Federal Bar Association
Massachusetts Chapter

Newsletter

Trevin C. Schmidt, Editor **SPRING 2020**

President's Column

By Juliet A. Davison

I am pleased and honored to assume the Presidency of the Massachusetts Chapter of the Federal Bar Association and to continue to build on the strong foundation established by so many of my predecessors (most immediately, Jonathan Handler and Harvey Weiner). The Chapter is well positioned for future growth and expanded activities and initiatives. The Chapter supports the work of the Federal Courts in Massachusetts by undertaking various educational, civic, and philanthropic initiatives designed to advance the interests of the Court community, federal practitioners and the public.

The Chapter is delighted to announce that it will recognize The Honorable Stephen G. Breyer, Associate Justice of the United States Supreme Court for his service to the country, the judiciary and the legal community at our Annual Judicial Reception which will take place at the John Joseph Moakley United States Courthouse. We expect that the Reception will be a memorable and noteworthy event and we are most honored that Associate Justice Breyer has accepted our invitation. Based upon the advice of federal, state and local officials, the Reception has been postponed due to the current COVID-19 health crisis. We will announce the new date for the Reception when we are confident that it is safe and prudent to do so.

Our Chapter is successful because so many are willing to contribute their ideas, creativity and time. Most notably, our federal judges – the First Circuit, District Courts, Magistrate, Bankruptcy and Immigration – as well as Assistant U.S. Attorneys and Assistant Federal Defenders – give generously of their time and participate in our Chapter's activities without hesitation. Our Chapter would not be what it is without their support. Nor would we be where we are without the tireless commitment, thoughtfulness and contributions of our Clerk of Courts, Robert M. Farrell, and Project Coordinator, Carolyn Meckbach. The Chapter operates through the diligent efforts of many practitioners and lawyers who unstintingly volunteer their time and ideas. It is a tribute to the hard work of all of these members of the community that the Chapter continues to thrive and expand each year.

We have had an abundance of terrific programming so far this year. The Honorable F. Dennis Saylor IV, Chief Judge for the District of Massachusetts, launched our "Breakfast with the Bench" series on January 7, 2020. Judge Saylor highlighted some of the responsibilities of the role of the Chief Judge and also gave insightful trial practice tips and strategies. And on February 25, 2020, we welcomed The Honorable David G. Barron of the U.S. Court of Appeals for the First Circuit, at a Breakfast with the Bench. Judge Barron gave an informative presentation on the topic of judicial independence. We very much look forward to hearing from The Honorable Leo Sorkin, U.S. District Court Judge for the District of Massachusetts, The Honorable O. Rogeriee Thompson of the First Circuit Court of Appeals and The Honorable David Hennessy, U.S. District Court Magistrate Judge, at our upcoming Breakfasts with the Bench.

Our programming got off to a strong start with the Re-Entry Job Skills Workshop on October 30, 2019. The purpose of the Workshop is to help state and federal probationers gain job search skills through mock interviews and feedback sessions. The program was well attended by both probationers and mock interviewers. The program allowed the probationers to hone their interview skills and to develop job search strategies and all participants benefitted from the opportunity to collaborate on an important project and to meet new people. This is an important initiative of the Chapter which we hope to expand in the future.

The third annual Wills for Veterans program, a joint initiative of the JWV Department of Massachusetts and the Chapter, took place on November 26, 2019. Twenty five soldiers, veterans, and their spouses had their wills, healthcare proxies, and durable powers of attorney drafted by seven volunteer estate planning attorneys, six of whom were from the law firm of Day Pitney. There was not an empty slot.

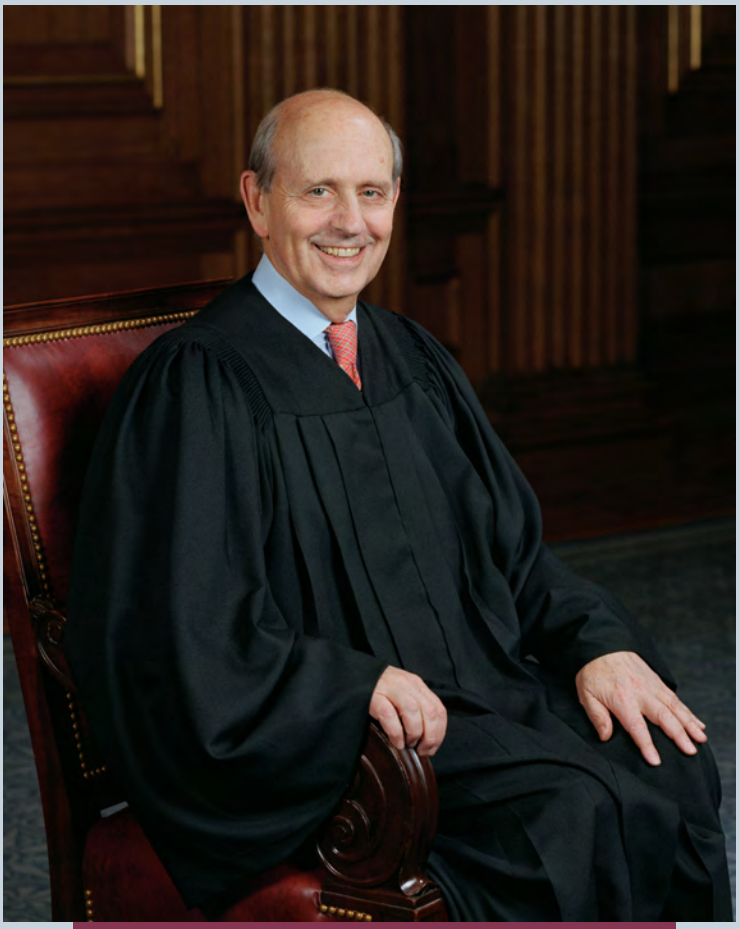
The Chapter was delighted to support the bi-annual U.S. District Court Bench Bar Conference which took place on November 14, 2019. The daylong Conference was fully subscribed and offered an abundance of interesting and thoughtful speakers and panels on a variety of germane topics, including Professor Pamela Karlan delivering the Supreme Court Review and Keynote Speaker Judge Richard Gergel (D.S.C.) discussing the remarkable facts memorialized in his book: "Unexampled Courage: The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties Waring" at the lunchtime plenary session.

And on January 28, 2020, the Chapter hosted a brown bag lunch, "A Conversation with outgoing Chief Judge Patti B. Saris and new Chief Judge F. Dennis Saylor IV" at which Judge Saris and Judge Saylor discussed the work of the Chief Judge, the many initiatives undertaken by Judge Saris and to be undertaken by Judge Saylor.

Additional exciting and topical programming is in the works in the areas of Attorney Wellness, the future of Probation in the District with new Chief of Probation, Ricardo R. Carter, (followed by a Welcome Reception for Chief Carter), a discussion with Harvard Law School Professor Jack Goldsmith of his book, "In Hoffa's Shadow," a forum with the Deans from local law schools, and Data Privacy and Cybersecurity, among others. Our programming has been put on hold due to the outbreak of COVID-19 but please stay tuned for information on speakers and dates when we are able to resume our programming. We are also looking forward to our "Giving Back" outing in which Chapter members and volunteers from the Clerk's office will serve dinner at Rosie's Place.

In closing – please come join us. Our mission is critical and the work we do is rewarding and fun; we offer abundant educational opportunities, one of a kind and innovative programming, networking, and friendship. We are always looking for volunteers to take on tasks large and small, and there is something here for everyone: assisting in organizing and coordinating a variety of events, spearheading initiatives, and writing opportunities for our Newsletter and for The Federal Lawyer. We look forward to seeing you.

Annual Federal Judicial Reception: May 5, 2020 (Postponed)



Associate Justice of the United States Supreme Court Stephen G. Breyer

THE MASSACHUSETTS CHAPTER OF THE
FEDERAL BAR ASSOCIATION

is delighted to announce that that we will welcome and pay tribute to

The Honorable Stephen G. Breyer
Associate Justice of the United States Supreme Court

at our

Annual Federal Judicial Reception

May 5, 2020
5:00-8:00 pm

The John Joseph Moakley United States Courthouse
1 Courthouse Way
Boston, Massachusetts 02210

Please Save The Date!

Wills for Veterans III

By Harvey Weiner, Past President - FBA Mass. Chapter, Peabody & Arnold LLP

On November 26, 2019, the third annual Massachusetts Wills for Veterans Day took place, a joint initiative of the JWV Department of Massachusetts and the Mass. Chapter of the Federal Bar Association. Twenty five soldiers, veterans, and their spouses had their wills, healthcare proxies, and durable powers of attorney drafted by seven volunteer estate planning attorneys, six of whom were from the law firm of Day Pitney. There was not an empty slot. Once again, Colonel James Downey and Harvey Weiner, both of the FBA Mass. Chapter, organized and supervised the event, as well as being witnesses. They each signed their respective names over seventy times.

Harvey Weiner and Col. James Downey supervise the third Wills for Veterans program held at Day Pitney LLP

Harvey Weiner and Col. James Downey are surrounded by the seven estate planners who participated in Wills for Veterans Day

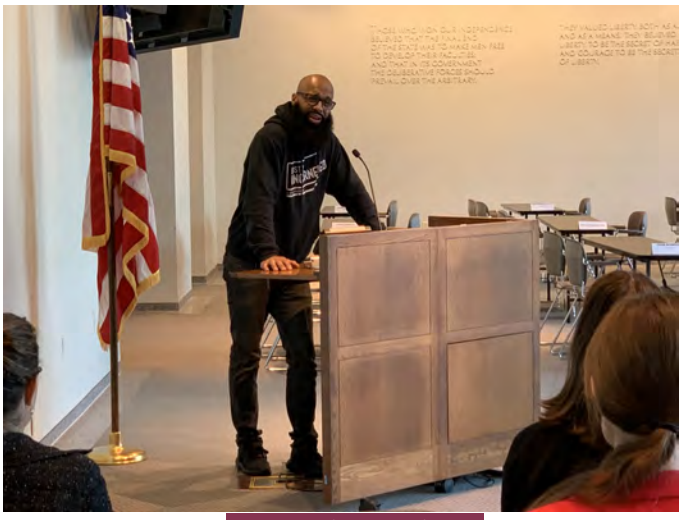
Re-Entry Workshop

By Juliet Davison*, President - FBA Mass. Chapter, Davison Law, LLC*

On October 30, 2019, the FBA - MA Chapter hosted the Re-Entry Job Skills Workshop at the Moakley Courthouse. The purpose of the Workshop is to help state and federal probationers gain job search skills through mock interviews and feedback sessions. Sara Colb and Amy Bratskeir organized the event and Magistrate Judge Kelley was in attendance and delivered opening remarks. Luis Rodrigues gave an inspiring and moving keynote speech on the topic of "A ReEntry Success Story." Mr. Rodriguez discussed his own experience, the time he spent on the streets, in prison and then how he decided to turn his life around. He encouraged the attendees to follow his example and to take advantage of the many resources offered in Boston. He urged the probationers to ask for help and not to let pride stand in the way of progress. Mr. Rodriguez spoke of the important role that his mentor played for him and described the work he has undertaken since he decided to change his life.

Approximately 20 probationers and 25 interviewers attended the Workshop. Each probationer participated in mock interviews for three separate positions with one or two mock interviewers. Each interview lasted ten minutes with five minutes then allocated to feedback and discussion.

The program allowed the probationers to hone their interview skills and to develop job search strategies and all participants benefited from the opportunity to collaborate on an important project and to meet new people. This is an important initiative of the Chapter which we hope to expand in the future.



Keynote Speaker Luis Rodriguez

Magistrate Judge Kelley addresses the attendees

(L-R) Amy Bratskeir, Luis Rodriguez and Sara Colb

Bench Bar Conference

By Juliet Davison, President - FBA Mass. Chapter, Davison Law, LLC

The FBA-MA Chapter was delighted to support the 2019 Bench and Bar Conference of the United States District Court for the District of Massachusetts which took place on November 19, 2019. The Conference was a full day event, packed with engaging and informative speakers and presentations. Plenary Sessions included:

- The Supreme Court Review with Professor Pamela Karlan of the Stanford Law School
- The History and Legacies of the Nineteenth Amendment, moderated by Senior District Judge Rya Zobel with panelists Historian and author Susan Ware, Professor Manisha Sinha of the University of Connecticut and Professor Corinne Field of the University of Virginia;
- Sexual Assault on Campus, moderated by District Judge F. Dennis Saylor IV with panelists Samantha Harris, Foundation for Individual Rights in Education, Ellen Berkman, University Attorney, Harvard University, and Professor Jeannie Suk Gersen, Harvard Law School; and
- The Current Prosecution Focus of Criminal Justice Reform, moderated by Judge Mark Mastroianni with panelists Emily Bazelon, author of Charged, Professor Michael Cassidy of the Boston College Law School, First Assistant U.S. Attorney Nathaniel Mendell and Professor Matthew Charity of the Western New England School of Law.

Breakout Sessions included:

- Selecting and Persuading Jurors, moderated by Joe Savage, Goodwin Procter LLP with panelists Judge F. Dennis Saylor IV, Karen Postal, Harvard Medical School and author of *Testimony That Sticks: the Art of Communicating Psychology and Neuropsychology to Juries*, Dennis Donoghue, Donoghue & Associates, Inc. and Brian Carney, WIN Interactive;
- Managing a Changing World: E-discovery and Technology in Criminal Cases, moderated by Judge Katherine Robertson with panelists Assistant U.S. Attorney Amy Burkart, Timothy Watkins, Federal Public Defender Office and CJA Chair Jessica Hedges, Hedges & Tumposky;
- Employment Law Update, moderated by Judge Indira Talwani with panelists Paul Holtzman, Krokidas and Bluestein LLP, Neil McKittrick, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. and Emma Quinn-Judge, Zalkind Duncan & Bernstein LLP.

Keynote Speaker Judge Richard Gergel of the District of South Carolina gave a moving presentation about the shocking events underlying his 2019 book Unexampled Courage: The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties.

Chief Judge Saris delivered Opening and Closing Remarks, including the passing of the torch to incoming Chief Judge Saylor and the Conference concluded with a cocktail reception with musical selections by the Haley Pilot School Theater Group.

The passing of the torch!

A Conversation with Outgoing Chief Judge Patti Saris and New Chief Judge F. Dennis Saylor IV

By Juliet Davison, President - FBA Mass. Chapter, Davison Law, LLC

On January 28, 2020, the FBA-MA Chapter hosted a Brown Bag Lunch at which outgoing Chief Judge Saris and new Chief Judge Saylor discussed the role and responsibilities of the Chief Judge as well as the many initiatives of the Court under Judge Saris' leadership and some of the challenges facing the Court. The conversation was lively and informative and the FBA extends its sincere thanks to Judge Saris and Chief Judge Saylor for taking time from their busy days to share their thoughts with the Chapter.

Breakfast with the Bench: January 7, 2020

By Erika P. Reis, President-Elect - FBA Mass. Chapter, City of Boston Law Department

On January 7, Chief Judge Dennis Saylor helped the Massachusetts Chapter of the Federal Bar Association kick off our popular Breakfast with the Bench series. Chief Judge Saylor discussed his transition to Chief as well as Trial Practice Tips and Strategies with attendees.

Chief Judge Saylor's suggestions were practical and very helpful to our attendees.

Breakfast with the Bench: February 25, 2020

By Juliet Davison, President - FBA Mass. Chapter, Davison Law, LLC

On February 25, 2020, the FBA – MA Chapter hosted a Breakfast with the Bench with Judge David J. Barron of the United States Court of Appeals for the First Circuit. Judge Barron discussed the topic of judicial independence and entertained a variety of question relating to that topic and to his experience as a judge since coming onto the bench in 2014. The Breakfast was engaging and informative and the Chapter thanks Judge Barron for sharing his time and insights with us.

Young Lawyers' Roundtable

By Carolyn Meckbach, FBA Mass. Chapter Honorary Board Member

Starting at the Court's Bench and Bar Conference in 2012, and each year since, the District Court has held – by invitation only – a Young Lawyers' Roundtable event for attorneys who have been practicing 10 years or fewer.

This year's program was held on January 9, 2020, with 15 Chapter members in attendance.

The program allows newer attorneys to meet with federal judges in an informal and more casual setting, discussing hypothetical scenarios pertinent to problems often encountered by young lawyers. Attendees meet in small groups and heard judges' thoughts about difficult discovery, motion, and evidentiary issues, along with best practices in court, while also being able to voice questions and concerns about litigating in federal court.

This year, the U.S. District Court renamed the event the "Young and Emerging Lawyers' Roundtable" to highlight that the event focuses on years of practice as opposed to age. Judge Bailey of the U.S. Bankruptcy Court and Judge Hillman of the U.S. District Court organized the event. As in past years, the Court stressed its desire that the program include a diverse group of lawyers in every sense of the word, drawing from all areas of practice.

This year's event had a total of 120 attendees, including 15 judges.

The Ginny Hurley Memorial Scholarship

Ginny Hurley joined the Clerk's Office of the United States District Court, District of Massachusetts in 1976 as a Deputy Clerk. Through the years her responsibilities grew and she touched the lives of virtually every member of the Court family. From 2003 until her passing, Ginny was responsible for organizing all of the educational programs at the Court for the bench, bar and public. Her title of "Outreach Coordinator" reflected the fact that she was the face of the court, welcoming all who came to take part in the judicial system, including dignitaries from around the world, international and national press, and students from down the street, all with grace and a smile. Ginny was a good friend, teacher and mentor. She was a quick wit, and had the ability to make people laugh.

Ginny derived great satisfaction coordinating the Court's summer programs for high school and college students – the Lindsay and Nelson Fellowship programs. She helped nurture and train the next generation to appreciate and participate in the legal progress. In memory of her tremendous work for these students, the Massachusetts Chapter of the Federal Bar Association has established the Ginny Hurley Memorial Scholarship. This scholarship, for books or tuition expenses, will be awarded annually to all graduating Lindsay and Nelson Fellows.

Donations are welcome. Checks should be made out to **Federal Bar Association – Massachusetts Chapter.**

Please include a note designating the funds for Ginny Hurley Memorial Scholarship.

Donations should be sent to FBA Treasurer Josh Segal, Lawson & Weitzen, LLP, 88 Black Falcon Avenue, Suite 345, Boston, MA 02210

Federal Court Shifts the Burden of Proof in Bond Hearings at the Boston Immigration Court

Brito v. Barr, 395 F. Supp. 3d 135 (D. Mass. 2019)

By Sara K. Ward, Esq., Maiona & Ward

In *Brito v. Barr*, 395 F. Supp. 3d 135, (D. Mass. 2019) a class-action lawsuit, the United States District Court for the District of Massachusetts held that it is a violation of the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act (APA) to place the burden of proof on the alien, as well as to fail to consider alternative conditions to detention and the alien's ability to pay in bond hearings under 8 U.S.C. § 1226(a). The Court then placed the burden of proof to the Government to prove that the alien poses a danger to society by clear and convincing evidence or is a flight risk by a preponderance of the evidence. The Court further held that immigration judges must consider alternative conditions to detention and the alien's ability to pay in setting the bond amount.

The three class representatives were aliens arrested and detained pursuant to 8 U.S.C. § 1226(a) which provides that on issuance of a warrant by the Attorney General, any alien may be detained until their removal hearing at an immigration court. The named defendant, Gilberto Pereira Brito, is a citizen of Brazil who was arrested by Immigration and Customs Enforcement (ICE) on March 3, 2019. Pereira Brito has a United States citizen wife and three United States citizen children, and has one criminal charge on his record dating back to May 2009. Floretine Avila Lucas, a citizen of Guatemala, was arrested by Customs and Border Patrol (CBP) agents on March 20, 2019. He has no criminal history. Jacky Celicourt is a citizen of Haiti who was arrested by ICE on January 16, 2019. He has one criminal charge on his record for theft of a pair of headphones. All three of the class representatives were denied bond because they had failed to meet their burden in proving to the immigration judge's satisfaction that they were neither a flight risk nor a danger to society.

Plaintiffs moved for summary judgment on their claim that the procedures followed in § 1226(a) bond hearings are unconstitutional as a violation of the Due Process Clause of the Fifth Amendment. Plaintiffs argued that (1) the burden of proof should be allocated to the Government, (2) the Government should have to prove by clear and convincing evidence that the alien is a flight risk and a danger to the community, (3) the immigration judge should consider the alien's ability to pay in setting bond amounts, and (4) the immigration judge should consider alternative conditions of release.

In support of allocating the burden of proof to the Government, Plaintiffs cited *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass. 2018), where the court held that the Fifth Amendment Due Process Clause "requires placing the burden of proof on the government in § 1226(a) custody redetermination hearings". Plaintiffs also cited *Darko v. Sessions,* 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018), pointing to other district courts that have come to the same conclusion. Plaintiffs claimed that requiring the Government to bear the burden is especially true given the length of time aliens may be detained awaiting their final hearings.

The Government cited *Ali v. Brott*, 770 F. App'x 298 (8th Cir. 2019), which held that § 1226(a) does not contain a reasonableness requirement for the length of time an alien may be detained. The Court ultimately agreed with the Plaintiffs' argument and allocated the burden of proof to the Government in § 1226(a) bond hearings.

The Court next turned to the Plaintiffs' standard of proof claim. Plaintiffs asserted the Government must prove by clear and convincing evidence dangerousness and flight risk. Plaintiffs proposed a higher standard of proof for flight risk than in the criminal context where the standard of proof is a preponderance of the evidence. In support of their claim, Plaintiffs argued that aliens without criminal convictions do not present the same flight risk as defendants in criminal proceedings. The Court rejected the Plaintiff's claim that the clear and convincing standard should be applied to both the dangerousness and flight risk determinations, stating "many aliens do not have viable defenses to removal and may well prefer to flee, rather than be removed from the country". The Court then held that the Due Process Clause requires that the Government prove dangerousness by clear and convincing evidence, and flight risk by a preponderance of the evidence.

The Court next decided the Plaintiffs' claim that the immigration judge consider both alternative conditions to detention and the alien's ability to pay. The Court found that this requirement ensures that the Government's interest in protecting the public and assuring the alien appears at future hearings, is reasonably related to the detention of the alien.

The Court then concluded that requiring the alien to bear the burden of proof in § 1226(a) bond hearings is unconstitutional, it is also a violation of the APA.

The Court's decision flipped the burden of proof, which had been in place for almost twenty years. 8 U.S.C. § 1226(a) is silent as to the burden of proof and the standard of proof in bond proceedings. Prior to the court's decision in this case, aliens were required to prove they were not a danger or a flight risk "to the judge's satisfaction", which the court noted was "effectively no standard at all". The Court's decision will change how bond hearings pursuant to § 1226(a) at the Boston Immigration Court are handled moving forward and will require the Government to prove that detention is necessary in accordance with the Due Process Clause. This is a significant victory for the immigration bar and detained aliens in Massachusetts.

* * *

Sara K. Ward is a partner at Maiona Ward and devotes the entirety of her practice to immigration law. Sara represent families and employees worldwide with immigrant and non-immigrant visa processing at US Consulates, as well as legal permanent residency at USCIS offices across the United States, Naturalization, adjustment of status, asylum, waivers of inadmissibility and business immigration matters.

First Circuit Holds that Massachusetts Employment Laws Applicable to Au Pairs Are Not Preempted by Federal Law

Capron v. Office of Attorney Gen. of Massachusetts, 944 F.3d 9 (1st Cir. 2019)

By Keith Benstein, Esq., Day Pitney LLP

In *Capron v. Attorney General of Massachusetts*, the First Circuit affirmed the district court's dismissal of an action in which Cultural Care, an au pair placement agency, and two host families (the "Plaintiffs") sought a declaration that federal laws concerning the au pair exchange program impliedly preempt the Commonwealth from requiring host families to comply with Massachusetts employment laws. In doing so, the First Circuit held that au pairs are entitled to minimum wage under the Massachusetts Fair Wage Law and various protections under the Massachusetts Domestic Workers Bill of Rights Act.

The Au Pair Exchange Program

The Fulbright-Hays Act permits foreign nationals to obtain a special visa to temporarily visit the United States to participate in various educational and cultural exchange programs. The United States Department of State (the "DOS") has promulgated regulations governing those programs, including the au pair program.

Under the au pair program, private placement agencies known as "sponsors" select foreign nationals between the ages of 18 and 26 to participate in the program as au pairs. The au pairs are placed with host families with whom they live for up to a year while providing no more than 45 hours of childcare services per week to the families. The regulations include a "wages and hours" provision requiring sponsors to ensure that au pairs are paid $7.25 per hour—the federal minimum wage under the Fair Labor Standards Act (the "FLSA")—for their 45 hours of work per week. The regulations also allow certain deductions from an au pair's compensation for room and board. The regulations, however, do not allow au pairs to enforce these provisions against either a sponsor or a host family. In fact, the only sanction for a sponsor's non-compliance is ejection from the program.

Relevant Massachusetts Laws

The two state laws at issue are the Massachusetts Fair Wage Law (the "MFWL") and the Massachusetts Domestic Workers Bill of Rights Act (the "MDWBOR"). The MFWL requires that employers pay employees a minimum hourly wage of $12.75, subject to certain inapplicable exceptions. The MFWL also requires employers to pay employees time-and-a-half for any hours worked in a week in excess of 40.

The MDWBOR, enacted in 2014, includes protections for "domestic workers," defined as individuals or employees who provide "nanny" and other household services for families in private homes. Regulations implementing the MDWBOR provide that domestic workers must be compensated at the overtime rate under the MFWL for any "working time" over 40 hours per week, which includes any time that a domestic worker is required to be on the employer's premises or on duty. The regulations also limit deductions that an employer may take from a domestic worker's wages for food and lodging and impose certain recordkeeping requirements.

In the district court action, Cultural Care alleged that under the DOS regulations au pairs are entitled to $195.75 per week in compensation, which represents 45 hours of work at $7.25 per hour less a 40% deduction for room and board. For purposes of the litigation, the parties agreed that au pairs are "employees" under the MFWL, and that the Massachusetts Attorney General (the "AG") considered au pairs to be "domestic workers" under the MDWBOR. If these laws applied to au pairs, Cultural Care alleged that au pairs' weekly compensation would jump from $195.75 to $445.50.

The District Court Action

The Plaintiffs filed suit against the AG seeking declaratory and injunctive relief. The Plaintiffs asserted that the federal laws applicable to the au pair program impliedly preempt Massachusetts from requiring host families to comply with the MFWL and the MDWBOR as employers of au pairs. The AG moved to dismiss, arguing that federal law does not preempt the MFWL or the MDWBOR. The district granted the AG's motion and dismissed the case.

Appeal to the First Circuit

The Plaintiffs—who bore the burden to prove preemption on appeal—argued that federal law impliedly preempted Massachusetts law under the doctrines of field preemption and obstacle preemption.

Field Preemption

Under field preemption, states may not regulate conduct in a field that Congress has determined must be exclusively regulated by the federal government. Congressional intent to preempt a field may be inferred from either a framework of regulations so pervasive that it leaves no room for the states to supplement it, or a federal interest so dominant that courts assume the federal government intended to preclude enforcement of state laws on the same subject. The First Circuit considered de novo the district court's finding that field preemption did not apply.

The Plaintiffs first argued that field preemption applied because the DOS regulations concerning the au pair program are so detailed and comprehensive that the states are left no room to supplement them. The First Circuit disagreed. The Court noted that the DOS regulations impose obligations on sponsors, not host families. According to the First Circuit, this fact does not support the inference that the federal government intended to preempt state laws that govern a "quintessentially local concern" such as the employment relationship between host families and au pairs.

The Plaintiffs also contended that the federal foreign affairs and immigration interests underlying the au pair program evince the federal government's intent to preempt all state laws applicable to au pairs. The First Circuit rejected this argument as well. The Court explained that the state laws at issue apply to all employers and employees in the Commonwealth. According to the First Circuit, the fact that these generally applicable laws also apply to au pairs does not justify a finding a preemption.

Obstacle Preemption

Obstacle preemption provides that federal law preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law at issue.

In making their obstacle preemption argument, the Plaintiffs urged the First Circuit to infer from the applicable federal statutes and DOS regulations that the federal government intended to set a uniform, nationwide ceiling with respect au pairs' compensation and employment rights. Continuing, the Plaintiffs argued that enforcing the Massachusetts laws would frustrate the DOS' objectives because those laws include protections that exceed the regulatory ceiling established by the federal government.

Rejecting this argument, the First Circuit first held that the federal statutes at issue—by their plain terms—do not show that the federal government intended to establish a uniform, nationwide compensation scheme for au pairs. The First Circuit then turned to the DOS regulations. The regulations, as noted above, apply to sponsors, not host families or au pairs. The regulations also do not forbid au pairs from being paid more than the federal minimum wage. Moreover, the regulations themselves refer to an "employment component," which supports the notion that state employment laws apply to au pairs. In this regard, the First Circuit held that "the Au Pair Program operates parallel to, rather than in place of, state employment laws that concern wages and hours and that protect domestic workers generally[.]"

Finding no preemptive intent in the language of the federal statutes or the DOS regulations, the Court turned to the Plaintiffs' argument that such intent may be inferred from the regulatory history. The Plaintiffs pointed to commentary accompanying regulations from the 1990s as well as language from the 1997 regulations to support the notion that the au pair program sets a uniform, nationwide ceiling for au pairs' compensation.

Although the commentary to the regulations from the early 1990s referred to a "uniform" compensation scheme for au pairs, the Court concluded that the context showed that the regulations sought to create a "uniform" scheme by standardizing deductions that host families applied to au pairs' compensation. Standardizing the deductions would ensure that au pairs' compensation was the same, or "uniform," across the states. The Court also found that the reference to "wages" and the FLSA in the 1997 regulations evinced the federal government's intent to set a nationwide floor for au pairs' compensation pursuant to the FLSA. Having rejected the Plaintiffs' ceiling argument, the First Circuit held that the MFWL and the MDWBOR were not obstacles to the accomplishment of the au pair program's purposes.

The Final Word?

The First Circuit's decision is certainly a boon to au pairs in the Commonwealth at least in the short term. But this good fortune for au pairs means that host families are now faced with dramatically increased costs for childcare services. In light of these dueling interests and the broad impact of the decision, it appears unlikely that the First Circuit's opinion will be the final word on au pair compensation in the Commonwealth.

* * *

Keith Bensten is an associate at Day Pitney LLP. An experienced civil litigator, Keith represents businesses and employers in complex commercial, product liability, and employment litigation. He has represented businesses and individuals in litigation matters in federal and state courts throughout the United States.

First Circuit Affirms Conviction Challenged on the Basis of Improper Search Warrant Evidence

United States v. Bregu, No. 18-1643 (1st Cir. 2020)

By R. Levi Barry, Esq., Day Pitney LLP

In *United States v. Bregu*, No. 18-1643 (1st Cir. 2020), the United States Court of Appeals for the First Circuit (Lipez, J.) affirmed the Massachusetts federal district court's conviction of Ilir Bregu for conspiracy to possess with intent to distribute and to distribute oxycodone. The appeal was filed by defendant Bregu, who asserted that his conviction must be vacated because the trial court improperly admitted challenged evidence obtained from the execution of five search warrants by federal law enforcement officers. Bregu had moved to suppress certain evidence ¬— including precise location data from Bregu's cell phone and a large amount of cash recovered from a hidden compartment of his vehicle — on the basis that the first warrant for cellular location data, which had served as the foundation for all four subsequent warrants, was not supported by probable cause.

The Probable Cause Standard

A warrant application must establish probable cause to believe that (1) a crime has been committed — the "commission" element — and (2) enumerated evidence of the offense will be found at the place to be search — the "nexus" element. When determining whether probable cause exists, courts look at the "totality of the circumstances," which reflects the fact that probable cause is a "fluid concept" not readily distilled to a neat set of legal rules. Moreover, when the warrant application relies "mainly" on confidential informants, the First Circuit Court of Appeals has articulated four factors to consider:

1. Whether the affidavit establishes the probable veracity and basis of knowledge of the informant;
2. Whether an informant's statements reflect firsthand knowledge;
3. Whether the informant's factual statements were corroborated; and
4. Whether a law enforcement affiant assessed the probable significance of the informant's provided information.

These factors constitute a "non-exhaustive list" and no single factor controls or is indispensable. Finally, stronger evidence on one or more factors may compensate for a weaker or deficient showing on another.

The First Warrant Application

On March 20, 2015, the FBI submitted an application for a search warrant pursuant to the Stored Communications Act ("SCA"). The SCA permits the government to compel cellular service providers to disclose certain phone records in connection with an ongoing criminal investigation. In this case, the government invoked the SCA for a warrant to obtain location data from Bregu's cell phone. Specifically, the warrant application requested "precise location information" for a prospective period of thirty days and "cell site location information," identifying the cell tower receiving transmissions from Bregu's cell phone, for a prospective period of sixty days.

In support of the warrant application, the FBI Special Agent submitted an affidavit detailing the investigation into Bregu, which had commenced nearly three years earlier. Importantly, the application noted that the investigation had begun after a confidential informant reported that Bregu and an accomplice were selling prescription narcotics that they had acquired from a source in New York and transported by car to Massachusetts.

Over the next two-and-a-half years after receiving this initial tip, the Special Agent's investigation into Bregu led him to three other suspicious individuals, one of whom was arrested and charged with possession with intent to distribute oxycodone in 2013. Following that arrest, a second confidential informant informed the Special Agent that another of the individuals had been illegally selling pills for years and continued to do so. Later, in January 2015, a third confidential informant reported that both of the remaining at large individuals were selling pills. Finally, FBI surveillance revealed that Bregu's car had visited those individuals' home several times, always preceded by a brief phone call; the FBI Special Agent concluded that those visits were likely for the purpose of delivering supplies of illegal pills.

In addition to recounting this investigation, the affidavit in support of the warrant application described the Special Agent's relationship with each of the three confidential informants. Notably, he stated that he knew the identity of all three informants and had debriefed each of them personally. Moreover, although the initial informant had been charged with distribution of cocaine after providing the first tip, the remaining informants had histories of reliable reporting to law enforcement. On these grounds, the magistrate judge agreed that there was probable cause and issued the requested warrant. Over the next several months, the FBI obtained additional warrants on the same grounds for other cell phones used by Bregu.

The Vehicle Warrant

On July 14, 2015, four months after obtaining the first warrant, the FBI Special Agent submitted an application for a fifth warrant, this time to search Bregu's car. This warrant incorporated the facts of the investigation used in the previous warrants and contained additional facts obtained by further FBI surveillance of Bregu and his accomplices. Notably, the FBI relied on location data from Bregu's phone — showing that Bregu had made trips to various areas in Boston before returning to New York — and pen register data indicating that he had contact with the accomplices during each trip. After each of these meetings, FBI agents observed Bregu's accomplices shuttling plastic bags between their car and their apartment. Finally, the application for the vehicle warrant detailed a suspicious midnight meeting between Bregu and an accomplice in which Bregu moved a plastic bag from his car to the accomplice's car while he was pumping gas.

The same day the FBI submitted the application, the magistrate judge issued the warrant to search Bregu's car "at any time of the day or night." Shortly thereafter, on July 16, law enforcement officers observed a meeting between Bregu and the accomplices. Following the meeting, the officers stopped Bregu in his car and executed the search warrant, during which they recovered $37,800 in cash from a hidden compartment behind the dashboard.

The Trial

In August 2015, a federal grand jury indicted Bregu with conspiracy to possess with intent to distribute and to distribute oxycodone. At that time, Bregu moved to suppress the fruits of the warrants detailed above, but the court denied the motion after a non-evidentiary suppression hearing. At trial, the government introduced the challenged evidence against Bregu, and a jury found him guilty of both counts.

The First Circuit Upholds the Warrants

On appeal, Bregu argued that the district court improperly denied his suppression motion and, as a result, his conviction must be vacated. Bregu argued, first, that the district court erred in its determination that there was probable cause for the magistrate judge to issue the first warrant for location data of his cell phone. The gravamen of his argument was that the information contained in the Special Agent's affidavit primarily concerned his accomplices and the only incriminating information about Bregu came from the initial informant, who was not reliable. Bregu also argued that, since the affidavit relied "mainly" on information from confidential informants, the trial court erred in failing to apply the proper enumerated factors for testing probable cause.

In affirming the district court's decision to admit the evidence, the Court of Appeals first noted that the Special Agent's affidavit did not rely "mainly" on confidential sources. Rather, the Appeals Court found that the affidavit contained "exhaustive" information implicating Bregu in an oxycodone-distribution conspiracy even in the absence of the initial informant's tip. The Appeals Court noted that pen register data and surveillance footage established a pattern — "at least five times in less than three months" — in which Bregu made brief contact with an accomplice by phone, then traveled from New York to their home, where he stayed briefly before returning to New York. The Appeals Court further noted that the nefarious purpose of these trips was supported by the additional informants' statements that the pill supplier was based in New York and by the successful execution of two controlled purchases of oxycodone from Bregu's accomplices "just days after two of Bregu's brief visits."

Moreover, even while discounting the importance of the informants to the Special Agent's affidavit, the Appeals Court also declined to read the district court's opinion as neglecting to address the enumerated factors. Rather, the First Circuit found that "[b]y noting" that the Special Agent personally knew all three confidential informants, and by detailing the means by which their information was corroborated, the district court "effectively addressed" the enumerated factors, at least well enough to establish probable cause.

* * *

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First Circuit Affirms Employees Who Applied for Social Security Disability Income Benefits Held to Higher Standard in Subsequent Americans with Disabilities Act Claim

Pena v. Honeywell Int'l, Inc., 923 F.3d 18 (1st Cir. 2019)

By Catherine M. Scott, Esq., Freeman Mathis & Gary, LLP

In *Pena v. Honeywell Int'l, Inc.*, the First Circuit clarified that an employee who claims to be totally disabled for purposes of a Social Security Disability Income (SSDI) benefits application cannot also maintain a claim as a "qualified individual" under the Americans with Disabilities Act (ADA) unless the employee can explain in sufficient detail any inconsistencies in the employee's prior statements. 923 F.3d 18, 28-31 (1st Cir. Apr. 26, 2019) (Lipez, J. dissenting). The First Circuit affirmed a grant of summary judgment to the employer on the plaintiff-employee's ADA claim and agreed with the lower court that the employee had not met her burden of explaining how she was a "qualified individual" capable of performing the essential functions of her position with reasonable accommodation in light of her prior statements that she was "totally disabled." Id. In doing so, the First Circuit discussed in detail and distinguished the United States Supreme Court's decision in *Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795 (1999), which held employees were not per se estopped from asserting a claim under the ADA if they had applied for SSDI benefits. Id.

The plaintiff-employee, Mayra Pena, brought suit against her former employer, Honeywell International, Inc. ("Honeywell"), claiming it discriminated against her by failing to provide her with a reasonable accommodation and later terminating her when she did not return to work in violation of the ADA. *Id.* at 21. Ms. Pena had requested not to be assigned to a certain department at Honeywell because that department exacerbated certain symptoms of her anxiety and depressive disorder. *Id.* at 24-25. Ms. Pena was absent from work for over three months and had used any and all available leave when Honeywell terminated her for job abandonment. *Id.* at 25. Shortly after her termination, the plaintiff applied for SSDI benefits and stated on her application that she had become "unable to work because of [her] disabling condition on [her last date of work]" and that she was "still disabled." *Id*. Ms. Pena confirmed she was still "totally disabled" during her deposition. *Id.*

In the lower court, Honeywell filed a motion for summary judgment on the basis Ms. Pena's statements in her application for SSDI benefits disqualified her from bringing a claim under the ADA because she was not a "qualified individual" capable of performing the essential functions of her position with reasonable accommodation. *Id*. at 26. The lower court granted summary judgment to the employer on these grounds. *Id.*

In analyzing the lower court's grant of summary judgment, the First Circuit first noted the conflict between a claimant under the ADA and a claimant seeking SSDI benefits. Id. at 27. While the ADA requires an individual be capable of performing the essential functions of his or her position with reasonable accommodation, *see* 42 U.S.C. § 12111(8), a successful SSDI applicant must be physically and/or mentally impaired such that he or she cannot do previous work or "any other kind of substantial gainful work which exists in the national economy." *Id.* § 423(d)(2)(A).

The First Circuit then analyzed the recent, seminal decision on this matter, *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999). Pena, 923 F.3d at 27. In Cleveland, the United States Supreme Court addressed this tension and reversed a Fifth Circuit decision that had created a "rebuttable presumption" that a plaintiff's filing of an SSDI application precluded that plaintiff from being a "qualified individual" capable of bringing a claim for disability discrimination under the ADA and remanded to the lower court for additional findings. *Id*. (citing 526 U.S. at 799-800, 807). The court in Cleveland went on to set forth the analysis in the event a plaintiff in an ADA claim had sought SSDI benefits. *Id*. First, the court must determine whether there was any inconsistency in between a plaintiff's prior SSDI statements and the plaintiff's position in the ADA litigation. *Id.* at 27-28. Second, when confronted with inconsistency in a plaintiff's statements, the court must then "require an explanation of any apparent inconsistency with the necessary elements of an ADA claim." *Id.* at 28 (citing Cleveland, supra, at 807). In order for a plaintiff to defeat a motion for summary judgment, the plaintiff's "explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless perform the 'essential functions' of her job, with or without 'reasonable accommodation.'" *Id.* at 28. Notably, the Cleveland court rejected that it was sufficient for the plaintiff to aver that SSDI statements were made in a different forum and were true at the time they were made. *Id.*

The First Circuit then analyzed whether the plaintiff had met this burden in opposing the employer's motion for summary judgment and found that she had not. *Id*. at 28. First, the plaintiff argued that had the SSDI application asked if she could do her job with reasonable accommodations, she would have answered "yes." *Id*. at 28-29. The First Circuit held to allow the plaintiff to sustain an ADA claim on this basis would make the holding in Cleveland meaningless and was simply another way of pointing out the differences in SSDI administrative procedures and the requirements of an ADA claim. *Id*. (citing Cleveland, supra, at 807). Second, the plaintiff argued she had produced sufficient evidence of a reasoned explanation for her inconsistent statements. *Id*. at 29. The First Circuit disagreed with Ms. Pena's characterization of her SSDI application statements and later testimony in her deposition and found she had uniformly asserted she was totally disabled as of her last date of work. *Id*. at 29-30. The First Circuit dismissed both of her ADA claims concerning wrongful termination and reasonable accommodation. *Id.* at 31.

Judge Lipez dissented from the majority holding and argued Ms. Pena had met her burden of producing a reasoned explanation for her inconsistent statements concerning her disability. *Id.* at 39-40. The dissent indicated the majority had taken too narrow of a reading of the Supreme Court's decision in Cleveland. *Id.* at 35-36. According to the dissent, principles of equity dictated a plaintiff who had produced evidence of being able to perform her work with a reasonable accommodation at the time she became unable to work should be allowed

allowed to overcome a motion for summary judgment in her ADA claim. *Id.* at 36-37. Because the employee had testified at her deposition that she did not become totally disabled until her last day of work when her employer refused to accommodate her, she could sustain her burden necessary under Cleveland to defeat summary judgment. *Id.* at 37. The dissent also noted the plaintiff had not made any specific factual statements that would have barred her from claiming she had an anxiety and/or depressive disorder. *Id.* at 38-39.

* * *

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