

HOT TOPICS:
THE LATEST INTERPRETATIONS
OF CURRENT EMPLOYMENT LAW

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A. WHAT CONSTITUTES SEXUAL HARASSMENT

Massachusetts General Laws, Chapter 151B defines sexual harassment to include:

“[S]exual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination on the basis of sex shall include, but not be limited to, sexual harassment.”

G. L. c. 151B, § 1(18). The statute thus recognizes two distinct forms of sexual harassment, the first being known as “quid pro quo” sexual harassment, and the latter being known as “hostile work environment” sexual harassment. Employers face liability for sexual harassment perpetrated by their workers or, as discussed at Section D, *infra*, even third parties. General Laws Chapter 151C similarly defines “sexual harassment” in the context of the educational environment. Recent decisions by state and federal courts in Massachusetts have (1) confirmed that out-of-work harassment may be considered in evaluating a charge of sexual harassment against an employer; (2) held that statutory sexual harassment protections in G. L. Chapters 214, 151B and 151C do not extend to volunteers in the workplace, while leaving the door open for potential employer liability; and (3) found a school not liable under Title IX where its responses to complaints of student-on-student sexual harassment were legally sufficient, even though they were ineffective.

1. Conduct Outside the Place of Employment Must Be Considered in Evaluating a Complaint of Sexual Harassment

In October 2006, the Massachusetts Appeals Court confirmed that “[i]n determining whether the work environment is hostile, significant out-of-work harassment . . . may be considered as well [as harassment that occurred in the workplace].” Salvi v. Suffolk County Sheriff’s Dept., 67 Mass. App. Ct. 596, 605 (2006), *citing* Massachusetts Commission Against Discrimination Guidelines: Sexual Harassment in the Workplace § II.E (2002).¹ See also Modern Cont’l/Obayashi v. MCAD, 445 Mass. 96, 106 (2005).

When the harassment takes place outside the workplace, the MCAD considers:

1. whether the harassing event is linked to the workplace;
2. whether the conduct occurred during work hours;
3. the severity of the conduct;
4. the work relationship of the complainant and harasser (including whether they come into contact on the job); and
5. whether the conduct adversely affected the terms and conditions of the complainant’s employment or impacted his work environment.

See MCAD Guidelines: Sexual Harassment in the Workplace § II(E) (2002); MCAD v. Neronha Finishing Co., 25 MDLR 91 (2003) (“Conduct resulting in sexual harassment ***need not*** occur in the workplace to be actionable”) (emphasis added).

Management must, therefore, in framing an appropriate response to complaints of workplace harassment, inquire and respond appropriately to conduct in the workplace and outside the workplace. An employer is liable to an employee who is sexually harassed

¹ The Salvi decision also significantly held that prejudgment interest under G. L. c. 231, § 6B, currently at the rate of 12% per annum, is available against the Commonwealth on Chapter 151B awards of back pay and emotional distress. Salvi, 67 Mass. App. Ct. at 608-610.

when it knew or should have known of the harassment and failed to take reasonable steps to end the harassment and prevent the conduct from occurring. Modern Cont'l/Obayashi, 445 Mass. at 106. While it may not always be possible for an employer to “eliminate offensive behavior,” the “promptness and effectiveness” of the employer’s actions are key factors in determining the reasonableness of the employer’s response, which must be viewed in the totality of the circumstances. Id. at 109. Employers have a duty to conduct a “fair and thorough investigation” of a worker’s allegations of discrimination. See G. L. c. 151B, § 3(b); College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 167-168 (1987). A “fair and thorough investigation” requires, at a minimum, that the employer: (1) interview persons who may have witnessed the discriminatory conduct; (2) take appropriate remedial action; and (3) produce evidence that it provided adequate training on how to identify and respond to a discrimination complaint. MCAD v. Wal-Mart Stores, Inc., 26 MDLR 293 (2004). Further, a “defendant’s failure to discipline anyone for the acts, or effectively to remedy them, may be considered part of the environment in which the plaintiff worked.” Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 541 (2001). See Section A(4), *infra*, for a checklist helpful to employers regarding the investigation of and response to a complaint of sexual harassment.

2. Statutory Sexual Harassment Protections in General Laws Chapters 214, 151B and 151C Do Not Extend to Volunteers

In 2006, the Massachusetts Supreme Judicial Court (“SJC”) overturned a 2005 Appeals Court decision to hold that G. L. c. 214, § 1C, which provides that “[a] person shall have the right to be free from sexual harassment, as defined in” General Laws Chapters 151B and 151C, does not apply to volunteers, although it noted that volunteers

still retain their common law rights with respect to sexual harassment. See Lowery v. Klemm, 446 Mass. 572 (2006), *reversing* Lowery v. Klemm, 63 Mass. App. Ct. 307 (2005). Thus employers may face liability for torts such as negligent hiring, retention or supervision.

The court below relied on the broad statutory language as well as public policy to conclude that volunteers were extended the same protections as employees because the legislature had intended to “reach sexual harassment wherever occurring, including in nontraditional employment structures.” Lowery, 63 Mass. App. Ct. at 312. The SJC, however, limited the scope of Chapter 214’s protections to that of Chapters 151B and 151C, which are only applicable to conduct occurring in the employment and academic contexts. Lowery, 446 Mass. at 578. The SJC reasoned that its decision did not render Chapter 214 merely duplicative of Chapters 151B and 151C, because it filled a gap in the statutory scheme by extending protection to employees and students that may not otherwise be available, for example, because Chapter 151B is only applicable to employers with six or more employees. Id. The SJC thus declined to extend those statute’s protections to volunteers at a workplace, who are considerably freer to leave a perceived discriminatory or hostile environment than employees who may depend on the income to survive and are unable, for whatever reason, to find substitute employment. Id.

The SJC was careful to point out, however, that its ruling does not “leave employers free [to] sexually harass volunteers with impunity” but, rather, that volunteers must pursue their claims through other avenues, such as the Civil Rights Act, at G. L. c. 12, § 11I, the Equal Rights Act at G. L. c. 93, §§ 102-103, or common law claims for

sexual harassment or related injuries that would otherwise be barred as to employees by the exclusivity provisions of the worker's compensation statute and Chapter 151B, such as negligence, intentional or negligent infliction of emotional distress, assault and battery, or breach of contract. See id. at 581. Thus employers and perpetrators of discrimination and harassment are not insulated from liability for unlawful acts merely because the victim is a volunteer at the workplace, they may simply be immune from certain causes of action.

3. School Not Liable Under Title IX Because Response to Complaint of Student-on-Student Harassment, Though Ineffective, was Legally Sufficient

In May 2007 the U.S. Court of Appeals for the First Circuit reversed a plaintiff's jury verdict to hold that the Town of Tewksbury, Massachusetts had not been "deliberately indifferent" to student-on-student sexual harassment, despite that the public school's response was wholly ineffective in preventing the harassment from continuing. Porto v. Town of Tewksbury, 488 F. 3d 67 (1st Cir. 2007). The opinion followed *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999), which held that a school system may only be liable under Title IX of the Civil Rights Act of 1964 for student-on-student sexual harassment if it were "deliberately indifferent" to the harassment, meaning that its response was "clearly unreasonable in light of the circumstances." See Porto, 488 F. 3d at 69, *quoting Davis*, 526 U.S. at 648. The plaintiffs in *Porto* obtained a jury verdict in their favor at the district court level, obtaining a judgment that included \$250,000 in compensatory damages as well as attorney's fees. Porto, 488 F. 3d at 69. The U.S. Court of Appeals reversed, however, finding insufficient evidence to sustain the

jury's conclusion that the town had been deliberately indifferent to the harassment. Id. The *Porto* decision dealt with a minor enrolled in special education classes in the Tewksbury school system who reported "various sexually-charged incidents" with another minor child including oral sex on the school bus and other inappropriate touching. Id. at 69-71. The school's response to the minor's caretakers' complaints included putting the two students on separate buses and instructing the teachers and aides to keep them separated and monitor their interactions with each other. Id. at 69. The harassment, however, continued and the minor plaintiff subsequently experienced behavioral problems and even attempted suicide. Id. at 71.

Title IX of the Education Amendments of 1972 provides that institutions who receive funding from the U.S. Department of Education may be liable for damages if the institution "subjects its students to harassment" through a "deliberate indifference" to the conduct. "Deliberate indifference," in turn, is defined broadly as a response that is "clearly unreasonable in light of the known circumstances" or, "at minimum, 'cause[s][students] to undergo' harassment or 'make them liable or vulnerable to it.'" Porto, 488 F. 3d at 72, *quoting* Davis, 526 U.S. at 644, 645, 648. Additionally, the harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." Porto, 488 F. 3d at 72, *quoting* Davis, 526 U.S. at 650. *Porto* utilized a strict test in determining whether Tewksbury had been deliberately indifferent, employing "'a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action' or inaction." Porto, 488 F. 3d at 73, *quoting* Bd. of

the County Comm'rs v. Brown, 520 U.S. 397, 410 (1997). The *Porto* court noted that the test for negligence is to be distinguished from the Title IX “deliberate indifference” test:

“[T]he fact that measures designed to stop harassment prove later to be ineffective does not establish that the **steps taken were clearly unreasonable in light of the circumstances known** by Tewksbury at the time. The test for whether a school should be liable under Title IX for student-on-student harassment is not one of effectiveness by hindsight.”

Porto, 488 F. 3d at 74 (emphasis added). The *Porto* court further pointed out that *Davis* did not require funding recipients to halt all student harassment, and even disapproved of a standard that would result in the institutions being forced to expel or suspend every student accused of misconduct. *Porto*, 488 F. 3d at 76 (“All that *Davis* requires is that the school not act *clearly unreasonably* in response to known instances of harassment.”) (emphasis in original). What is required of institutions subject to Title IX, therefore, is a reasonable response to the complaints in light of the circumstances presented; not an automatic termination, suspension or expulsion or a complete and immediate end to the harassing conduct. Thus, although the legal standards for liability differ depending on the cause of action pursued, at minimum a reasonable, good faith effort to investigate and respond meaningfully to a complaint of sexual harassment is required.

4. Practical Tips for Management: Responding to a Complaint of Sexual Harassment

In light of the foregoing, as well as the discussion of retaliation claims in Section C, *infra*, and the discussion of potential employer liability for the acts of non-employees at Section D, *infra*, following is a practical tips checklist for use by employers in responding to complaints of sexual harassment:

- If your company does not already have one, establish a timetable for investigating a particular claim of harassment, which may necessarily be flexible and tailored to each individual case. Communicate the established timetable to the complainant, and follow the timetable.
- Depending on the identities and working relationships of the alleged harasser and the complainant, have a human resources or other designated supervisory employee speak with the complainant alone in a respectful and patient way; reassuring him or her that the employer will fully investigate the allegations and will be speaking with all involved parties and potential witnesses.
- Ask the complainant to identify any witnesses to the harassing conduct or behavior.
- Ask for details about the harassing conduct and determine whether it occurred inside or outside the workplace, or both.
- Determine whether the harassing conduct was communicated verbally, physically, or through some other means such as email, voicemail, instant message, text message, or hand writings.
- Request that the complainant provide any physical or documentary evidence in his or her possession that relates to the alleged misconduct.
- Ask the complainant to specifically identify any potentially relevant electronic or paper materials related to the harassing conduct that may reside on company property, such as voicemail systems, company cell phones, computers, or other computer storage or network devices. Evidence may exist in text messages, instant messages, voicemails, or emails. Your company may have video surveillance in place that may need to be located and analyzed, depending on the locations of the alleged harassment and the locations of the video surveillance.
- Working with your internal IT staff, and acting reasonably and consistently with any company information management policy, lock down any potentially relevant data to ensure it is not destroyed. A good faith effort to develop all relevant evidence in an investigation is important, and a lack thereof can be used against you should any disputes later arise.
- Explain to the complainant that although the employer may take the worker's input with regards to possible solutions to the harassment, the

complainant does not have the right to dictate what, if any, remedial action is taken.

- Obtain the name(s) of all involved parties and witnesses and have an independent, unbiased supervisor or human resources representative (for example, if a supervisor is being accused of harassment, someone who reports to that same accused supervisor would **not** be a good choice for the head of the investigation) speak with each individual, alone, to find out any relevant facts.
- Document the names of the witnesses or parties interviewed, the date and place of the interview(s), the name(s) of every individual present during the interview(s), and a summary of what the witness or party stated during the interview.
- Beware**, however, that any notes taken (whether handwritten or typed) may later be discoverable in any action related to the harassment. Keep this in mind when making all records related to the complaint, investigation, and resulting actions taken, ensuring that all information taken down *accurately* reflects the statements of the witness. It may be wise to ask the witness or party to write out a statement on their own in your presence, or at least countersign a statement you write out while speaking with them, after reviewing the same for accuracy.
- The results of the investigation, the severity of the conduct, and the circumstances of the working relationships (i.e., whether the complainant and harasser currently work side-by-side, or whether they are already in separate departments) will dictate the parameters of the required response.
- Generally speaking it is always a good idea for an employer, in response to any complaint of sexual harassment, to schedule and hold a meaningful and mandatory sexual harassment training session for employees; and to redistribute the company's sexual harassment policy to employees.
- Sample questions to ask the complainant:**²
 1. Who, what, when, where, and how: *Who* committed the harassment? *What* exactly occurred or was said? *When* did it

² See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (Jun. 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>, last accessed Aug. 14, 2007.

occur, and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?

2. How did you react to the conduct or statements?
 3. What, if any response did you take to the conduct, either at the time or afterwards?
 4. How did the conduct affect you? Do you feel your job has been affected in any way and, if so, how?
 5. Were there any witnesses to the conduct; or did you speak to anyone about the conduct? Did anyone see or speak with you immediately after the conduct occurred?
 6. Has the person who harassed you done the same to anyone else, to your knowledge? Are you aware of any other complaints of sexual harassment by this individual?
 7. Did you take any notes about the conduct or your reaction to it?
 8. Is there any physical evidence or other documentation regarding the incident(s) complained of?
 9. How would you like to see the situation resolved?
 10. Do you know of any other relevant information?
- **Sample questions to ask the alleged harasser:**
1. What is your response to the allegations made by the complainant?
 2. Please describe the situation with the complainant from your perspective.
 3. If the individual denies the allegation, ask why the complainant might lie.
 4. Are there any persons, either inside or outside the workplace, who have relevant information?
 5. Are you aware of any notes, physical evidence, or other documentation regarding the incident(s)?

6. Do you know of any other relevant information?

□ **Sample questions to ask third parties:**

1. What did you see or hear?
2. When did the incident(s) occur?
3. Describe the alleged harasser's specific behavior toward the complainant and towards others in the workplace.
4. What did the complainant tell you? When did he or she tell you this?
5. What did the harasser tell you? When did he or she tell you this?
6. Do you know of any other complaints of harassment by this individual?
7. Do you know of any other relevant information?
8. Are there other persons you are aware of who might have additional relevant information?

See also MCAD Policy 9602, Model Sexual Harassment Policy (adopted by the Commission on Oct. 25, 1996), *available at* <http://www.mass.gov/mcad/harassment.html>, *last accessed* Aug. 14, 2007.

The U.S. Equal Employment Opportunity Commission recommends that any anti-harassment policy contain, at minimum, the following:

- A clear explanation of the prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;

- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (Jun. 18, 1999), *available at* <http://www.eeoc.gov/policy/docs/harassment.html>, *last accessed* Aug. 14, 2007. See also Model Sexual Harassment Policy promulgated by the Massachusetts Commission Against Discrimination, provided in the Appendix to these materials.

Although the type of remedial action taken, if any, will necessarily depend on the conduct that has occurred and the specifics of the employment relationship, the EEOC provides **examples of measures an employer can take against a harasser when it finds harassment has occurred to try to prevent further harassment (these measures will and should vary depending on the nature of the conduct and the working relationship between the parties):**

- issue an oral or written reprimand to the harasser;
- transfer or reassign the harasser or the complainant (ensuring that the complainant's transfer or reassignment cannot be seen as retaliation – see discussion at Section C, *infra*);
- demote the harasser;
- reduce the harasser's wages;
- suspend the harasser;

- discharge the harasser;
- train or counsel the harasser and other employees to ensure that everyone understands why the harasser's conduct violated the employer's anti-harassment policy; and/or
- monitor the harasser to ensure that the harassment ceases.

See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors.

Employers should not only take prompt and reasonable action to try to end the harassment and prevent its continuance, they should also take steps to try to correct the impact of the harassment on the complaining worker. To that end, the EEOC provides the following examples as ways an employer can try to correct the impact of harassment:

- a. restore any sick leave taken by the complainant because of the harassment;
- b. expunge any negative evaluations in the complainant's personnel file that arose from the harassment;
- c. reinstate the complainant to a former position, particularly if a transfer or demotion was part of the harassing conduct;
- d. require an apology by the harasser;
- e. monitor the treatment of the complainant by the other workers to ensure that s/he is not subjected to further retaliation by the harasser or others in the workplace because of the complaint; and
- f. correct any other harm caused by the harassment (e.g., compensate for losses).

See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors.

B. THE TREATMENT OF ARREST AND CONVICTION RECORDS

1. The U.S. Equal Employment Opportunity Commission's E-RACE Initiative

The U.S. Equal Employment Opportunity Commission (“EEOC”) announced in early 2007 that it was launching “E-RACE”, an initiative designed to combat discriminatory hiring practices. The EEOC is charged with enforcement of various federal laws including Title VII of the Civil Rights Act of 1964 and the American with Disabilities Act, both of which cover all private employers, state and local governments, and educational institutions that employ fifteen (15) or more individuals; the Age Discrimination in Employment Act, which covers all private employers with twenty (20) or more employees, state and local governments, employment agencies and labor organizations; and the Equal Pay Act, which covers all employers who are covered under the Federal Wage and Hour Law (the Fair Labor Standards Act).

One of the EEOC’s motivations for the E-RACE initiative is a growing trend towards the use of facially neutral employment criteria that may disparately impact people of color, such as arrest and conviction records. In March 2007, about a week after it had announced the E-RACE initiative, the EEOC filed a class action lawsuit against Walgreen Co., charging the large corporation with widespread racial bias towards thousands of its African-American employees. See EEOC v. Walgreen Co., No. 07-172 (S.D. Ill.); Tresa Baldas, *EEOC Cracks Down on Discriminatory Hiring Practices*, The National Law Journal (Mar. 30, 2007), *available at* <http://www.law.com/jsp/article.jsp?id=1175159036800>, *last accessed* Aug. 14, 2007 .

The EEOC points to the fact that in Fiscal Year 2006, 36% (or 27,238) of the charges filed with the agency alleged race-based discrimination; and cites the following studies in support of its contention that facially neutral hiring practices are having a disproportionate impact on people of color: Devah Pager, *The Mark of a Criminal Record*, *American Journal of Sociology* (Mar. 2003), available at <http://www.northwestern.edu/ipr/publications/papers/2003/pagerajs.pdf>, last accessed Aug. 10, 2007; and Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Brendan More Employable than LaKisha and Jamal? A Field Experiment on Labor Market Discrimination* (May 6, 2003), available at http://economics.uchicago.edu/download/_DISCRIMINATION.pdf, last accessed Aug. 10, 2007.³ The Pager study concludes that there is a disparate impact to non-white candidates in the use of criminal conviction records as hiring criteria and, simultaneously, that there was a trend towards a disproportionate and thus potentially discriminatory emphasis of criminal record histories with non-white candidates, where it was a non-issue for white testers in the study group. Specifically, the Pager study finds:

“Based on the results presented . . . the effect of a criminal record appears more pronounced for blacks than it is for whites. While this interaction term is not statistically significant, the magnitude of the difference is nontrivial. While the ratio for callbacks for nonoffenders relative to ex-

³ The authors of the second study sent fictitious resumes to employers in Chicago and Boston who had placed help-wanted ads in newspapers, attempting to manipulate the perceived races of the applicants by “randomly assigning to the resumes either a very African American sounding name or a very White sounding name.” Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Brendan More Employable than LaKisha and Jamal? A Field Experiment on Labor Market Discrimination* (May 6, 2003), available at http://economics.uchicago.edu/download/_DISCRIMINATION.pdf, last accessed Aug. 10, 2007. The authors ultimately concluded that “employers are 50 percent more likely to call back resumes with White names for interviews. Moreover, . . . [f]or White names, higher quality resumes elicit 30 percent more callbacks. For African Americans, however, higher quality resumes elicit a far smaller increase in callbacks.” *Id.*

offenders for whites is 2:1, this same ratio for blacks is nearly 3:1. The effect of a criminal record is thus 40% larger for blacks than for whites.”

Devah Pager, *The Mark of a Criminal Record*, *American Journal of Sociology* (Mar. 2003) at 959-960 (“On three separate occasions . . . black testers were asked in person (before submitting their applications) whether they had a prior criminal history. None of the white testers were asked about their criminal histories up front.”), *available at* <http://www.northwestern.edu/ipr/publications/papers/2003/pagerajs.pdf>, *last accessed* Aug. 10, 2007.⁴

2. Massachusetts Criminal Offender Record Information (CORI) Laws

Among other various areas of state law, the Massachusetts Criminal Offender Record Information (“CORI”) Act, General Laws Chapter 6, §§ 167-178, and the regulations promulgated thereunder, contain detailed and specific circumstances in which “criminal offender record information” may be accessed, transmitted, stored, disseminated, and evaluated. The Legislature set forth an extensive definition of what constitutes CORI, including “records and data in any communicable form compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial

⁴ See also EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982) (2/4/87), *available at* <http://www.eeoc.gov/policy/docs/convict1.html>, *last accessed* Aug. 15, 2007 (confirming that the Commission continues to hold that a hiring policy or practice that excludes individuals on the basis of their conviction records, **absent a justifying business necessity**, is unlawful under Title VII). The EEOC’s underlying position is that such policies or practices have “an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.” *Id.*, *citing* Green v. Missouri Pacific Railroad Co., 523 F. 2d 1290 (8th Cir. 1975). See also EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (7/29/87), *available at* <http://www.eeoc.gov/policy/docs/convict2.html>, *last accessed* Aug. 15, 2007.

proceeding, sentencing, incarceration, rehabilitation, or release.” G. L. c. 6, § 167. The CORI Act also limits what constitutes “criminal offender record information” by specifically excluding certain types of information such as statistical and evaluative information; most records concerning individuals under seventeen years of age, and “information concerning any offenses which are not punishable by incarceration.” G. L. c. 6, § 167.

The Massachusetts CORI Act sets forth certain classes of entities or individuals who may, and in some cases, must, obtain certain CORI information regarding current or prospective employees. For example, see the following Massachusetts General Laws:

- G. L. c. 6, § 172E (CORI information shall be available to long term care facilities as defined by G. L. c. 111, § 72W; and such facilities shall obtain CORI information for any applicant “under final consideration for a position that involves the provision of direct personal care or treatment to residents.”);
- G. L. c. 6, § 172F (conviction data, arrest data, sealed record data, and juvenile arrest or conviction data shall be available to the office of child care services for specified purposes);
- G. L. c. 6, § 172G (children’s camps shall obtain all available CORI information and juvenile data of all employees or volunteers prior to service);
- G. L. c. 6, § 172H (programs providing activities for children under eighteen shall obtain all CORI information on any prospective volunteer before accepting their services); and
- G. L. c. 6, § 172I (schools to obtain criminal records of taxicab drivers that have been contracted to provide student transportation).

The repercussions for violating CORI laws are significant. General Laws Chapter 6, § 178 sets punishment for each offense as a maximum fine of five thousand dollars (\$5,000) and/or a maximum jail or house of correction sentence of one year for anyone

“who willfully requests, obtains or seeks to obtain criminal offender record information under false pretenses, or who willfully communicates or seeks to communicate criminal offender record information to any agency or person except in accordance with the provisions” of the Act.⁵

In January 2007, the U.S. District Court for the District of Massachusetts held, in evaluating claims against a town, a police department, and various individuals for violations of the CORI Act, that an applicant or employee’s generalized “reputation” was not a protected property right for the purposes of the substantive component of the Due Process Clause, and thus a CORI Act violation, even if established, would not give rise to a cause of action under the Federal Civil Rights Act, 42 U.S.C. § 1983, or the Massachusetts Civil Rights Act, G. L. c. 12, §§ 11H and 11I. Galvin v. Town of Yarmouth, 470 F. Supp. 2d 10, 14-15 (D. Mass. 2007) (also holding that the plaintiff failed to establish causal link between the CORI disclosure made and the adverse employment action, a necessary element in establishing a violation of the Act). See also Schuurman v. Town of North Reading, 139 F. R. D. 276 (D. Mass. 1991) (holding that Fed. R. Evid. 609 as well as a 1978 Criminal History Systems Board blanket certification both permit access to CORI information, with the exception of juvenile records, for counsel’s use as impeachment evidence).

The Massachusetts Anti-discrimination Statute, General Laws Chapter 151B, specifically prohibits an employer (as defined in that statute) from requesting of an

⁵ All restrictions on the dissemination of CORI information are lifted on the date of death of the individual who is the subject of the CORI information. G. L. c. 6, § 178B.

applicant or current employee certain specified CORI information, and makes it unlawful for the employer:

“to request any information, to make or keep a record of such information, to use any form of application . . . which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information . . . regarding (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application . . . or . . . request for information.”

G. L. c. 151B, § 4(9). **The Supreme Judicial Court has held, however, that Chapter 151B does not prohibit employers from requesting certain CORI information from sources outside of the applicant; or from relying on the information obtained in making a hiring decision.** Bynes v. Sch. Comm. of Boston, 411 Mass. 264 (1991).

The SJC found in *Bynes* that the Legislature’s intent in the prohibitions of Chapter 151B § 4(9) was “merely to protect employees from such requests from their employers[,] and not to proscribe employers from seeking such information elsewhere.” Id. at 268. The SJC ultimately found that the defendant school committee, who had been certified under clause (c) of G. L. c. 6, § 172 to receive certain CORI information, did not improperly obtain or rely on those records in making adverse employment determinations that resulted in the plaintiff school bus drivers’ termination. Id.

Effective June 30, 2005, however, the Criminal History Systems Board (“CHSB”) promulgated new CORI regulations including 803 CMR 3.05 (requiring agencies

certified to receive CORI information to use revised CORI request form); and 803 CMR 6.11, which requires an employer to allow job applicants an opportunity to challenge the accuracy and relevance of a CORI report prior to the employer making any adverse decision based on the information contained in the report. The regulation also requires that certified employers maintain a written CORI policy that, at minimum, includes the following provisions:

- “(a) notify the applicant of the potential adverse decision based on the CORI;
- (b) provide a copy of the CORI to the applicant and the agency's CORI policy;
- (c) provide a copy of the CHSB’s information concerning the process in correcting a criminal record;
- (d) inform the applicant which part of the criminal record appears to make him ineligible;
- (e) provide the applicant with an opportunity to dispute the accuracy and relevance of the CORI;
- (f) upon receipt of additional documentation from the applicant and/or the CHSB, review the information with the applicant and inform him/her of the decision;
- (g) document all steps taken to comply with same.”

803 CMR 6.11. The type of information accessible is also narrowed by Chapter 6, § 172 itself, which only permits information provided pursuant to par. six of § 172 if the subject of the CORI request, at the time the request is made,

“has been convicted of a crime punishable by imprisonment for a term of five years or more, or has been convicted of any crime and sentenced to any term of imprisonment, and **at the time of the request:** [1] is serving a sentence of probation or incarceration, or [2] is under the custody of the parole board; or [3] having been convicted of a misdemeanor, has been

released from all custody or supervision for not more than one year; or [4] having been convicted of a felony, has been released from all custody or supervision for not more than two years; or [5] having been sentenced to the custody of the department of correction, has finally been discharged therefrom, either having been denied release on parole or having been returned to penal custody for violation of parole, for not more than three years.”

G. L. c. 6, § 173, par. 7 (emphasis added).⁶

As a result of the natural tension between trying to encourage a fresh start for offenders and trying to ensure public safety through the dissemination of information, the storage and dissemination of CORI information has been the subject of much political fodder in recent years in the Commonwealth. The laws surrounding criminal records information are under a great deal of scrutiny and there are a number of proposed statutory amendments before the Massachusetts Legislature. See, e.g., S.B. 2193, 185th Gen. Court (Mass. 2007) (An Act Relative to Distribution and Use of Criminal Offender Record); H.B. 1317, 185th Gen. Court (Mass. 2007) (An Act Relative to Distribution and Use of Criminal Offender Record Information); H.B. 1430, 185th Gen. Court (Mass. 2007) (An Act to Ease the Transition of Ex Offenders); H.B. 1509, 185th Gen. Court (Mass. 2007) (An Act Enhancing Public Safety by Establishing a Criminal Offender Database); H.B. 1509, 185th Gen. Court (Mass. 2007) (An Act Enhancing Public Safety by Establishing a Criminal Offender Database); H.B. 1523, 185th Gen. Court (Mass. 2007) (An Act Relative to CORI Reform); H.B. 1595, 185th Gen. Court (Mass. 2007) (An Act Relative to Criminal Offender Information); H.B. 1692, 185th Gen. Court (Mass.

⁶ See also Globe Newspaper Co. v. Fenton, 819 F. Supp. 89 (D. Mass. 1993) (finding provision of CORI Act that prohibited public access to alphabetical indices of criminal defendants unconstitutional, though noting that statute effectively achieved worthy objective, namely protecting the privacy, rehabilitation, and reintegration of convicted individuals).

2007) (An Act Relative to Money Laundering); and Andrea Estes, *Patrick Seeks to Limit Background Checks, Criminal Records Proposal in Works* (Feb. 12, 2007), Boston Globe, available at http://www.boston.com/news/local/massachusetts/articles/2007/02/12/patrick_seeks_to_limit_background_checks?mode=PF, last accessed Aug. 9, 2007.

Various pieces of pending Massachusetts legislation seek, *inter alia*,

- (1) to limit the scope of information available to agencies, other entities or persons granted access pursuant to G. L. c. 6, § 172, first paragraph, clause (c) (otherwise known as “clause (c)” exceptions to the limits on obtaining criminal records information) to only records of convictions and pending cases;⁷
- (2) to require that any agency or other entity granted access under clause (c), who is, after receiving the CORI information and as a result of such information is “inclined to make an adverse decision as to the individual who is the subject of the report[,]” provide the applicant with a copy of the report before making such decision and “afford him an opportunity, in a private discussion, to dispute the accuracy or relevance of the report, after which the agency [or other entity] . . . shall consider all the information before making a final decision[;]”⁸ and
- (3) to require that “any agency or individual who requests access to criminal offender record information . . . participate in a training session offered by

⁷ S.B. 2193, 185th Gen. Court (Mass. 2007). See also H.B. 1317, 185th Gen. Court (Mass. 2007).

⁸ S.B. 2193, 185th Gen. Court (Mass. 2007). See also H.B. 1317, 185th Gen. Court (Mass. 2007).

the board for the purposes of accurate interpretation and understanding of such criminal offender record information.”⁹

The proposed legislation evidences a trend in the Commonwealth towards a further limitation of access to certain types of criminal offender record information, both in the types of entities who may be entitled to the information and to the scope of the information provided; thereby broadening the scope of privacy afforded to certain individuals with criminal records and perhaps furthering their ability to obtain gainful and lawful employment. The proposed legislation simultaneously seeks to establish a criminal offender database that contains conviction information deemed to be public records.¹⁰

Employers and those advising them should stay abreast of current privacy legislation related to criminal records information, to ensure compliance with affirmative obligations of CORI Act and the regulations promulgated thereunder, and keep up with the categories of information that are, depending on their nature, becoming either more easily accessible or more protected by the Legislature. See Section B(3), *infra*, for a checklist and practical tips related to employer interview practices. See also Ernest Winsor, Esq., Mass. Law Reform Institute, *The CORI Reader* (3d ed., 2d Rev., Jul. 14, 2006), *available at* <http://www.mlri.org/uploads/aF/ic/aFicW5dhy9GLEv1DlG6sRw/CORIREader-3d-Ed-2d->

⁹ H.B. 1430, 185th Gen. Court (Mass. 2007).

¹⁰ See H.B. 1509, 185th Gen. Court (Mass. 2007), at Section 7.

Rev.pdf, *last accessed* Aug. 10, 2007 (thorough guide to requesting and obtaining CORI information in Massachusetts).¹¹

3. Criminal Records and Negligence Claims Against Employers

There is also a natural tension between an employer's responsibility of due care to business invitees and employees and the privacy and anti-discrimination rights of individuals with criminal records. Along these lines, employers in Massachusetts have been found liable in negligence to employees and members of the public alike for reasonably foreseeable tortious acts of their employees. In cases where the employer failed to perform a sufficient investigation into the individual's background, for example, courts will look to what a more thorough investigation would have revealed to determine whether, had the employer fulfilled its duty to investigate (if one is found to exist), the act complained of was reasonably foreseeable to the employer.¹² See, e.g., Or v. Edwards, 62 Mass. App. Ct. 475 (2004) (affirming jury verdict of liability for wrongful death brought about by negligent hiring against landlord who entrusted apartment keys to individual with criminal record); Coughlin v. Titus & Bean Graphics, Inc., 54 Mass. App. Ct. 633 (2002) (finding employer not liable to family of murder victim where employee with record of violent crimes, including those against women, was slated to work in

¹¹ See also Commonwealth of Massachusetts Administrative Office of the District Court, A Guide to Public Access, Sealing and Expungement of District Court Records (Rev. May 2007), *available at* <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/pubaccesscourtrecords.pdf>, *last accessed* Aug. 10, 2007.

¹² The U.S. District Court for the District of Massachusetts has described the inquiry for negligent hiring, retention or supervision claims as (1) examining "the facts about the employee known by the employer or reasonably available to the employer[;]" and based on the knowledge or imputed knowledge found; (2) "was it foreseeable that some harm could come to 'related person,' in which case a duty of reasonable care is owed to those persons[;]" (3) "would a reasonable person have acted upon that knowledge differently than the defendant[;]" and (4) "would those steps that a reasonable person would have taken make any difference[.]" Great Northern Ins. Co. v. Paino Assocs., 364 F. Supp. 2d 7, 21 (D. Mass. 2005).

warehouse and not in contact with members of the public, and background check would not have provided information that would have allowed defendant to “reasonably foresee” that employee posed a threat to the general public); Foster v. The Loft, Inc., 26 Mass. App. Ct. 289, 294 n. 6 (1988) (“For us to hold that an employer can never hire a person with a criminal record or retain such a person as its employee ‘at the risk of being held liable for his tortious assault flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray.’”). Generally speaking, “an employer, whose employees are brought in contact with members of the public in the course of the employer’s business, has a duty to exercise reasonable care in the selection and retention of employees.” Coughlin, 54 Mass. App. Ct. at 638-639.

In *Or*, a residential landlord, prior to entrusting apartment keys to a man named Vao Sok (“Sok”) who performed various odd jobs around the building, learned from Sok that he was facing criminal charges for auto theft, that he couldn’t work on certain days because he had to report to court for “probation,” and that he had spent time in a hospital for what the landlord believed was mental observation. Or, 62 Mass. App. Ct. at 480-481. The landlord did not, however, require Sok to fill out an employment application or provide background information or references; nor did he inquire from any source about Sok’s “ability, behavior, character, record, or any other dimension.” Id. at 481. Sok was later convicted of the kidnapping, rape and murder of one of the apartment resident’s young daughters, the estate of which was the plaintiff in the civil action against the landlord. Id. at 479 n. 6. Sok, as it turns out, was actually under indictment at the time he started working for the landlord for kidnapping and raping a young girl, and notice of

his arrest had been publicized in two local papers. Id. at 481. Further, a friend whom Sok was staying with, who was a tenant in the apartment building, readily told investigators about Sok's drinking problems and that he was afraid to leave his wife and children alone with Sok. Id. The Appeals Court analyzed the traditional negligence elements of duty, breach of duty, causation and damages and affirmed the jury's verdict on liability because as a residential landlord, the defendant had a heightened duty to protect his tenants from "reasonably foreseeable risks of harm, including foreseeable risks of criminal acts" and a jury could have reasonably inferred that the landlord might have learned more about Sok's background upon "simple inquiry among those who knew" him. Id. at 483-484. Had the landlord made such a simple inquiry, the risk of Sok using the keys to access a vacant apartment used for the raping and killing of a young girl would have been reasonably foreseeable in light of Sok's background. Id. at 483-491 ("[T]he defendants are held liable as the harm that eventuated was among the (foreseeable) harms that made the failure to inquire tortious (negligent)."). See also Bonnie W. v. Commonwealth, 419 Mass. 122. The Supreme Judicial Court, in *Bonnie W.*, held that a jury could have reasonably found the Commonwealth liable for the acts of a parole officer who was "bound, as any other person would be, to act reasonably" in his conversations with an ex-convict's prospective employer, and that the parole officer had "violated that duty to the detriment of the [employer]" by misrepresenting the status of the individual's record and recommending him for a job as a maintenance man at a trailer park, with entrustment of keys to trailers as part of the position, where a resident of the park was later assaulted by the same individual in her trailer. Id. at 123-127 (subject of

recommendation had just been released from prison after serving sentences on convictions for robbery and multiple counts of rape).

The opinions discussed above illustrate that employer decisions based on criminal record information, from whatever source, must be openly and carefully made and necessarily require a fact-specific analysis of the individual at issue as well as the nature of the duties the individual will be expected to perform for the employer. Through the actions of negligent hiring, retention, and supervision, courts have imposed “a continuing duty upon employers to respond appropriately to information known or reasonably available to them about an employee, both at the initial hiring and during the course of employment.” Great Northern Ins. Co. v. Paino Assocs., 364 F. Supp. 2d 7, 20 (2005), *citing Foster*, 26 Mass. App. Ct. at 294-295. Pursuant to Massachusetts’ CORI laws, moreover, employers must now provide an opportunity to the applicant or employee to dispute the accuracy or relevance of any CORI information being relied upon by the employer to make any adverse employment decision.

4. Practical Tips for Management: Inquiring About Criminal Histories

In light of the foregoing discussion, following is a checklist for employers who inquire into the criminal backgrounds of applicants or employees (note that certain employers have been granted access to criminal record information by the Massachusetts Criminal History Systems Board, and may obtain certain information regarding an applicant or employee’s criminal records; but access to this information is limited by the context of the request):

Questions Employers May Ask a Job Applicant.¹³

- Have you been convicted of a felony? Yes or no?
- Have you been convicted of a misdemeanor within the past five (5) years (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)? Yes or no?
- Have you completed a period of incarceration within the past five (5) years for any misdemeanor (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)? Yes or no?
- If the answer to the previous question is “yes”, please state whether you were convicted more than five (5) years ago for any offense (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)? Yes or no?
- Any inquiry into the prior arrests or convictions of an applicant must contain the following language, pursuant to G. L. c. 276, § 100A:

“An applicant for employment with a sealed record on file with the commissioner of probation may answer ‘no record’ with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer ‘no record’ to an inquiry herein relative to prior arrests or criminal court appearances. In addition, any applicant for employment may answer ‘no record’ with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution.”

It is **unlawful**, conversely, for an employer to request, make or keep a record, or exclude discriminate against any applicant or worker on the basis of information regarding:

- Any arrest or other disposition for which no conviction resulted;

¹³ See 804 C.M.R. 3.02.

- A first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace;
- Any misdemeanor conviction where the latter of the conviction date or completion of any incarceration date is five (5) or more years prior to the application or request for such information, unless the individual has been convicted of any offense within five years immediately preceding the date of such application or request for information.¹⁴

C. POTENTIAL EXPANSION OF RETALIATION CLAIMS

1. Broad Standard Announced for Evaluation of Retaliation Claim Under Title VII of Civil Rights Act of 1964

In June 2006, the United States Supreme Court issued its decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006) (hereinafter “*Burlington Northern*”), holding that the anti-retaliation provision of Title VII applies not only to adverse actions taken by employers *in the workplace*, but also to any employer action, including actions taken outside the workplace, that would have been “materially adverse to a reasonable employee or job applicant.” *Burlington Northern*, 126 S. Ct. at 2409. Prior to this decision, the circuit courts varied widely in their standards for determining whether an employer’s action constitutes retaliation, ranging from holdings that the challenged action must have an adverse impact on the “terms, conditions, or benefits of employment,” to holdings that the challenged action must simply constitute “adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.” See *Burlington Northern*, 126 S. Ct. at 2410-2411, *citing and generally discussing* *Rochon v. Gonzales*, 438 F. 3d 1211, 1217-1218 (D.C. Cir. 2006); *Washington v. Illinois Dep’t of Revenue*,

¹⁴ G. L. c. 151B, § 4(9).

420 F. 3d 658, 662 (7th Cir. 2005); Von Gunten v. Maryland, 243 F. 3d 858, 866 (4th Cir. 2001); Ray v. Henderson, 217 F. 3d 1234, 1242-1243 (9th Cir. 2000); Robinson v. Pittsburgh, 120 F. 3d 1286, 1300 (3rd Cir. 1997); Mattern v. Eastman Kodak Co., 104 F. 3d 702, 707 (5th Cir. 1997); Manning v. Metro. Life Ins. Co., 127 F. 3d 686, 692 (5th Cir. 1997). The Supreme Court analyzed the language and purpose behind the separate anti-discrimination and anti-retaliation provisions of Title VII, concluding that the objective behind the anti-retaliation provision, namely to prevent employers “from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic’s guarantees[.]” was not served by limiting the focus of the analysis to harm that is directly related to the terms, conditions, or benefits of employment. Burlington Northern, 126 S. Ct. at 2412. This, according to the analysis, is because “An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.” Id. (emphasis added). Further,

“Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. ‘Plainly, effective enforcement can thus only be expected if employees felt free to approach officials with their grievances.’ Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act’s primary objective depends.”

Id. at 2414, *quoting* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

The Court discussed the degree of harm required to trigger Title VII’s anti-retaliation provision and noted that not all forms of retaliation are prohibited, only those that produce an injury or harm, and a plaintiff must show that, objectively speaking, a “reasonable employee would have found the challenged action **materially** adverse,

‘which in this context means it well *might have dissuaded a reasonable worker from making or supporting a charge of discrimination.*’” Burlington Northern, 126 S. Ct. at 2141-2415 (emphasis added), *quoting* Rochon, 438 F. 3d at 1219. With respect to the materiality component, the Court noted that “normally petty slights, minor annoyances, and simple lack of good manners” will not suffice because the purpose of Title VII is not to set out a “general civility code for the American workplace.” Burlington Northern, 126 S. Ct. at 2415, *quoting* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). Moreover, the standard is purposefully kept in general terms because the Court recognized that the significance of a particular act of retaliation will usually differ depending on the facts and circumstances of the particular case. Burlington Northern, 126 S. Ct. at 2415 (“A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.”). After all, the “real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” Burlington Northern, 126 S. Ct. at 2415, *quoting* Oncale, 523 U.S. at 81-82.

The Supreme Court ultimately found that despite a more stringent standard for retaliation utilized in the jury instructions below,¹⁵ there was sufficient evidence for a jury to conclude that the work reassignments at issue, namely plaintiff’s reassignment from a forklift operator, which required more qualifications, was more desired by the

¹⁵ The District Court below had instructed the jury to decide whether the plaintiff had “suffered a materially adverse change in the terms or conditions of her employment” thereby excluding consideration of any out-of-work conduct that didn’t have a direct impact on the terms or conditions of the plaintiff’s employment. Burlington Northern, 126 S. Ct. at 2416, *quoting* Record Appendix at 63.

other workers, and carried an indication of prestige, to truck labor duties which were by all accounts dirtier and more difficult, would have been materially adverse to a reasonable employee. Burlington Northern, 126 S. Ct. at 2417. The Court similarly found that an indefinite suspension without pay during an investigation for alleged subordination, after thirty-seven days of which plaintiff was reinstated and provided backpay, could nonetheless constitute unlawful retaliation and, therefore, the jury below was reasonable in finding that the suspension was materially adverse. Id. at 2317-2418. The Court reasoned that the suspension without pay could constitute unlawful retaliation because Title VII also provides for compensatory and punitive damages to help make victims whole and, in *Burlington Northern*, the plaintiff and her family suffered uncertainty during that time, were forced to live for thirty-seven days without income, and the plaintiff suffered from and sought treatment for emotional distress. Id. at 2317. Thus, “an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay.” Id. Employers who litigate in circuits that previously applied the more stringent analysis of Title VII retaliation claims may see a rise in claims filed by employees who feel they have been retaliated against for making or supporting a charge of discrimination or, at the very least, a higher percentage of those types of claims getting past the various dispositive motion phases.¹⁶

¹⁶ The U.S. Equal Employment Opportunity Commission’s charge statistics for the years 1997 – 2006 reveal that TITLE VII retaliation claims increased from 2005 to 2006 by a mere 131 claims (19,429 to 19,560), and the statistics also reveal that the percentage of Title VII retaliation claims, as related to other types of discrimination claimed, remained at a constant 25.8% in the years 2005 and 2006. The number of Title VII retaliation claims, moreover, was significantly lower in 2005 and 2006 than in any of the previous five years. See Charge Statistics from the U.S. Equal Employment Opportunity Commission, available at <http://www.eeoc.gov/stats/charges.html>, last updated Feb. 26, 2007, last accessed Aug. 7, 2007.

Justice Alito, although ultimately concurring in the *Burlington Northern* judgment authored by Justice Breyer and joined by the remaining Justices Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, and Ginsburg, issued a separate opinion where he disagreed with the majority's statutory interpretation and foretold the practical problems that may arise from the standard set forth. Burlington Northern, 126 S. Ct. at 2418. Justice Alito criticized the majority's interpretation as having "no grounding in the statutory language[.]" and instead favored the interpretation utilized by the 4th, 3rd and 11th Circuit Courts of Appeals. Id. This alternate interpretation reads the anti-discrimination and anti-retaliation provisions of Title VII together, and thus "discrimination" for the purposes of the anti-retaliation provision is defined and limited by the discriminatory acts described in the anti-discrimination provision, namely discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment." Id., quoting Section 703(a) of Title VII, at 42 U.S.C. § 2000e-2(a)(1). Justice Alito cautioned that the majority opinion will lead to a great deal of uncertainty for fact finders and litigants because (1) "the majority's interpretation logically implies that the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination that prompted the retaliation[;]" (2) the majority leaves us with an unclear conception of what constitutes a "reasonable worker" because in the examples provided various individual characteristics of the worker are considered, such as age, family responsibilities, and gender; and (3) the loose causation standard utilized by the majority, namely whether the retaliatory act "well might have dissuaded a reasonable worker from

making or supporting a charge of discrimination[,]” introduces an new, unclear, and unwelcome standard to an already complex area of the law. *Id.* at 2420-2421.¹⁷

The practical import of the *Burlington Northern* decision for employers subject to liability under Title VII is that they will have to make thorough, fact-specific, bias-free and broad-based investigations into any claims of conduct perceived to be either discriminatory or retaliatory in nature, investigations that go beyond the four walls of the workplace. Given that some state statutes, as discussed below, provide even greater protections than Title VII, however, cautious employers should always engage in such investigations in order to effectively insulate themselves from liability for the discriminatory or retaliatory acts of their employees.

2. Implications of Expanded Federal Retaliation Standard on Claims Brought Under the Massachusetts Anti-Retaliation Provisions of G. L. c. 151B

The Massachusetts anti-retaliation counterpart to that contained in Title VII is much broader in its scope of protections, and provides that it shall be unlawful:

“For any person, employer, labor organization or employment agency to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five. **[Further, it shall be unlawful] [f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to**

¹⁷ The First Circuit Court of Appeals, in 2002, applied the following standard in evaluating a retaliation claim brought under Title VII side by side with a discrimination claim under Massachusetts General Laws Chapter 151B § 4(1): to sustain a retaliation claim, the plaintiff “must produce evidence on three points: (1) they engaged in protected conduct under Title VII, (2) they experienced an adverse employment action; and (3) a causal connection exists between the protected conduct and the adverse action[, and] **[t]o be adverse, an action must materially change the conditions of plaintiffs’ employ.**” *Gu v. Boston Police Department*, 312 F. 3d 6, 13-14 (1st Cir. 2002) (emphasis added). Thus the *Burlington Northern* decision widens the potential liability of employers defending Title VII retaliation actions in the First Circuit, which had previously utilized stricter standard of interpretation.

coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.”

G. L. c. 151B, §§ 4(4), 4(4A) (emphasis added). Although occasionally the Supreme Judicial Court will consider “analogous Federal law” in interpreting other provisions of General Laws Chapter 151B,¹⁸ in the context of the state’s anti-retaliation provision, the language used is “much more specific than Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 (1994) . . . **and we may well find liability [for retaliation] under c. 151B even if the same conduct would not be actionable under Title VII.**” Bain v. City of Springfield, 424 Mass. 758, 765 n. 4 (1997).¹⁹ See also Melnychenko v. 84 Lumber Co., 424 Mass. 285, 288 (1997) (rejecting defendant and dissent’s urging to follow federal interpretations of Title VII in determining whether same-sex harassment perpetrated by a heterosexual individual is actionable sex discrimination, noting that the federal interpretations “are hardly in accord” on the issue and that, nonetheless, “we arrive at our own conclusions in construing our own statute.”). Thus it is unlikely that the U.S. Supreme Court’s recent expansion of the anti-retaliation protections available under

¹⁸ See, e.g., Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (looking to U.S. Supreme Court precedent under anti-discrimination provisions of Title VII as persuasive, though not binding, authority on three-stage order of proof test to be utilized in absence of direct evidence of discrimination).

¹⁹ The plaintiff in *Bain* initially won a jury verdict for retaliation, despite that her sex discrimination claim failed. Bain, 424 Mass. at 758. The Supreme Judicial Court ultimately found that the plaintiff had presented sufficient evidence to support a finding of a “threat or intimidation in the enjoyment of her right under the statute to bring a complaint - unfounded though the jury found the complaint to be[,]” and upheld her recovery for retaliation. Id. at 765.

The SJC remanded for a new trial on the issue of punitive damages, however, due to improperly considered evidence. Id. at 769. It held that certain evidence presented by the plaintiff, i.e., that her superior acted coldly, exhibited hostile body language, and second-guessed her, couldn’t “be allowed to be considered unlawful retaliation” because these were merely “subjective and intangible impressions[,]” and “[s]uch vague and impressionistic elements have no place in defining the standards for legal intervention in the often fraught and delicate domain of personnel relations.” Bain, 424 Mass. at 765-766.

Title VII of the Civil Rights Act of 1964 will have any significant impact on the way the anti-retaliation provision of G. L. c. 151B is interpreted; as the Massachusetts statute already provides broader protections on its face.

In 2004, the Massachusetts Supreme Judicial Court held that a prima facie case of retaliation under G. L. c. 151B §§ 4(4) and (4)(4A) requires a showing that the plaintiff “engaged in protected conduct, that he suffered some adverse action, and that a ‘causal connection existed between the protected conduct and the adverse action.’” Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004). See also Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 121 (2000) (articulating test for success on a claim of retaliation under Chapter 151B as proof that (1) the plaintiff “reasonably and in good faith believed that the [employer] was engaged in wrongful discrimination, that [he] acted reasonably in response to [his] belief, and that the [employer’s] desire to retaliate against [him] was a determinative factor in its decision to terminate [his] employment.”), quoting Tate v. Dep’t of Mental Health, 419 Mass. 356, 364 (1995). The SJC found that the plaintiff professor in *Mole*, who charged that UMass had retaliated against him for supporting his wife’s sexual harassment claim against the University, had failed to provide any direct evidence of retaliatory motive; and in light of the defendant’s production of several nonretaliatory reasons for the actions taken that included critical performance evaluations, reductions in salary, assigning his laboratory spaces to others and, ultimately, termination, the plaintiff bore the burden of “proving that the articulated nonretaliatory reasons were pretext[.]” which he failed to do. Mole, 442 Mass. at 591-592. Under the facts of *Mole*, the adverse actions predated, for up to a period of two

years, any protected activity and, thus, the SJC held it was impermissible to infer a motive of retaliation from the adverse actions that were taken *after* the employer learned of the protected activity. Mole, 442 Mass. at 594-595.

The *Mole* court goes on, citing federal circuit case law, to discuss situations in which an unbiased, independent decision maker can break the chain of causation relieving the employer of liability even if the plaintiff is able to show a retaliatory or discriminatory motive on the part of a supervisor who recommends that an adverse action be taken. Mole, 442 Mass. at 598-600 (“When assessing the independence of the ultimate decision maker, courts place considerable emphasis on the decision maker’s giving the employee the opportunity to address the allegations in question, and on the decision maker’s awareness of the employee’s view that the underlying recommendation is motivated by bias or a desire to retaliate.”). Thus employers should involve a third person in termination or disciplinary decisions; an individual who does not merely serve as a rubber stamp to the perhaps arbitrary, abbreviated and, at worst discriminatory or retaliatory recommendation of a supervisor to terminate or otherwise discipline an employee, but instead performs a thorough and unbiased investigation into the facts and circumstances of the reasons behind the recommendation. Note further, that a supervisor found to have committed unlawful retaliatory acts in violation of Chapter 151B faces potential individual liability for tortious interference with advantageous relations, and the accompanying compensatory and punitive damages that may be available to a successful plaintiff. See, e.g., Zimmerman v. Direct Federal Credit Union, 262 F. 3d 70 (1st Cir. 2001) (affirming jury verdict in plaintiff’s favor on state law retaliation claim and tortious

interference with advantageous relations claim and ratifying award of punitive damages for violation of Chapter 151B at a rate of 2:1 compared to the underlying compensatory damages).

D. EMPLOYER LIABILITY FOR THE ACTS OF NON-EMPLOYEES

1. Employer May Be Liable for Discriminatory Acts of Non-Employee Third Party

In 2005, the Massachusetts Supreme Judicial Court rejected the argument that an employer may never be liable for sexual harassment perpetrated by non-employee third parties (in this case, employees of one of the defendant general contractor's subcontractors); but nonetheless held that, under the facts and circumstances of that case, the employer's response to the plaintiff's complaints about the harassing conduct was reasonable and thus satisfied its legal obligations to its employee. Modern Continental/Obayashi v. MCAD, 445 Mass. 96 (2005) (overturning MCAD award of \$50,000 to female Big Dig worker who was sexually harassed by third party subcontractor). The Court adopted the standards promulgated in the MCAD Guidelines and comparable Federal precedent applying Title VII of the Civil Rights Act of 1964 as well as EEOC regulations in holding that "an employer is not strictly liable for sexual harassment perpetrated by nonemployees [but, rather,] [t]he standard is one of reasonableness." Id. at 108.²⁰ The court then articulated the elements of the approach, **with the ultimate question being the reasonableness of the employer's action:** "did

²⁰ California, for example, also extends liability to employers for sexual harassment perpetrated by nonemployees against its employees. See Carter v. California Dep't of Veterans Affairs, 38 Cal. 4th 914, 135 P. 3d 637 (2006) (holding that amendment to state Fair Employment and Housing Act expressly providing for liability of employers for sexual harassment perpetrated by nonemployees merely clarified existing California law on point).

the employer ‘take prompt, effective and reasonable remedial action,’ . . . or ‘immediate and appropriate corrective action,’ . . . once it realized or should have realized that one of its employees was being victimized by a third party’s harassment?” *Id.* at 108, *quoting* Massachusetts Commission Against Discrimination Guidelines: Sexual Harassment in the Workplace § III.C (2002); 29 C.F.R. § 1604.11(e); and *citing* Turnbull v. Topeka State Hosp., 255 F. 3d 1238 (10th Cir. 2001); Lockard v. Pizza Hut, Inc., 162 F. 3d 1062, 1074 (10th Cir. 1998); Mart v. Dr. Pepper Co., 923 F. Supp. 1380, 1388 (D. Kan. 1996); and Woods-Pirozzi v. Nabisco Foods, 290 N. J. Super. 252, 272, 675 A. 2d 684 (App. Div. 1996). **The standard “imposes a duty [on the employer] ‘to take prompt action reasonably calculated to end the harassment and reasonably likely to prevent the conduct from recurring.’”** Modern Continental/Obayashi, 445 Mass. at 108-109 (emphasis added).

The court distinguished and explicitly rejected any standard that would require an employer to “actually succeed in stopping or preventing the harassment[.]” *Id.* at 109. The court emphasized, however, that the “promptness and effectiveness” of the employer’s response will constitute key factors in the analysis, though not being dispositive of the issue. *Id.*, *quoting* Turnbull, 255 F. 3d at 1245.

Finally, the *Modern Continental/Obayashi* court pointed out that the applicable standard does not require a hindsight view of whether an employer took the *best* course of action available, but merely asks whether the response was “appropriate in light of all the circumstances.” Modern Continental/Obayashi, 445 Mass. at 109, *quoting* Crist v. Focus Homes, Inc., 122 F. 3d 1107, 1112 n. 5 (8th Cir. 1997). The reasonableness

element, moreover, may be read “in light of the [employer’s] practicable ability to control the actual perpetrators.” Modern Continental/Obayashi, 445 Mass. at 118. Similarly, the court held that an employer “is not required to respond with the precise remedy that the harassment victim wishes or asks for – the victim does not have a right to ‘dictate the remedy the employer chooses to stop the harassment.’” Id. at 109, *quoting* Hallberg v. Eat’n Park, 1996 WL 182212 (W. D. Pa. 1996), 70 Fair Empl. Prac. Cas. (BNA) 361, 64 USLW 2644. The Appeals Court ultimately held that, as a matter of law, the defendant’s response to the plaintiff’s complaints of sexual harassment met its obligation to promptly act in a way reasonably calculated to stop the plaintiff’s harassment. Modern Continental/Obayashi, 445 Mass. at 110 (overruling MCAD’s erroneous imposition of strict liability on employer defendant because its actions were not wholly successful in stopping the harassment and MCAD’s erroneous reliance on its own opinion as well as that of the plaintiff that the employer could have taken more or different actions and more quickly than it did).²¹

In conclusion, the *Modern Continental/Obayashi* opinion serves as a critical reminder to employers that they must take prompt, reasonable remedial actions that are reasonably calculated to stop the harassment, despite that the perpetrator of the harassment may be a non-employee. See discussion at Section A(4), *supra*, for practical steps an employer can and should take in responding to a complaint of harassment.

²¹ The court notes that when an employer takes remedial action, the reasonableness of the action(s) taken may be determined as a matter of law at, for example, the summary judgment stage of litigation. Modern Continental/Obayashi, 445 Mass. at 110-111.

2. Employer Is Not Jointly & Severally Liable to Employee for Third-Party Violation of Massachusetts Tips Act Where Third-Party was Invoicing Party Under the Act

In a clarifying holding in 2007, the Massachusetts Appeals Court limited the liability of an employer under the Massachusetts Tips Act for unlawful acts of a third-party non-employee. See Cooney v. Compass Group Foodservice, 69 Mass. App. Ct. 632 (2007) (declining to impose joint and several liability on employer for acts of non-employee defendant in context of Massachusetts Tips Act, G. L. c. 149, § 152A, under version of law in effect prior to 2004 amendments, because clear statutory language places burden and liability for compliance on *invoicing* entity rather than employer). The plaintiffs' employer in *Cooney* had contracted with defendant Northeastern University to provide food and beverage services for events at Northeastern's Henderson House, but Northeastern prepared invoices for its customers and distributed all proceeds therefrom, levying a "service charge" on each customer invoice that grew up to 18% by the time the lawsuit was initiated and that, further, was never distributed to or shared in any way with the plaintiff waitstaff or bartenders. Cooney, 69 Mass. App. Ct. at 640-641. Because the employer was not involved in the invoicing of the customers or the ultimate distribution of the invoice revenues (it was undisputed here that Northeastern utilized all of the "service charge" revenues were used for the upkeep of the Henderson House), the Appeals Court found that it could escape liability under section 152A. Id. at 632, 640-641.

APPENDIX

I. Cases

<u>Burlington Northern & Santa Fe Railway Co. v. White</u> , 126 S. Ct. 2405 (2006)	A
<u>Cooney v. Compass Group Foodservice</u> , 69 Mass. App. Ct. 632 (2007)	B
<u>Galvin v. Town of Yarmouth</u> , 470 F. Supp. 2d 10 (D. Mass. 2007)	C
<u>Lowery v. Klemm</u> , 446 Mass. 572 (2006)	D
<u>Modern Cont'l/Obayashi v. MCAD</u> , 445 Mass. 96, 106 (2005)	E
<u>Mole v. University of Massachusetts</u> , 442 Mass. 582, 591 (2004)	F
<u>Or v. Edwards</u> , 62 Mass. App. Ct. 475 (2004)	G
<u>Porto v. Town of Tewksbury</u> , 488 F. 3d 67 (1st Cir. 2007)	H
<u>Salvi v. Suffolk County Sheriff's Dept.</u> , 67 Mass. App. Ct. 596, 605 (2006)	I

II. Massachusetts Statutes, Regulations and Agency Materials

General Laws Chapter 6, § 167	J
General Laws Chapter 6, § 172	K
General Laws Chapter 149, § 152A	L
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804 Code of Massachusetts Regulations 3.02	O
Model Sexual Harassment Policy, MCAD Policy 96-2 (Oct. 25, 1996)	P

III. Massachusetts House and Senate Bills, Massachusetts 185th General Court

S.B. 2193, 185th Gen. Court (Mass. 2007) (An Act Relative to Distribution and Use of Criminal Offender Record)	Q
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H.B. 1317, 185th Gen. Court (Mass. 2007) (An Act Relative to Distribution and Use of Criminal Offender Record Information) . . .	R
H.B. 1430, 185th Gen. Court (Mass. 2007) (An Act to Ease the Transition of Ex Offenders)	S
H.B. 1509, 185th Gen. Court (Mass. 2007) (An Act Enhancing Public Safety by Establishing a Criminal Offender Database)	T
H.B. 1523, 185th Gen. Court (Mass. 2007) (An Act Relative to CORI Reform)	U
H.B. 1595, 185th Gen. Court (Mass. 2007) (An Act Relative to Criminal Offender Information)	V
H.B. 1692, 185th Gen. Court (Mass. 2007) (An Act Relative to Money Laundering)	W