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Judicial and Legislative Developments in Maine Employment Law

BY: Devin W. Deane, Esq. The last several months have seen a great deal of activity in the field of employment law. In a series of decisions, the Maine Supreme Judicial Court and the United States District Court for the District of Maine have more clearly defined the limits on liability under the Maine Whistleblowers Protection Act (MWPA). Meanwhile, the Maine Legislature has enacted several laws which grant Maine workers new rights in the areas of leave, pay, and protection from discrimination. Judicial Decisions Pushard v. Riverview On January 30, 2020, the Maine Supreme Judicial Court decided the case of *Roland Pushard v. Riverview Psychiatric Center*, 2020 ME 23. In *Pushard*, the Court clarified that an employee does not necessarily qualify as a whistleblower simply because he or she complained about a dangerous condition in the workplace. Rather, one must actually reveal a condition that is not generally known to the employer. Roland Pushard was the Director of Nursing at Riverview. He complained to the hospital director, Jay Harper, about his concern with the inadequacy of the institution's staffing practices. He told Harper that he believed Riverview patients were put at risk because the hospital was staffed by under-qualified caregivers. After Pushard was terminated, he brought suit alleging that he was fired in violation of the MWPA, which prohibits retaliation against an employee who, "acting in good faith, . . . reports to the employer . . . , orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual." 26 M.R.S. § 833(1)(B). The Law Court had previously ruled, in *Cormier v. Genesis Healthcare LLC*, 2015 ME 161, 129 A.3d 944, that a healthcare worker could be protected under the MWPA for reporting staffing-related safety concerns. The Court said, however, that Pushard was not protected under the Act because "he was not exposing a concealed or unknown safety issue. Instead, he was simply giving his opinion concerning his supervisor's attempts to address well-known problems related to staffing." The Law Court explained: Pushard's conduct does not meet that standard because he was simply engaged in a policy dispute with his employer about how best to handle Riverview's staffing issues. That Riverview was understaffed was known to the public, the Legislature, and Riverview employees. Even if the specific staffing decisions about which Pushard complained were not widely known, it is uncontroverted that Pushard "did not believe that he was making Harper or anyone else aware of anything they were not already aware of." For this reason, Pushard was not *reporting*; he was complaining. The implications of the *Pushard* case are hard to gauge. It seems unlikely that the Maine Legislature meant to deny job protection to those who complain about unsafe conditions or illegal practices whenever those things are already known to some members of management. On the other hand, in situations like the one in *Pushard*, where a problem truly is public knowledge, the protection of the MWPA arguably should not extend to every employee who echoes what others have said. The Law Court seems to have understood that the facts of the *Pushard* case were fairly unusual, and therefore tried to limit the reach of its holding. The Court expressly observed that it had "no occasion here to articulate a comprehensive standard for what qualifies as a protected report." In particular, the Court "decline[d] to adopt an 'initial reporter' rule for WPA cases, as urged by Riverview." Therefore, it remains to be seen how momentous the decision will be. At the very least, however, we can be sure that in cases to come, there will be litigation over the question of when pre-existing awareness of an unsafe condition or an illegal practice makes an employee a "complainer," who can be disciplined for commenting on those conditions and practices, rather than a statutorily-protected "reporter." Apon v. ABF Freight Systems, Inc. In

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two separate decisions rendered over the course of several months in the same case, the United States District Court for the District of Maine established additional limits on liability under the Whistleblowers Protection Act. The Plaintiff in the Apon case was an Operations Supervisor for ABF Freight System, Inc., a national trucking company. When the federal government enacted rules to implement "hours of service" and meal break requirements in the Federal Motor Carrier Safety Act – measures to make sure that drivers didn't become overworked and overtired while driving – ABF took steps to ensure compliance. The company required all management personnel to sign a document entitled "Leadership Responsibility Hours of Service and Meal Break Compliance Form." The "Leadership Form" stated that "[c]ompliance must be achieved through oversight, enforcement, and leadership of the Branch Managers and Linehaul Managers." Because the Leadership Form did not mention Apon's job title (Operations Supervisor), he refused to sign it, and he was fired for his refusal. He then sued, alleging violations of both the "reporting" and "refusal" protections of the Whistleblower Protection Act. Apon claimed that his firing was motivated in part by the fact that he had reported to a supervisor his reasonable, good faith belief that his signature on the form would violate state or federal transportation laws, rules, or regulations. He also claimed that the firing was motivated in part by his refusal to commit an illegal act. ABF, represented by NH&D, first moved to dismiss the "refusal" claim on the ground that Apon had not identified any particular law he would have violated if he had signed the Leadership Form. There is well-settled authority that employees are protected from retaliation if they *report* what they genuinely and in good faith believe to be violations of the law, even if they are wrong – that is, even if the employer is not actually violating the law. ABF argued, however, that in order to be protected under the MWPA for refusing to carry out a directive, an employee must allege, and ultimately prove, that the directive was actually illegal. The District Court agreed and granted the motion, reasoning that "Section D of the MWPA . . . does not protect an employee who has refused to carry out a directive to engage in an activity that he *genuinely believes would be* a violation of a law or rule. Rather, it protects employees who, acting in good faith, refuse to carry out a directive or engage in an activity that "*would be* a violation of a law or rule." After the dismissal of the "refusal" claim, the parties conducted discovery on the "reporting" claim, and at the close of discovery ABF moved for summary judgment. ABF argued that the "reporting" claim also failed because, even if Apon was telling the truth when he said he believed it would be illegal for him to sign the Leadership Form, he had not conveyed that belief to anyone at ABF. The District Court agreed on this score as well. According to the Court, it was not enough that Apon objected to the form, telling his supervisor that he "had an issue with the form" and that he needed someone to explain why he, as an Operations Supervisor, was required to sign it. The Court reasoned that "for an employee's conduct to fall within the protection of the MWPA, the purpose of which is to deter retaliation against employees who report what they reasonably believe to be illegal acts, *the employee must communicate that he or she thinks the reported act is illegal*. Put another way, 'it is a basic prerequisite to a whistleblower protection claim that the plaintiff has actually blown the proverbial whistle.'" Legislative Developments In the fall of 2019 the Maine legislature enacted several new laws and amendments to existing laws that affect employment law in Maine. Many of the laws, which took effect in the fall and by now have been widely publicized, are intended to curb unfair or discriminatory employment and pay practices. Others are intended to provide Maine workers opportunities for paid time off for inevitable life events. Earned Employee Leave The Maine Legislature enacted LD 369, "An Act Authorizing Earned Employee Leave," which is intended to ensure that Maine workers have adequate opportunities to take time off without losing pay to take care of inevitable life events. The law is the first of its kind in the United States. It requires an employer – except an employer in a seasonal industry – that employs more than 10 employees for more than 120 days in any calendar year to provide each employee earned paid leave based on the employee's base pay. The law specifies that an employee is entitled to earn one hour of paid leave for every 40 hours worked, up to 40

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hours in one year of employment, with accrual of leave beginning at the start of employment. The employee is required to work for 120 days before an employer is required to permit use of the paid time off. The law requires reasonable notice prior to use of the paid time off. The Department of Labor is required to prepare rules for the implementation of this law. The rulemaking process is underway and the law will take effect January 1, 2021. The Department of Labor has the exclusive authority to enforce the new law and remedy violations thereof. Pay Equality The Legislature also enacted LD 278, "An Act Regarding Pay Equality." The law prohibits an employer from inquiring about a prospective employee's compensation history until after an offer of employment that includes all terms of compensation has been negotiated and made to the prospective employee. As stated in the Act's legislative findings and intent, it is intended to address wage inequality that is perpetuated when an employer bases its compensation decision on the pay history of a prospective employee. The rationale is that a prospective employee will continue to experience wage inequality if her pay is based on the unequal pay she received in the past. The Act further provides that an employer's inquiry into a prospective employee's compensation history is evidence of unlawful employment discrimination under the Maine Human Rights Act and Maine Equal Pay Act, for which the employee may recover compensatory damages. An employer may be fined not less than $100 and not more than $500 for each violation of the Act. Pregnant Workers Through enactment of LD 666, "An Act to Protected Pregnant Workers," the Legislature required employers to provide reasonable accommodations for employees' pregnancy-related conditions, unless providing the accommodations would impose an undue hardship on the employer. The Act specifies that reasonable accommodations may include, but are not limited to, providing more frequent or longer breaks; temporary modification in work schedules, seating, or equipment; temporary relief from lifting requirements; temporary transfer to less strenuous or hazardous work; and provisions for lactation. Gender Identity LD 1701, "An Act to Clarify Various Provisions of the Maine Human Rights Act," was also enacted into law. The Act adds gender identity as a protected class under the Maine Human Rights Act and prohibits "[d]iscrimination in employment . . . on the basis of sexual orientation or gender identity." The Act defines gender identity as "the gender identity, appearance, mannerisms or other gender-related characteristics of an individual, regardless of the individual's assigned sex at birth." Religious organizations that do not receive public funds are exempted from compliance with the law. Noncompete Agreements Another law enacted by the legislature, LD 733, "An Act To Promote Keeping Workers in Maine," limits the scope and enforceability of non-compete agreements. The Act states that "[n]oncompete agreements are contrary to public policy" and are enforceable only to the extent that they are reasonable and no broader than necessary to protect:

1. The employer's trade secrets (as defined by statute);
2. The employer's confidential information that does not qualify as a trade secret; or
3. The employer's goodwill.

26 M.R.S. § 599-A. The Act outright prohibits noncompete agreements for an employee earning wages at or below 400% of the federal poverty line. 400% of the current federal poverty line is $49,960. According to the U.S. Census Bureau, per capita income and median household income in Maine were $29,886 and $53,024 in 2017, respectively. Thus, noncompete agreements are now prohibited for a significant majority of Maine employees. An employer may be fined not less than $5,000 for violating this prohibition. The Department of Labor is responsible for enforcement of the prohibition; the Act does not create a private right of action for the affected employee. "Wage Theft" Finally, the Legislature enacted LD 1524 "An Act to Prevent Wage Theft and Promote Employer Accountability." The law creates additional remedies for so-called "wage theft" by an employer, which is defined as a violation of state laws regarding minimum wage, overtime, and timely and full payment of wages, among others. The additional remedies

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include injunctive relief through the courts and cease operations orders from the Commission of Labor. The remedies are in addition to existing penalties and, with respect to injunctive relief, the Act provides that an employer must pay costs and attorneys' fees to the prevailing party (either an employee or the Department of Labor). The Act is intended to curb abusive wage payment practices, which affects the employee involved, but also affects the State's payroll tax base, and creates an unfair advantage as compared to competitors who play by the rules. Employers should review their personnel policies, including policies regarding compensation, paid leave, reasonable accommodations, and noncompete agreements, to ensure their consistency with the newly enacted laws. Employment counsel at Norman, Hanson & DeTroy are available to provide further and specific guidance with these and other employment matters.

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