. Div. 97, 2009 WL 1744000 (Mass. App. Div. 2009).**

An employer that fired a worker without providing the prior warning or suspension called for in its personnel manual violated an implied employment contract. The plaintiff employee did not negotiate the terms of the manual, which expressly stated that it could be unilaterally modified by the defendant employer and that it served as a guide, not a contract.

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## Employee Handbooks

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### **Buttrick v. Intercity Alarms, LLC, 2009 Mass. App. Div. 97, 2009 WL 1744000 (Mass. App. Div. 2009).**

The employee alleged that the employer's operations manager told him it was “very necessary” to sign the manual because of a noncompetition clause in the manual. The employee also alleged that he had understood himself to be bound by the manual's terms, particularly the noncompetition clause, which he said he had honored for two years following his termination. It was not unreasonable for him to regard the manual as a binding commitment.

## XVII. LABOR

## Labor

### **Northeastern Land Services, Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009).**

The NLRB's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of Section 3(b) of the National Labor Relations Act. A confidentiality provision in employment contracts prohibiting temporary workers from disclosing the terms of their employment violates NLRA Section 8(a)(1) because employees would reasonably construe the language to prohibit activity protected by Section 7, such as discussing compensation with other employees or a union.

## Labor

### **Massachusetts Bay Transp. Authority v. Boston Carmen's Union, Local 589, 454 Mass. 19 (2009).**

A settlement agreement that awarded retroactive seniority and a top pay rate to a victim of alleged unlawful discrimination takes precedence over the terms of a collective bargaining agreement. Despite the fact that the union did not approve the settlement, the terms of settlement reflected the clear and overriding legislative policy against discrimination.

*Continued on next page*

## Labor

### **Massachusetts Bay Transp. Authority v. Boston Carmen's Union, Local 589, 454 Mass. 19 (2009).**

Once the presumption of legitimacy was established, the burden shifted to the union to show that the parties colluded to subvert the collective bargaining agreement. Where the settlement is presumptively legitimate and where the union has not shown that the settlement was a sham and in derogation of the collective bargaining agreement, public policy required the collective bargaining agreement to yield to the employee's settlement agreement.

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## Labor

### **Massachusetts Bay Transp. Authority v. Boston Carmen's Union, Local 589, 454 Mass. 19 (2009).**

- In 2004, there was a settlement between the Massachusetts Bay Transportation Authority and a hearing-impaired job applicant whose 1999 offer of employment was withdrawn after he failed to pass a physical examination conducted without allowing him to use hearing aids.
- The union had filed a grievance against the settlement arguing that the award denied promotion and higher pay to bargaining unit employees under the collective bargaining agreement.

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## Labor

### **Massachusetts Bay Transp. Authority v. Boston Carmen's Union, Local 589, 454 Mass. 19 (2009).**

- An arbitrator rejected the transit agency's position that the settlement was justified by public policy, because of the absence of adjudication of the discrimination complaint.
- The court said that although arbitration is “strongly favored” under state law as a method for settling disputes, “an arbitral award must be vacated” if it requires a person to engage in conduct prohibited by state or federal law.

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## Labor

### **Massachusetts Bay Transp. Authority v. Boston Carmen's Union, Local 589, 454 Mass. 19 (2009).**

- The court concluded that a presumption of legitimacy arose from the settlement agreement and the union did not rebut by showing that the settlement was an attempt to subvert the collective bargaining agreement. Because retroactive seniority is a presumptive remedy for discrimination in hiring, public policy required that the arbitrator's award be vacated.

## Labor

### **S. Bay Boston Mgmt. Inc. v. UNITE HERE Local 26, 587 F.3d 35 (1st Cir. 2009).**

An employer properly was compelled to arbitrate disputes that arose under a neutrality agreement it negotiated with a union, despite the company's claim that it was coerced by the city into signing the agreement. The company could not show that its agreement with the union was void because of governmental coercion or that enforcement of the pact was preempted by the National Labor Relations Act. The obligation to arbitrate disputes under the neutrality agreement survived the expiration of the agreement.

## **XVIII. INVASION OF PRIVACY**

## Invasion of Privacy

**Rodrigues v. The Scotts Company, LLC and EG Systems Inc., d/b/a Scotts Lawnservice, 2008 U.S. Dist. LEXIS 6682 (2008) and Rodrigues v. EG Systems Inc., d/b/a Scotts Lawnservice, 639 F. Supp. 2d 131 (D. Mass) (2009).**

- In March 2006 the Employer began testing potential employees for nicotine pursuant to its “Live Total Health Initiative.” One goal of the initiative was to reduce smoking among employees.

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## Invasion of Privacy

**Rodrigues v. The Scotts Company.**

- Pursuant to this initiative, the Employer prohibited employees from using tobacco at any time and did not hire tobacco users (resources were provided to aid in the quitting of tobacco use).
- The Plaintiff applied for a job with the Employer and was subjected to a drug screening. The Plaintiff was hired, pending the outcome of his drug test. Shortly thereafter his drug screening came back with a positive testing for tobacco. He was then terminated.

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# Invasion of Privacy

## **Rodrigues v. The Scotts Company.**

- Plaintiff filed suit claiming
  - 1) violation of privacy
  - 2) violation under the Massachusetts Civil Rights Act (“MCRA”)
  - 3) wrongful termination, and
  - 4) violation of ERISA.

# Invasion of Privacy

## **Rodrigues v. The Scotts Company.**

- In 2008, the court dismissed counts two and three.
- On Count two (MCRA) the court found that Rodrigues failed to allege that “any interference with Rodrigues’ rights by ‘threats, intimidation or coercion.’”
- In response to his claim that Scotts threatened to terminate him, “if he did not submit to a urine test for nicotine,” the court found that, “a threat to terminate employment at-will, without more, is not a ‘threat’ within the meaning of the MCRA.”

*Continued on next page*

## Invasion of Privacy

### **Rodrigues v. The Scotts Company.**

- As for the allegation of wrongful termination, the court found that “There simply is no reason to believe it likely that the Massachusetts courts would find termination of an at-will employee/smoker to be against a putative public policy to protect smokers rights.”

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## Invasion of Privacy

### **Rodrigues v. The Scotts Company.**

- In 2009, the court dismissed the invasion of privacy and ERISA Section 510 counts.
- Plaintiff had no claim under the Massachusetts privacy statute because, “he has never attempted to keep that fact private.”

*Continued on next page*

## Invasion of Privacy

### **Rodrigues v. The Scotts Company.**

- The court dismissed the ERISA Section 510 claim because, “A person such as Rodrigues, who has only a contingent offer of employment, does not have an expectation of benefits under the potential employer’s ERISA plan that Section 510 protects.

## **XIX. DEFAMATION**

## Defamation

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### **Noonan v. Staples, Inc. 561 F.3d 4 (1st Cir. 2009).**

In Massachusetts, truth is not an absolute defense in an action for libel. M.G.L. c. 231, §92 provides truth is a defense to a libel action unless actual malice is proven.

## **XX. ARBITRATION**

## Arbitration

### **Warfield v. Beth Israel Deaconess Med. Ctr. Inc., 454 Mass. 390 (2009).**

In light of the state's "overriding public policy" against discrimination in the workplace, an agreement to arbitrate such claims rather than take them to court must be "stated in clear and unmistakable terms. A clear agreement is needed to trigger the presumption of arbitration. A female doctor could not be required to arbitrate her gender-based job discrimination and retaliation claims because, although claims under Massachusetts's anti-bias statute are arbitrable, the arbitration provision of her employment agreement did not expressly mention such claims.

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## Arbitration

### **Warfield v. Beth Israel Deaconess Med. Ctr. Inc., 454 Mass. 390 (2009).**

The clause in the employee agreement only referenced claims arising out of the agreement or discussions leading to the agreement, not employment generally or, more significantly, statutory workplace bias claims.

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## Arbitration

### **Warfield v. Beth Israel Deaconess Med. Ctr. Inc., 454 Mass. 390 (2009).**

- Warfield started working for Harvard Medical Faculty Physicians at Beth Israel Deaconess Medical Center Inc. (HMFP) and agreed to become the hospital's "anesthesiologist-in-chief," signing a contract with HMFP and the hospital covering her duties, compensation and benefits, and the circumstances under which she could be terminated.

*Continued on next page*

## Arbitration

### **Warfield v. Beth Israel Deaconess Med. Ctr. Inc., 454 Mass. 390 (2009).**

- The agreement expressly stated that Warfield would remain an employee of HMFP and that it superseded any and all prior discussions, understandings, or agreements between the parties regarding employment. It also contained an arbitration clause.
- She alleged that another doctor subjected her to a "relentless pattern of gender-based discriminatory treatment" for several years and she repeatedly complained to the hospital's president and chief executive officer but he either failed to act or did not do enough to end the mistreatment.

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## Arbitration

### **Warfield v. Beth Israel Deaconess Med. Ctr. Inc., 454 Mass. 390 (2009).**

- Warfield was later fired and alleged that she had been retaliated against for her complaints.
- Warfield filed suit asserting sex discrimination and retaliation claims under MGL ch. 151B as well as tortious interference with contract and defamation claims. Pointing to her employment agreement, the hospital and other defendants sought to dismiss the case and compel her to arbitrate.

*Continued on next page*

## Arbitration

### **Warfield v. Beth Israel Deaconess Med. Ctr. Inc., 454 Mass. 390 (2009).**

- The court first held that employment discrimination claims arising under G.L. c. 151B are arbitrable and then addressed whether the parties had contractually agreed, in the agreement, to submit statutory claims of discrimination to arbitration.

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## Arbitration

### **Warfield v. Beth Israel Deaconess Med. Ctr. Inc., 454 Mass. 390 (2009).**

- The court held that in light of the state's “overriding public policy” against discrimination in the workplace, an agreement to arbitrate such claims rather than take them to court must be “stated in clear and unmistakable terms.” The agreement Warfield signed did not meet that standard, it ruled.

## Arbitration

### **Dixon v. Perry & Slesnick, P.C., 75 Mass. App. Ct. 271 (2009).**

Where employers and an employee entered into an individually negotiated employment agreement, a Massachusetts Wage Act claim stating that the employers had not paid the employee all compensation owed to her, was subject to a mandatory arbitration provision in that agreement. The court noted that while it did not appear that a reported Massachusetts case had ever considered whether an aggrieved party can be compelled to arbitrate a Wage Act claim, other statutory claims have been held subject to arbitration.

## XXI. BENEFITS

## Benefits

### **Wallace v. Johnson & Johnson, 585 F.3d 11 (1st Cir. 2009).**

The delegation of plan responsibilities is permissible under ERISA where the plan itself expressly grants the Pension Committee the authority to do so. Decisions of the department to whom plan responsibilities are appropriately delegated should be upheld unless they are arbitrary and capricious.

## Benefits

### **Denmark v. Liberty Life Assur. Co., 566 F.3d 1 (1st Cir. 2009).**

Where an ERISA-regulated benefits insurance plan delegates discretionary authority to a structurally conflicted plan administrator, the court's standard of review for benefit-denial decisions is abuse of discretion; the conflict is just one factor which the court must consider, together with the mitigating steps that the administrator has taken; where a conflict infected the benefit-denial decision, the conclusion was justified that the denial itself was an abuse of discretion.

*Continued on next page*

## Benefits

### **Denmark v. Liberty Life Assur. Co., 566 F.3d 1 (1st Cir. 2009).**

- Denmark was diagnosed as suffering from fibromyalgia. The plan administrator denied Denmark's application for LTD benefits and reaffirmed its denial after submitting her file to a referral service furnishing physicians to evaluate the functional abilities of claimants.

*Continued on next page*

## Benefits

### **Denmark v. Liberty Life Assur. Co., 566 F.3d 1 (1st Cir. 2009).**

- The district court reviewed the decision under an abuse of discretion standard and acknowledged the potential conflict of interest posed by the plan administrator's dual role in making benefits determinations and paying claims, but found no significantly probative evidence that the conflict had actually influenced its decision making.

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## Benefits

### **Denmark v. Liberty Life Assur. Co., 566 F.3d 1 (1st Cir. 2009).**

- The court found that the LTD plan delegated discretionary authority to Liberty and thus the abuse of discretion standard applies.
- The court is duty-bound to inquire into what steps and administrator has taken to insulate its decision-making process against the effects of a structural conflict.

*Continued on next page*

## Benefits

### **Denmark v. Liberty Life Assur. Co., 566 F.3d 1 (1st Cir. 2009).**

- A finding that the conflict has infected the benefit denial decision justifies the conclusion that the denial itself was arbitrary and capricious, i.e., an abuse of discretion.

## Benefits

### **Lafleur v. La. Health Serv. & Indem. Co., 563 F.3d 148 (5th Cir. 2009).**

The health plan administrator raised new grounds for denying benefits in litigation did not substantially comply with the Employee Retirement Income Security Act's ("ERISA") requirement of notice to the participant of the reasons for the denial of benefits.

## Benefits

### **PBGC v. Oneida, 562 F.3d 154 (2nd Cir. 2009).**

A PBGC termination premium must be paid; even those created by the Deficit Reduction Act of 2005 (DRA) were not “claims” that could be discharged by Oneida's Chapter 11 plan of reorganization.

## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009)**

The manager, trustee, and investment advisor of an employer's 401(k) plan created for the benefit of its employees is not a functional fiduciary of the plan's beneficiaries if these beneficiaries exercise discretionary authority or control over the administration, management, and disposition of the assets of the investment vehicles. The employer's fiduciary duty does not extend to disclosing the plan's administrative fee structure and selecting investment plans with smaller fees.

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- Deere sponsored two Section 401(k) plans for its employees and it entered an agreement in 1990 with Fidelity Management Trust Co. (Fidelity Trust) to make Fidelity the plans' trustee.

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- Under the agreement, Fidelity was to perform recordkeeping and other administrative tasks for the plans, while Deere retained the authority to select the plans' investment options.
- Deere agreed that it would limit its selection of investment options to investments funds offered by Fidelity Management and Research Co. (Fidelity Research).

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- The plans' participants also had the option of using a Fidelity-operated facility called BrokerageLink which gave participants access to some 2,500 additional funds managed by different companies.
- Each of the Fidelity funds offered under the plans charged investors an asset-based fee. Fidelity Research shared some of the fee revenue it received with Fidelity Trust. The amount of the shared asset-based revenue allegedly was not disclosed to Deere or the plan participants.

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- In their class action complaint, three Deere employees alleged that Deere and the Fidelity companies breached their ERISA fiduciary duties by providing investment options with excessive and unreasonable fees and costs.
- The employees also alleged that the defendants violated ERISA by failing adequately to disclose information about the fees and costs to plan participants.

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- The court held that the Fidelity companies were not “functional fiduciaries” and as such could not be held liable for breaching a fiduciary duty to the plans.
- It also held that Fidelity Research was not a plan fiduciary when it determined how much revenue it would share with Fidelity Trust.

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- Deere and the Fidelity companies had no duty to disclose the revenue-sharing arrangement that existed between Fidelity Trust and Fidelity Research.
- Deere disclosed to the participants the total fees being paid to the funds and directed the participants to the fund prospectuses for information about fund-level expenses. The court said this disclosure “was enough” because the total fee, not the post-collection distribution of the fee, was the critical figure.

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- The Deere plans offered a sufficient mix of investments for their participants, and thus even if Deere selected some investment options with excessive fees, no “reasonable trier of fact could find” that Deere failed to satisfy its duty of providing a wide array of investment choices.

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- The court said there was a wide range of expense ratios among the 20 Fidelity mutual funds and the 2,500 other funds available through BrokerageLink. All of the funds were also offered to investors in the general public for the same expense ratio the court noted.
- The court added that nothing in ERISA would have required the plan fiduciaries to “scour the market to find and offer the cheapest possible fund.”

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- The court refused to issue a specific ruling on whether Section 404(c)'s safe harbor applies to the selection of investment options for the plan. Deere and Fidelity had argued that the selection of investment options is protected by Section 404(c), whereas the participants and the Department of Labor argued that there is a carve-out in Section 404(c) that prevents the safe harbor from shielding fiduciaries' selection of investments.

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## Benefits

### **Hecker v. Deere & Co., 556 F.3d 575 (7<sup>th</sup> Cir. Wis. 2009).**

- Although the court said it would not decide whether Section 404(c) shields a fiduciary from an imprudent selection of investments, the court ultimately said the safe harbor provision protects a fiduciary that “satisfies the criteria” of Section 404(c) and “includes a sufficient range of options so that the participants have control over the risk of loss.”

## XXII. EXPANSION OF FMLA COVERAGE FOR MILITARY FAMILIES

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### Expansion of FMLA Coverage for Military Families

- On October 28, 2009, President Obama signed the 2010 National Defense Authorization Act (NDAA) which expand the FMLA military family leave benefits
- Extends exigency family leave coverage to family members of active duty members of the Armed Forces
- Can now take FMLA caregiver leave for 5 years after the veteran ends active duty
- Family members are now eligible for 26 weeks of leave to care for a veterans who were members of the Armed Forces at any time during the 5 years preceding the date of treatment, recuperation, or therapy

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## **XXIII. HARRASSMENT PREVENTION ORDERS (M.G.L. c. 258E)**

## Harassment Prevention Orders

- Provides a broad tool to obtain restraining orders that would presumably apply to workplace and work-related disputes.

## XXIV. ARRA AND HHS REGULATIONS AMEND HIPAA BREACH RULES

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### HIPAA Amendments by ARRA

- Statutory privacy and security requirements extended to Business Associates
- Covered Entities and Business Associates are now required to notify individuals of breaches that pose a “significant risk” of harm to the individual.
- If the breach affects more than 500 individuals, must also notify:
  - Prominent media outlets in the state or jurisdiction; and
  - The Department of Health and Human Services

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## XXV. MASSACHUSETTS DATA SECURITY REGULATIONS

### Massachusetts Data Security Regulations

- Governor Patrick signed comprehensive identity theft legislation into law in August 2007, making Massachusetts the 39th state to require notice to residents of unauthorized access or use of their personal information
- The new regulations were effective March 1, 2010
- Establish minimum standards for protecting and storing personal information about Massachusetts residents contained in paper or electronic format.
- The new law covers individuals, business and government agencies that own, license, maintain or store personal information.

*Continued on next page*

## Massachusetts Data Security Regulations

- Personal information includes a person's first and last name (or first initial and last name) in combination with
  - Social security number
  - Driver's license number
  - State identification number
  - Financial account or debit or credit card number regardless of whether any security code, access code or password is disclosed
- Notice must be provided of a security breach or unauthorized access or use regardless of whether there is a likelihood of harm

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## Massachusetts Data Security Regulations

- Notice must be provided to the individual, the Attorney General and the Director of Consumer Affairs and Business Regulation
- Notice must be provided as soon as possible and without unreasonable delay
- Content of the notice depends on the recipient

## XXVI. PROPOSED REGULATIONS: ADA AAA

## Proposed Regulations: ADA AAA

- The ADA Amendments Act (ADA AAA) became effective January 1, 2009
- The ADA AAA Amendments Act retains the ADA's basic definition of "disability" as: (1) an impairment that substantially limits one or more major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment
- EEOC published proposed regulations on September 23, 2009 which would change how these statutory terms are interpreted in the ADA

## Proposed Regulations: ADAAA

The proposed regulations:

- Provide that the definition of “disability” should be interpreted broadly
- Significantly lower the threshold by providing that the term “substantially limits” does not mean a limitation has to “significantly” or “severely” restrict a major life activity in order to meet the standard; and delete references to the terms “condition, manner, or duration” under which a major life activity is performed

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## Proposed Regulations: ADAAA

- Expand the definition of “major life activities” by providing two non-exhaustive lists of included activities and functions.
- The first list includes activities such as:
  - caring for oneself,
  - performing manual tasks,
  - seeing, hearing, eating,
  - sleeping, walking, standing,
  - sitting, reaching, lifting, etc.
- The second list includes major bodily functions, such as functions of the immune system, special sense organs, and skin, etc.

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## Proposed Regulations: ADAAA

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- Provide that mitigating measures other than “ordinary eyeglasses or contact lenses” should not be considered in assessing whether an individual has a disability
- Provide that an impairment that is episodic or in remission can be a “disability” if it would substantially limit a major life activity when active
- Change the definition of “regarded as” so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity

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## Proposed Regulations: ADAAA

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- Provide that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation
- Provide that qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision should not be used unless shown to be job-related for the position in question and consistent with business necessity

## XXVII. PROPOSED REGULATIONS: GINA

### Proposed Regulations: GINA

- On May 21, 2008, the Genetic Information Nondiscrimination Act (“GINA”) was signed into law. Applies to employers with 15 or more employees.
- GINA prohibits health insurers and employers from discriminating on the basis of genetic information.
- EEOC issued proposed regulations in March 2009, but no final rule has yet been published for Title II (Employment). Proposed regulations state that “GINA is designed to extend to individuals in the area of genetic discrimination the same procedures and remedies as are provided under Title VII.”

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## Proposed Regulations: GINA

- Title I of GINA prohibits discrimination in group health plans based on genetic information and the use of such information as the basis for determining eligibility or setting premiums, or for underwriting purposes.
- GINA is effective for plan years beginning after May 21, 2009, and the regulations issued by the Department of Labor to enforce Title I apply to plan years beginning after December 7, 2009.
- The regulations affect wellness programs that seek information about participants' family history, and provide further guidance regarding GINA's application to group health plans and health insurance issuers.

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## Proposed Regulations: GINA

- Title II of GINA prohibits employers from discharging, refusing to hire or otherwise discriminating on the basis of genetic information.
- These provisions were effective on November 21, 2009.
- Title II defines "genetic information" as including information about an individual's genetic tests, genetic tests of a family member, and family medical history. It does not include information about the sex or age of an individual or his or her family members, or information that an individual currently has a disease or disorder.

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## XXVIII. HEALTH CARE REFORM

### Health Care Reform

The House passed a bill on November 7, 2009, while the Senate passed its version on December 24, 2009.

#### **House Bill**

- The House Bill would create a government regulated insurance exchange, in some ways similar to the Massachusetts Health Care Connector Authority (the “Connector”), wherein private insurers would compete with the government in selling policies

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## Health Care Reform

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- The government would negotiate rates with private insurers to provide government plans, the so-called “public option.”
- The House bill would require a 2.5% tax on income for all individuals who do not enroll in an appropriate level of coverage by 2013, similar to the Massachusetts individual mandate for minimum creditable coverage.

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## Health Care Reform

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- As in the Massachusetts law, plans would be required to cover a variety of benefits with no annual or lifetime maximums on certain benefits and a maximum out-of-pocket cost for individuals and families.
- Affordability guidelines would also be set, and those falling below the guidelines would not be subject to the tax.

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## Health Care Reform

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- It requires employers to pay at least 72.5% of the premium of its lowest cost plan for individuals and 65% for families.
  - Employers with payrolls below \$500,000 would be exempt from the tax, but those with higher payrolls would have to pay a penalty of a percentage of their payroll up to 8% for those employers with payrolls over \$750,000.

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## Health Care Reform

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- Small employers with 25 or fewer employees making low wages would be able to take a tax credit of up to 50% of the total cost of health care provided to employees for up to two taxable years.
- By 2013, insurers would not be able to turn down an individual due to a pre-existing condition.
- Employers would also be required to extend tax benefits for health care to same sex and domestic partners and their children.

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## Health Care Reform

### **Senate Bill**

- The Senate Bill shares many of the provisions of the House Bill but is more conservative.
- The Senate Bill would place a 5.4% income tax surcharge on individuals making \$500,000 annually or families making \$1,000,000 annually. The Senate Bill would also cut Medicare by \$500 billion and would impose a 40% tax on so-called “Cadillac” health plans.

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## Health Care Reform

- Instead of including a public option, the Senate Bill includes the creation of non-profit private health plans overseen by the federal government.
- The penalty for failure to purchase health insurance is slightly less than in the House Bill. The fine under the Senate Bill would be \$750 or 2% of income, whichever is greater.
- The Senate Bill includes a mandate on employers with more than 50 employees to provide health care or face a \$750 per employee fine, similar to the Massachusetts Fair Share Contribution.

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## Health Care Reform

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### **President's Proposal**

- President Obama recently made a compromise proposal meant to reconcile the two bills.
- The President's proposal uses the more conservative Senate Bill as its basis with some changes.
- The proposal scales back the Senate's tax on "Cadillac" plans and creates a new tax on unearned income for wealthy Americans.

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## Health Care Reform

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- The proposal expands the Medicare drug benefit for seniors and federal Medicaid assistance for states.
- The proposal does not include the public option.
- The proposal would create a nationwide authority to review insurance rate increases with the goal of preventing big rate hikes.
- The President convened a bi-partisan health care summit last week to discuss his proposal and other ideas with members of Congress from both parties.

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## Health Care Reform

### **Governor Patrick's Proposal in Massachusetts**

- Governor Patrick recently unveiled a small business jobs incentive plan that included certain provisions designed to control health care costs for small businesses.
- The Governor instructed the Insurance Commissioner to file an emergency regulation requiring insurers to file proposed changes in small business premiums with the Division of Insurance before they become effective so that the Commissioner can review them and decide whether they are excessive or unreasonable in relation to the benefit provided.

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## Health Care Reform

- The Governor proposed legislation to trigger a presumptive disapproval for insurer rates significantly above the Consumer Price Index for Medical Services and similar oversight for provider rates.
- The proposal gives small employers a choice of more affordable plans beginning in July 2010 by requiring insurance carriers to offer at least one network plan with premiums at least 10% lower than premiums for the full network product.

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## Health Care Reform

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- The proposal also grants authority to the Insurance Commissioner to examine premiums for small businesses to prevent duplicative or unjustified administrative fees from driving up costs and empowers the Commissioner to protect small businesses from drastic increases in rates based on changes in workforce composition.

## **XXIX. MASSACHUSETTS NON-COMPETE BILLS**

## Massachusetts Non-Compete Bills

- Two competing bills were filed relating to non-compete agreements
- Rep. William Brownsberger submitted a bill that would ban non-competes altogether. See "An Act to Prohibit Restrictive Employment Covenants" (Jan. 5, 2009); House Bill No. 1794
  - <http://www.mass.gov/legis/bills/house/186/ht01pdf/ht01794.pdf>
  - Violators would be liable for the affected employee's attorney's fees

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## Massachusetts Non-Compete Bills

- Rep. Lori Ehrlich submitted a bill that would codify Massachusetts non-compete common law and allow the enforcement of reasonably tailored non-competes. See "An Act Relative to Non-Compete Agreements" (Jan. 13, 2009); House Bill No. 1799
  - <http://www.mass.gov/legis/bills/house/186/ht01pdf/ht01799.pdf>.
  - Non-compete agreements would be unenforceable for any employee whose annual gross salary and commissions is less than \$100,000

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## Massachusetts Non-Compete Bills

- Also limits the term of the agreement to two years
- Would only be enforceable for the full term if the employer provided to the employee a minimum of the greater of:
  - Compensation equal to 50% of the employee's annual gross base salary and commissions at the time of the employee's termination or
  - \$100,000

## XXX. NEWSWORTHY ISSUES

# Newsworthy Issues

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- Amy Bishop - Negligent Hiring
- Lifestyle Discrimination

# Questions?

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# Thank You

The Presenter wishes to acknowledge MHTL Law Clerk, Robyn Hegerich, who compiled the cases and Attorneys Tom Colomb, Brian Fox and Samantha Kaplan who compiled the remainder of the materials.



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