Collins, Loughran & Peloquin, P.C.

CLIENT ADVISOR

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FLAWED PSYCH EVALUATION LEADS TO DISCRIMINATION LIABILITY

Employers are risking more than the employee being placed at the top of the next list when they rely on a faulty psychological evaluation to bypass an applicant for police officer. A Superior Court decision issued in August in *Boston Police Department v. Kavaleski et al.* ruled that the City of Boston was liable for disability discrimination under M.G.L. c. 151B for regarding Kavaleski as having a disability she did not have. The decision was the latest loss by the City in a nine year battle that involved more than one bypass of Kavaleski based on psychological screenings which "did not definitively diagnose Kavaleski with a specific condition, but rather alluded to a variety of ailments or flaws." The foundation of the Superior Court's decision, issued by Justice Peter Lauriat, was a prior decision won by Kavaleski in *Police Department of Boston v. Kavaleski*, 463 Mass. 680, (2012). The SJC upheld a Civil Service Commission decision allowing Kavaleski's bypass appeal based upon overreaching from the department's evaluating psychologist.

In deciding the discrimination claim in her favor, the Superior Court noted that none of the psychological screeners diagnosed Kavaleski with a psychiatric condition or disorder – never mind a Category A or B condition under HRD's Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Safety Personnel. Further, Kavaleski had never been diagnosed as having a psychiatric condition or disorder. The Court found that the City violated c. 151B because, even though she had no impairment, the City regarded her as having an impairment, thereby engaging in so-called "regarded as" discrimination when it revoked its offers of employment based on the psychological evaluations. According to the Court, not only was this discriminatory, but it was a violation of c. 151B's limitations on medical evaluations. Judge Lauriat wrote, "the purpose of c. 151B is to prevent employment decisions based on amorphous, unsubstantiated fears about psychological or medical impairments, no matter how peculiar or off-base these fears might be."

Read more about this case and how it impacted a more recent Civil Service case in our Employment Blog at www.collinslabor.com.

VICTIMS OF DOMESTIC VIOLENCE ENTITLED TO 15 DAYS LEAVE

On August 8, 2014, Governor Patrick signed the "Act Relative to Domestic Violence" which requires an employer of fifty or more employees to provide fifteen days of leave to an employee who is a victim of domestic violence, or one who is needed to care for a family member (spouse, child, parent, grandparent, grandchild, or sibling) who is a victim of domestic violence. Domestic violence includes but is not limited to abuse against an employee by a current or former spouse, family member or someone the employee has a dating relationship with. The employee must not be the perpetrator of abusive behavior against the employee's family member.

Leave is allowed for reasons including to enable the domestic violence victim to obtain: medical attention; counseling; victim services or legal assistance; housing; a protective order from a court; child custody orders; or other related court assistance.

The employee is required to provide advance notice of leave to the extent practicable, except in the case of imminent danger or harm. In the case of emergency, the employee shall provide notice to the employer within three days of taking leave. The employer has the "sole discretion" to determine whether the leave is paid or unpaid. The employee is required to exhaust all accrued leave before seeking leave unless employer elects to waive this requirement.

The employer may request documentation from the employee to support request for leave, to include one of the following documents: protective order; police report; medical documentation; documentation concerning prosecution of perpetrator; or a sworn statement from the employee attesting to the relevant facts.

Employers are reminded, similar to other legally protected leaves (e.g., Family, Medical, Maternity, Small Necessities), not to take any adverse action against the employee for exercising their right to take leave under this law. Employers must also notify employees of their rights under this Act. One good way to do that is to develop a policy with assistance of labor and employment counsel.

Speaking Engagement

Joshua Coleman will present at this year's STAM (Small Town Administrators of Massachusetts) meeting on September 18, 2014 in Carlisle, MA.

STAM provides a forum for the exchange of ideas and information among small town administrators in municipal management, tailored to address the group's specific and unique interests.

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