Federal Bar Association, Massachusetts Chapter

Mass FBA Insider

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A Message from the Chapter President

I am very pleased to report that the Massachusetts Chapter of the Federal Bar Association is growing by leaps and bounds. We are in the process of establishing ourselves as an important bar organization in the Commonwealth. We are currently in the process of drafting new by-laws to reflect the re-organization and expansion of the Executive Council through recent elections. We have established several committees this year to deal with the different issues that arise during the course of a year including elections, legislation, membership, and events to name but a few.

"Governor Deval Patrick was the keynote luncheon speaker and it was a huge success."

We are engaging more members of the bar and coordinating with the federal bench in both our social and academic activities. Some of our recent efforts include:

This past June, through the efforts of past Presidents Neil McKittrick, a Director in the law firm of Goulston Storrs and Patricia Connolly, Assistant United States Attorney, the Chapter participated in organizing the inaugural Massachusetts District Court Judicial Conference, hosted by Chief Judge Mark Wolf. This one day conference, preceded the night before by a cocktail reception, invited federal practitioners to participate in several events and seminars. Governor Deval Patrick was the keynote luncheon speaker and it was a huge success. Past President Neil McKittrick was a panelist on the topic of e-discovery and I was a panelist on a session addressing mediation in the federal courts.

I had the good fortune along with the Chapter's National Delegate, Sarah Worley, principal of Pre-Trial Solutions and newly elected Chapter Council member, Christopher P. Sullivan, a partner at the law firm of Robins, Kaplan, Miller & Ciresi, LLP to attend the Annual FBA Conference in Atlanta, Georgia in September. In addition to partaking of three fun-filled days, we were able to see the dedication and hard work that the FBA does for its members and the Federal Bench. I was also able to bring back many ideas to assist in moving us forward.

The Chapter has also continued to hold its breakfast series this year at the Federal Courthouse in the judges' dining room (thanks to Chief Judge Mark Wolf). This series is a unique opportunity for members to engage with the federal judges in an intimate setting on different issues. We have held two breakfasts this year and both were very well attended. Magistrate Judge Robert Collings, who is an expert in the field, led a discussion on e-discovery in September and Judge Nathaniel Gorton spoke on and fielded many questions on trial practice in November. We had another breakfast scheduled for the latter part of January on health care fraud and one in February with Judge George O'Toole on immigration. We are also planning on taking the series on the road in late March or early April to Worcester to reach out to the federal practitioners in the Worcester area.

This past November the Chapter also co-sponsored, along with Suffolk University Law School and the Macaronis Institute for Trial & Appellate Advocacy an advanced course on e-discovery.

Our Younger Lawyers Division has continued to be very energetic and active this year, starting with their annual Summer Fling in July. The guest speaker was Judge F. Dennis Saylor IV who spoke about how he encourages younger lawyers to actively participate in his courtroom. There was a very large turn-out and many thanks to our hosts, the law firm of Sherin and Lodgen.

The YLD also has sponsored two more in their series, "Lessons From the Bench". In July, our liaison to the Federal Bench, Judge Patti Saris spoke on "Intellectual Property Law,

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Patents and Trademarks: Trials and Errors". Our thanks to the host law firm of Choate, Hall and Stewart, LLP. And in September, Magistrate Judges Marianne Bowler and Charles Swartwood (retired) did a presentation on "Mediation: Practical Tips for Success". Many thanks to our host law firm of Morrison Mahoney LLP. Both were excellent programs and very well attended.

And that's not all! The YLD has initiated a new series this Fall, "Brown Bag Lunches" at different law firms with noted practitioners speaking to small groups of young lawyers. In October the law firm of Berman, DeValerio, Pease, Tabacco Burt & Puccillo hoseted "The Nuts and Bolts of Securities Class Actions" and in November the law firm of Morrison Mahoney LLP led the topic of "The Nuts and Bolts of Depositions".

The YLD has several events scheduled for the new year including a Brown Bag on Federal Leave laws and a Lessons from the Bench with Judge Reginald Lindsay, topic to be announced.

We are very very grateful to all of our sponsor law firms and encourage any other firms to call myself or Michael Pacinda, Chair of the Younger Lawyers to find out information about participating in these programs.

We are also very appreciative and grateful for all the time and effort that the judges have given to us in the past year. Our local federal bench are always willing to give of their time whenever we ask them.

The signature event of the Massachusetts Chapter is fast approaching, our annual Judicial Reception. This year, we will be honoring Judge Nancy Gertner for her service and dedication to the judiciary and the bar on February 6 at the Seaport Hotel in Boston. It promises to be a fun evening. Please watch for an announcement on ticket prices and sponsorships or contact Laraine Rossi at Laraine.Rossi@cityofboston.gov and again we invite all to attend.

This is an exciting time for the Massachusetts Chapter as we continue to increase our membership and grow in importance and visibility here in the legal community. The members of the Executive Committee have many new and creative ideas for the Chapter in the coming months and the Younger Lawyers have activities scheduled around the clock.

Please feel free to contact me with any thoughts you may have on the Chapter. We are moving forward. Please join us.

Happy New Year to All.

Susan M. Weise is First Assistant Corporation Counsel of the City of Boston Law Department and President of the Massachusetts Chapter of the Federal Bar Association

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The Massachusetts Chapter

of the Federal Bar Association

cordially invites you to its

Annual Reception for the Federal Judiciary

on Wednesday, February 6, 2008

from Six o'clock to Eight o'clock in the evening

At the Seaport Hotel
Plaza C Ballroom
One Seaport Lane
Boston, Massachusetts 02210

The Massachusetts Chapter will proudly honor:

The Honorable Nancy Gertner

Recognizing her service to the Judiciary and to the Bar of
The District of Massachusetts

To reserve tickets, please contact:
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$50 - individual tickets (FBA members)
$75 - individual tickets (non-members)
$500 - Sponsors (package of 11 tickets)*

*Please respond by January 25, 2008 if your firm is interested in being a sponsor.

Stray Remarks Can Result In Targeted Lawsuits

It is an unfortunate truth that plaintiffs in employment discrimination cases can often point to, and may even have corroborating evidence for, racist, sexist or otherwise inappropriate remarks made by coworkers or even supervisors. When such statements are not necessarily part of a wider, institutional pattern of behavior, courts use the label "stray remarks" and there has been a significant about of litigation concerning their admissibility.

Even the most reprehensible remarks are often of little or no relevance to the adverse employment decision that prompted a discrimination claim. They may also be isolated, infrequent or without consequence, such that they cannot form the basis of liability for harassment. In such cases, federal courts have and should recognize that the proffered remarks are insufficient, as a matter of law, to prevent summary judgment against the employee or should be excluded from the evidence presented to a jury.

Stray Remarks as Pretext

So-called stray remarks are irrelevant if they are unrelated to the decision-maker *and* to the adverse employment decision at issue. *See Washington v. Milton Bradley Co.*, 340 F. Supp.2d 69, 78, n.8 (D.Mass.2004) (noting that a supervisor alleged to harbor discriminatory views is only relevant where he acts on such views and his actions influence the decision-maker). The First Circuit has held that stray remarks, although of potential relevance in proving bias, are not probative of pretext at the summary judgment stage unless they are related to the employment decision at issue. *See Straughn v. Delta Airlines, Inc.*, 250 F. 3d 23, 36 (1st Cir. 2001). "[M]ere generalized 'stray remarks,' arguably probative of **bias** against a protected class, normally are **not probative of pretext** absent some discernible evidentiary basis for assessing their temporal or contextual relevance." *Straughn*, 250 F.3d at 36 (emphasis in original).

In *Straughn*, the plaintiff alleged that a supervisory employee's occasional use of a "southern black" accent constituted evidence of pretext, calling into question the proffered reasons for the adverse employment action taken against her. *See Straughn*, 250 F.3d at 35.

"...stray remarks... are not probative of pretext at the summary judgment stage unless they are related to the employment decision at issue."

The First Circuit held that the supervisor's actions, without more, were not probative of pretext on the part of the employer where there was (1) no "discernible contextual or temporal relationship between the discharge decision and the [actions]," (2) a "demonstrabl[e] self-sufficient basis for the management recommendation [that Straughn be discharged for] persistent work-related dishonesty," and (3) where the supervisor's role was "distinctly subordinate" in the dismissal decision. *See Straughn*, 250 F.3d at 37; *See also Horne v. City of Boston*, 509 F.Supp.2d 97, 111 (D.Mass.2007) (holding decision maker in a retaliation case did not rely upon information obtained from improperly motivated underlings); *Compare Cariglia v. Hertz Equip. Rental*, 363 F.3d 77, 85-6 (1st Cir.2004)(holding that discriminatory animus could be imputed to decision maker where it improperly influenced decision to implement adverse employment action).

Stray Remarks as Harassment

Though *Straughn* unequivocally states that stray remarks may be probative of bias under certain circumstances, they are irrelevant not only when considering whether pretext existed in a straightforward discrimination action, but when assessing a hostile environment claim. Stray remarks may be excluded or deemed an insufficient basis for liability in a harassment case, if the allegedly harassing statements, though inexcusable, do not amount to the type of "severe and pervasive" harassment that the law deems actionable.

The Supreme Court has held that there is a difference between a workplace that is "permeated with 'discriminatory intimidation, ridicule, and insult,'" and one in which someone uttered an "'epithet which engenders offensive feelings

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"Stray Remarks"...continued.

in an employee' [without] sufficiently affect[ing] the conditions of employment... ." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)). In Massachusetts, liability (under Mass. Gen. L. c.151B) may only be found where an employee's work environment is so pervaded by harassment or abuse that it alters his/her conditions of employment. *See Thompson v. Coca Cola, Co.*, 2007 WL 2003369, at *9 (D. Mass. 2007)(collecting Supreme Judicial Court and First Circuit precedent). Other Districts have similarly high bars for actionable conduct, but no "bright line" rule.[1]

Simply put, not all objectionable conduct constitutes actionable harassment. In *Thompson*, the First Circuit considered the hostile environment claim of a Jamaican man who alleged that a supervisor had made at least three derogatory comments about minorities, including the statements, "I'm going to deal with you, you fucking Jamaican," and "I hate Jamaican music and Jamaicans." *Thompson* at *9. The Court, while crediting the remarks as true, found that this evidence was insufficient, as a matter of law, for a jury to reasonably conclude that there was a "severe and pervasive" racially biased atmosphere. *See Thompson* at *10. Accordingly, summary judgment was entered for the employer.[2]

A second example is *DeNovellis v. Shalala*, in which the First Circuit upheld the entry of summary judgment in favor of an employer, where its Italian American employee alleged that several derogatory comments by coworkers suggesting his involved in organized crime constituted a work environment hostile to his national origin. *See DeNovellis v. Shalala*, 124 F. 3d 298, 310 (1st Cir.1997). The comments from coworkers were alleged to be the basis upon which the plaintiff was given undesirable job assignments. See *DeNovellis* 124 F. 3d 298. The First Circuit held that these stray remarks, while evidencing a bias against the plaintiff, were insufficient, absent more compelling evidence of hostility, to demonstrate the type of toxic environment that is actionable as harassment by an employer. *See DeNovellis*, 124 F. 3d at 311.

The type of racist, sexists or otherwise reprehensible remarks at issue in these cases are always harmful to the workplace and should not be tolerated, but they do not always create liability for the employer. If the plaintiff cannot relate the claims to the adverse employment action at issue or has not set forth evidence that his/her workplace was charged with severe and pervasive hostility[3], the remarks are not probative, should be excluded and are insufficient to defeat a motion for summary judgment.

[1]Noteworthy are a number of cases in which a single incident has been deemed sufficient to constitute harassment (most of which involve actions, as opposed to words) and the Supreme Court's decision in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), in which it rejected a single-incident claim, did not foreclose the possibility that a single incident could create employer liability for harassment.

[2]A factually similar case in which the First Circuit came to the same conclusion is *DeJesus v. Potter, Postmaster General, U.S. Postal Serv.*, 2006 WL 3786043 (1st Cir.2006). The plaintiff alleged that his supervisor referred to U.S. Postal Service Caribbean Branch employees as "you people" and stated incoming mail from Puerto Rico was "off the banana boat" and that another employee said his coworkers in Puerto Rico were "like blind musicians Ray Charles and Jose Feliciano," but the Court deemed the comments, "simple teasing, offhand comments, and isolated incidents [which] (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."

[3]One factor to look at in determining whether a plaintiff considered the remarks harassing is whether he/she reported them at the time they were made. In the union context, were grievances filed? When the plaintiff initially made his/her claim of discrimination or harassment, were these comments referenced or might they have been unearthed during discovery? Did the plaintiff avail himself/herself of reporting channels offered by the employer or make any complaints to supervisors or coworkers?

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FBA Massachusetts Chapter — Upcoming Events

Feb 6 6—8 p.m.	The Seaport Hotel	*Annual Judicial Reception Recognizing the Service of Hon. Nancy Gertner*
Feb 14 8—9 p.m.	Moakley Courthouse Judicial Dining Room	*Breakfast with the Federal Bench Seminar Featuring the Hon. George A. O'Toole, Jr.*

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