

NORRIS, MURRAY & PELOQUIN, LLC

Legal Counsel to Employers and Schools

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WELCOME ANA OLIVEIRA

We are excited to welcome Ana Oliveira as the newest member of our team. Ana, who joined NMP in July, will be providing legal assistance to Attorneys Tim Norris and Melissa Murray.

Ana can be reached at:
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We are confident that Ana will be a great asset and addition to our firm.



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SJC Ruling: Taking A Vacation Not Presumed An Abuse Of FMLA

In DaPrato v. Massachusetts Water Resources Authority, the Supreme Judicial Court (SJC) upheld a superior court jury verdict and judgment to an employee who was terminated for going on vacation while out on Family Medical Leave Act (FMLA) leave following foot surgery. The decision makes clear that an employer should not automatically presume that an employee is violating the terms of their medical leave when they go on vacation during this leave. In this case, Mr. DaPrato's physician had confirmed that he was not cleared to return to work, but that his vacation activities did not violate his post-surgical restrictions. DePrato sued and was awarded almost \$2 million in damages.

While this decision is significant, it is worth noting that the Massachusetts Water Resources Authority (MWRA) made a number of mistakes along the way that made a difference in the outcome of this case. For instance, the MWRA did not seek review of the employee's medical records, it declined to conduct an independent medical examination, and it ignored his FMLA paperwork. These decisions were likely made based on the opinion of the Human Resources (HR) Director who testified she believed all vacations while on medical leave are impermissible. This is incorrect. Employers may only consider an conduct on leave that is inconsistent with the reason for leave. For example, going mountain climbing while recovering from hip surgery.

In addition, employers must conduct a thorough investigation prior to taking adverse action against an employee for abusing medical leave, including taking into account all available evidence to determine whether the conduct was inconsistent with the leave. In this case, the MWRA attempted to introduce photographs of Mr. DaPrato standing on a boat and holding a large fish, but this evidence had not been considered when the termination decision was made. Even more troubling, the MWRA never reviewed the surgeon's notes and did not follow up with him on the status of the recovery. Had the employer proceeded in "good faith", it could have eliminated liquidated damages.

Untruthfulness Remains Solid Reason For Police Bypass

Readers of our Civil Service Commentary may recall the 2018 decision in Joao Paulo Leite Pereira de Araujo v. Abington Police Department, 31 MCSR 59, where the Commission granted DeAraujo's appeal of the Town's decision to bypass him and remove him from consideration for appointment to the position of full-time police officer. The Commission rejected 9 out of the 10 reasons used to bypass him, including reasons related to his failure to pay taxes between 2002 and 2004, and untruthfulness related to that failure.

Abington appealed, and the superior court held that, although the Commission correctly rejected 9 of 10 reasons for the bypass, the Town was reasonably justified in relying on the remaining reason—his untruthfulness with respect to his failure to file taxes—as grounds for the bypass. Notwithstanding this decision, the court denied the Town's request that Araujo be removed from the eligible list pursuant to PAR .09 (finding no detriment to the public interest given Araujo's misconduct occurred 15 years ago and he'd been a good citizen since then).

The court did not address other issues raised by the Commission concerning disparate treatment and discrimination based on immigration status. Stay tuned for further updates on this.