

CLIENT ALERT: Massachusetts Supreme Judicial Court Addresses Discrimination Claim Involving Safety Risk - By Jonathan Persky

On April 18, 2017, the Massachusetts Supreme Judicial Court (“SJC”) ruled that a Boston police officer had a triable claim of disability discrimination because the City would not remove him from desk duty. The officer had suffered a traumatic brain injury and the City limited him to desk duty out of concern that he could not perform the essential functions of the regular position. The case, *Gannon v. City of Boston*, clarifies that an employer’s good-faith belief that a disabled employee cannot safely perform his or her job duties—even in reliance on a medical opinion—does not preclude an employment discrimination claim if the employee presents contrary evidence about his or her ability to perform.

The plaintiff, Sean “The Cannon” Gannon, became a Boston police officer in 1996. In 2004, Gannon, who had been an amateur mixed martial arts (“MMA”) combatant, made his professional debut as an MMA prizefighter. Over the course of the next year, Gannon received numerous severe injuries from his fights, including at least two concussions. In 2005, Gannon retired from the professional MMA circuit after suffering a broken eye socket.

Although Gannon returned to full duty as a police officer only two weeks after his final fight, he soon began suffering from sleep apnea and insomnia. In early 2006, colleagues visited Gannon’s home after he failed to report for work, and found him confused and disoriented. A psychiatrist retained by the City concluded that Gannon suffered from impaired thinking and difficulty focusing as a result of his MMA injuries. Gannon was then indefinitely reassigned to desk duty. Although Gannon had produced reports by his own psychiatrist and independent providers concluding that he was fit for full duty, the City’s psychiatrists continued to believe that Gannon’s lack of mental acuity and deficient memory precluded him from serving as an active-duty police officer. Gannon brought suit against the City, alleging that the police department had discriminated against him on the basis of perceived disability in violation of Chapter 151B of the Massachusetts General Laws.

Not all disabled employees are protected by Chapter 151B. The employee must show that, notwithstanding the disability, he or she is able to perform the essential functions of the position, either with or without a reasonable accommodation. The issue considered by the SJC was whether Gannon was such a qualified disabled individual entitling him to protection under the statute. Because the medical evidence was in conflict as to whether or not Gannon could perform the essential functions of his job, the SJC ruled that Gannon should be entitled to a trial.

The SJC further recognized that employers have a legitimate interest in ensuring the safety of its employees and the public. To address this concern, the SJC announced the following test for cases, such as this one, where the employer asserts that hiring or reinstating a disabled employee would pose a safety threat:

- First, the employee must make a *prima facie* showing that he or she is “handicapped” within

the meaning of the law—i.e., either has or is regarded as having a physical or mental impairment which substantially limits one or more major life activities—and that the employee is capable of performing the essential functions of the job either with or without reasonable accommodation.

- Second, the employer bears the burden of producing “specific evidence” of “an unacceptably significant risk of serious injury to the employee or others.” The employer must show that it has conducted an “individualized factual inquiry” taking into account “substantial information regarding the employee’s individual work and medical history.”
- Third, the burden shifts to the employee to prove that he or she is capable of performing the essential functions of the job “without posing an unacceptably significant risk of serious injury to the employee or others.” The fact-finder must consider both the severity of the feared injury and the probability that injury would result.

The *Gannon* decision has potentially far-reaching consequences for employers who must make difficult decisions regarding the hiring or retention of individuals with medical conditions, including but not limited to those in safety-sensitive positions. The law has long imposed an obligation on employers to conduct individualized inquiries into whether a reasonable accommodation will permit disabled employees to perform the essential functions of their positions. However, this is not enough to fully guard against liability under Chapter 151B. An employer who acts in good faith and in reliance on a medical opinion related to legitimate safety concerns may still face a jury trial if the employee can produce a contrary medical opinion concluding that the employee may safely perform the essential functions of his or her position.

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