New England IN-HOUSE

Suit against firm tests limits of anti-bias statute

By: david.e.frank October 7, 2011

Ariel Ayanna was not seeking to create new law when he sued his employer, a Boston law firm, for disability discrimination.

But the former Dechert lawyer may end up doing just that by the time U.S. District Court Judge Nathaniel M. Gorton in Boston decides how to rule on the firm's motion to dismiss in the widely publicized "associational discrimination" lawsuit.

In Ayanna v. Dechert, the now-unemployed father of two claims the international law firm fired him from his $170,000 a year job, in part, for spending too much time away from the office to tend to his mentally ill wife and his family.

"This is a really significant issue with wide-ranging implications for employment lawyers in Massachusetts," said Ayanna's attorney, Rebecca G. Pontikes of Boston. "It's surprising there haven't been any appellate decisions on associational discrimination, but that doesn't change the fact that it's been recognized here for a long time."

Massachusetts Superior Court judges are split on whether employees can bring disability discrimination claims against employers based on a relationship with someone from a protected class, Pontikes said.

In June 2010, Judge Mitchell H. Kaplan ruled in Brelin-Penney, et al. v. Encore Images, Inc., et al. that they cannot. But his colleague, Paul A. Chernoff, reached the opposite conclusion in 2005.

As a result, Pontikes, who is handling the case with Lori A. Jodoin, is asking Gorton either to deny the firm's dismissal request or report the question to the Massachusetts Supreme Judicial Court.

Despite the lack of precedent, Dechert's lawyer, Daniel J. Cloherty of Collora in Boston, argues that the state's anti-discrimination statute, Chapter 151B, does not allow complaints like Ayanna's to proceed.

The fact that the Massachusetts Commission Against Discrimination has recognized associational discrimination for more than 30 years is irrelevant, Cloherty says in court filings.

"Chapter 151B only protects a person 'alleging to be a qualified handicap person' who has been discriminated against 'because of his handicap,'" he writes.

Unlike the broader Americans with Disabilities Act, which explicitly provides for claims based on associational standing, "Chapter 151B does not include 'associated persons' within the class of persons protected from employment discrimination," states Cloherty, who declined to comment for this story.

Liberal construction

MCAD general counsel Catherine C. Ziehl said Cloherty's argument is off base. Chapter 151B was enacted prior to the passage of the federal ADA and any comparisons between the two should have no bearing on the question, she said.

The MCAD is closely monitoring Ayanna's suit and will likely seek to intervene if Gorton rules in favor of the 800-lawyer firm, according to Ziehl.

"Unless our interpretation of Chapter 151B is unreasonable and additionally frustrates the purposes of the statute, our decisions will generally be upheld," she said. "The SJC and Appeals Court have said that over and over and over again, and there is no reason that shouldn't be the case here."

A ruling in Dechert's favor would represent a major change in MCAD decision-making, Ziehl added. No judge, until Kaplan, had ever held the MCAD was exceeding its authority by recognizing associational discrimination.

"Under the legislative framework, we're supposed to liberally construe the statute so it achieves the purposes for which it was enacted," Ziehl said. "The SJC has gone far to recognize that it is our responsibility to interpret and fill in the voids of Chapter 151B, because no piece of legislation covers every aspect."

At the same time that Dechert's motion is before Gorton, the Appeals Court is considering whether Judge Kaplan committed error in Brelin-Penney. A panel heard oral arguments in March but has yet to issue a decision.

Sol J. Cohen of Cohen & Sales in Waltham, Mass., plaintiff's counsel in Brelin-Penney, said the employment bar has long relied on the fact that the MCAD recognizes associational discrimination. It makes no sense, he said, to let an employee obtain a final MCAD disposition, only to then face the possibility of not having it considered by a judge.

"If we're really trying to eradicate discrimination in the commonwealth, I don't see how we can accomplish that goal by allowing an employee to be terminated simply because they have an association with someone in a protected category," he said. "Whether it's resolved in Brelin-Penney or [Ayanna], it's going to be extremely important for an appellate court to let us all know, once and for all, what the rules are."

You're fired

Ayanna began working in Dechert's financial services group in 2006. According to his suit, which was filed in December 2010, he received positive reviews during his first year and was awarded a $30,000 bonus for his work in 2007.

In May 2008, Ayanna's wife attempted suicide shortly before giving birth to the couple's second child. He claimed his wife was suffering from borderline personality disorder, long-term post-traumatic stress and other mental health issues.

As a result, Ayanna took time off under the Family Medical Leave Act and became the children's primary caretaker. When he returned to Dechert, he alleged that partners there refused to provide him with work and criticized him for not meeting his job requirements.

Though he carried a BlackBerry and turned his assignments in on time, he said, his superiors expressed displeasure with his schedule, which sometimes required him to come in after 9 a.m. or leave in the evening to tend to his family.

He was fired in December 2008 after partners at the firm allegedly told him he failed to meet his billable-hour requirements and his "personal issues" had interfered with his job.

Ayanna's suit claims that the firm discriminated against him, in part, because of his association with his wife, a disabled person.

Relying heavily on Judge Kaplan's Brelin-Penney decision, the firm sought to dismiss the associational discrimination claim, arguing "it simply does not exist under Chapter 151 as a matter of law."

It is not clear if Gorton plans to hear arguments or make his ruling on the papers.

Dechert's motion does not involve Ayanna's sex discrimination and retaliation claims, which the firm called "similarly baseless."

Shop talk

James W. Bucking, an employment lawyer at Foley Hoag, said the concept of associational discrimination has been "gaining force" in Massachusetts over the last few years.

"There is no doubt that it is a trendy concept right now," the Boston lawyer said. "There are many examples where the issue is not directly about the employee, but rather about somebody else in the employee's life."

While judges have recognized race, gender and sexual orientation associational discrimination claims, they have never done so in a disability suit. Notwithstanding the MCAD's position, Dechert's argument likely will carry the day, Bucking predicted.

"I think we'll continue to see a lot more litigation of this kind, but in the disability discrimination context, the statute is specific to the employee," he said. "Something's either lawful or unlawful based on what the Legislature, and not the MCAD, decides."

Although the ADA expressly allows for associational standing in federal disability discrimination cases, Chapter 151B is silent on the question, said John Pagliaro of the New England Legal Foundation.

"You just can't go around shopping in any body of federal or state discrimination law for little excerpts to use to bolster your point," he said. "That's kind of what the MCAD was doing when they established their precedent on the issue."

What the MCAD has not done is examine the language of Chapter 151B, he said.

"I don't think they even quote the statute or have any contact with the actual plain meaning of it," Pagliaro said. "I find that remarkable."

Pagliaro submitted an amicus brief in Brelin-Penney on behalf of his organization and the Associated Industries of Massachusetts, out of concern that the MCAD had unreasonably expanded the statute.

"The person with the cause of action has got to be the person with the handicap," Pagliaro said. "The MCAD has been ignoring that principle for a long time."

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