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Physical Restraint Online Reporting Form

As of January 1, 2016, the revised regulations on physical restraint in public education programs (603 CMR 46.00) have become effective. Under the revised regulations, school programs are required to collect and report physical restraint data to the DESE on an annual basis.

Initially the DESE had indicated that programs would be required to use its new electronic form for reporting restraint data. As of January 5, 2016, however, the DESE has updated its guidance to indicate that use of the Restraint Reporting Form is optional.

Programs that opt to use their own report/form, are reminded to make sure that such form meets the reporting requirements of the revised regulations.

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SJC Ruling Clarifies Evidence Required To Establish Pretext

On February 29, 2016, the Massachusetts Supreme Judicial Court ("SJC") issued an important decision articulating the type of evidence required for a plaintiff to survive summary judgment in an employment discrimination case. *Bulwer v. Mount Auburn Hospital*, 2015 WL 10376073 (2016). For years, courts have grappled with this issue in discrimination cases where there is rarely a "smoking gun," or direct evidence of discrimination. In *Bulwer*, the SJC makes clear that under Massachusetts law, specific evidence of discriminatory intent is not necessary for a case to proceed to trial.

The plaintiff in *Bulwer*, is a black man of African descent who had practiced medicine for 13 years in three different countries before relocating to the United States. In order to practice in the United States, however, Mr. Bulwer needed to complete a residency program. In 2005, he was accepted to and enrolled in a program at Mount Auburn Hospital. In his first few months of the program, Mr. Bulwer received widely differing reviews: some evaluators considered him "excellent" and others evaluated him as "horrendous." After considering the disparate evaluations, the hospital's residency review board decided not to extend Mr. Bulwer's residency contract beyond the first year. Mr. Bulwer challenged this determination and a review committee was convened. After three days of evidence and deliberation, the review committee upheld the review board's decision. Immediately following the decision, the hospital terminated Mr. Bulwer, citing patient safety.

In its decision, the SJC explained that a plaintiff can establish pretext by presenting evidence that the employer gave a false reason for termination, regardless of whether the plaintiff is ultimately able to show that the false reason is discriminatory. At summary judgment, the motion judge cannot weigh or evaluate the evidence. In *Bulwer*, the fact that the plaintiff had received widely differing evaluations, the subjectivity of some of the negative ones, the failure to follow its own review procedures, and the failure to provide remediation opportunities granted to non-minorities, was sufficient for the Court to conclude that the case should proceed to trial.

The SJC's decision affirmed the decision of a split 3-2 Appeals Court which had a thorough and vigorous dissent. With this decision, the bar for employment discrimination lawsuits has certainly been lowered. Also significant is the Court's treatment of performance evaluations, which suggests that significant variations in evaluations can be evidence of pretext.

Developments In Gender Pay Equity

There are administrative and legislative developments likely to change the landscape of gender pay discrimination claims in Massachusetts. Under the state's Equal Pay Act (passed in 1945) and existing case law, a successful plaintiff must demonstrate the following: (1) the duties of the two jobs being compared have key common characteristics; and (2) the jobs involve comparable skill, effort, responsibility and working conditions.

A bill recently passed by the State Senate (unanimously) would preserve the second prong of proof but eliminate the requirement that job duties be substantially comparable. If enacted, it would usher in an era of comparable worth litigation, with cases being directly filed in the Superior Court (no filing at MCAD required) and prevailing plaintiffs recovering attorney's fees and costs.

A related development is the Attorney General's act of sending demand letters to private employers, under the 1945 Equal Pay Act, seeking a wide range of information about demographics and job description details, ostensibly to determine if there are gender or racial disparities. There is no reason to believe that public employers will be immune from such inquiries or from litigation if the Equal Pay Act amendment is enacted.