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CLIENT ALERT: Massachusetts Supreme Judicial Court Holds Chapter 151B Anti-Retaliation Provisions Protect Former Employees

Clarifying existing confusion about the scope of Massachusetts General Laws Chapter 151B's anti-retaliation provisions, the Massachusetts Supreme Judicial Court (the "SJC") has held that an employer may be liable to former employees under the Commonwealth's anti-discrimination statute for retaliatory conduct occurring after the employment relationship has ended. In *Psy-Ed Corp., et al. v. Klein, et al.*, the SJC upheld a lower court's finding that an employer's baseless lawsuit against a former employee who had filed a charge of discrimination with the Massachusetts Commission Against Discrimination ("MCAD") against the employer constituted retaliation under G.L. c. 151B, § 4(4) ("Section 4(4)"). Furthermore, the SJC concluded that another former employee and shareholder of the company who signed an affidavit at odds with the employer's position in the same MCAD proceeding could pursue a retaliation claim against the company under §§ 4(4) and 4(4A) ("Section 4(4A)") based on conduct occurring after his employment had been terminated. The SJC's decision serves as a reminder of the broad protections afforded to both current and former employees who engage in activities protected by anti-discrimination laws and highlights the potential dangers employers face in handling disputes with their former employees.

The SJC's holding arises out of complicated litigation involving state law retaliation claims against Psy-Ed Corporation ("Psy-Ed") and its president and chief executive officer Joseph Valenzano, Jr. by two former employees, Dr. Stanley Klein and Kimberly Schive. In 1997, Schive, who is deaf, filed a charge of disability discrimination against Psy-Ed with the MCAD. In connection with that matter, Klein, who both worked for Psy-Ed and held an ownership interest in the company, signed an affidavit at Valenzano's request supporting Psy-Ed's position before the MCAD. Ultimately, however, Psy-Ed terminated Klein's employment. Subsequently, Klein negotiated his complete separation from the company, culminating a settlement agreement that included a mutual release of all claims and provided for Psy-Ed's reacquisition of Klein's shares in exchange for an initial payment and a promissory note obligating Psy-Ed to make sixteen quarterly payments to Klein. The settlement agreement also obligated Klein to cooperate with the company's investigation and defense of any claim by Schive against the company. Unbeknownst to Psy-Ed, in October 1997, while settlement was being negotiated, Klein signed a second affidavit in the Schive MCAD matter that did not support Psy-Ed's position.

After learning of Klein's second affidavit and the MCAD's issuance of a probable cause finding in the Schive case, Psy-Ed and Valenzano sued Klein and Schive, asserting claims of defamation, violation of G.L. c. 93A, § 11, civil conspiracy, and tortious interference with contractual and business relations. Psy-Ed's board also voted to discontinue payments to Klein under the promissory note. In response, Schive filed another MCAD charge against Psy-Ed and Valenzano, alleging retaliation in violation of G.L. c. 151B, and ultimately asserted a retaliation counterclaim in the litigation. Thereafter, in 2002, Klein filed a lawsuit against Psy-Ed and Valenzano that alleged retaliation in violation of Section 4(4)

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and Section 4(4A). The two actions were subsequently consolidated.

The central issue presented to the SJC was whether action taken by an employer against its former employees could constitute a violation of Section 4(4) and Section (4A). Section 4(4) makes it unlawful to "discriminate" against any person because he has opposed discrimination, filed a complaint with the MCAD, or testified or assisted in an MCAD proceeding, while Section 4(4A) prohibits a person from coercing, intimidating, threatening or interfering with another person in their exercise or enjoyment of rights granted or protected by Massachusetts anti-discrimination law.

In an opinion written by Justice Botsford, the SJC explicitly found that alleged retaliatory conduct need not target a current employee to violate those provisions. The Court noted that Section 4(4) and Section 4(4A) each address actions taken by "any person" against another "person." According to the Court, neither provision expressly requires the existence of an employer-employee relationship at the time of the alleged wrongful conduct. Moreover, the Court found that given Chapter 151B's "broad remedial purposes" it would be an error "to imply such a limitation where the statutory language does not require it." The Court reasoned that "where an employer's discriminatory conduct results in an employee's termination, [Section] 4(4) and (4A) must necessarily expand beyond current employees to have the intended effect of protecting victims of discrimination from suffering further ill treatment as a consequence of exercising their rights under G.L. 151B."

In addition, the Court also found that the filing of a lawsuit can constitute an unlawful act under Chapter 151B. Where a claim of retaliation is based upon the employer's filing of a lawsuit against a former employee, as was the case in *Psy-Ed*, the Court noted that the scope of Section 4(4) and (4A) is limited by the constitutional right to petition. However, according to the Court, "sham" or "baseless" lawsuits are not afforded this constitutional protection.

In light of the SJC's expansive reading of Chapter 151B in other contexts, the *Psy-Ed* decision is not surprising. Nonetheless, in light of *Psy-Ed*, employers must proceed with caution in dealing with employees who have engaged in conduct arguably protected by anti-discrimination laws. As the SJC's decision confirms, where a former employee has engaged in some form of protected activity, any adverse action taken by the employer – even if taken after the employment relationship has terminated, including the litigation of legal disputes with former employees – may give rise to potential liability for retaliation under Massachusetts law. Accordingly, employers must remain vigilant to ensuring that, when they engage in any action towards a former employee that could be perceived as adverse, the legitimate, nondiscriminatory reasons for the action are well-documented and no retaliatory motive is at play.

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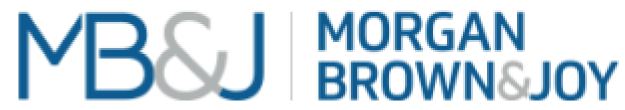

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