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July 26, 2013 – Massachusetts Continuing Legal Education Programs, presents
Mock Trial of a MCAD Retaliation Case: Representing Employees and Employers in a Public Hearing at the MCAD

Practicing before the Massachusetts Commission Against Discrimination (MCAD) can be complex and challenging. This program demonstrates and explains effective techniques for presenting and defending a winning case before the MCAD. The panel of experts share their practical ideas, techniques, and strategies for winning a MCAD case through simulation of portions of an MCAD Public Hearing of a retaliation case. Observe and interact with seasoned employment attorneys as they present key aspects of the complainant and respondent's respective cases to an actual MCAD Hearing Officer.

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CATCHING UP WITH OUR CLIENTS . . .

SUPREME COURT RULINGS TILT IN FAVOR OF EMPLOYERS AS TERM ENDS

In a pair of decisions on Monday, June 24, the Supreme Court tightened the standards by which employees can bring claims under Title VII of the Civil Rights Act of 1964.

In *University of Texas Southwestern Medical Center v. Nassar*, the Court required plaintiffs, when bringing retaliation claims under Title VII to prove "but for" causation, rejecting the more lenient "motivating factor" standard of proof. What this means in lay person's terms can be explained using a little math. Let's say the employee claims she was fired in retaliation for complaining about sex discrimination, and the employer defends on that ground that she was fired for violating its attendance policy, as she was frequently absent and late to work. Under a "motivating factor" standard of proof, the employee can prevail if retaliation was "a motivating factor" meaning it could have been 40% responsible for the decision—it need not be the primary reason. In contrast, applying the "but for" standard of proof, the employee can only prevail if she would not have been fired "but for" the retaliatory motive, which has to be at least 51% of the reason—the primary reason.

In *Vance v. Ball State University*, the Court clarified the definition of "supervisor" under Title VII, rejecting the broader definition urged by the plaintiff and the Equal Employment Opportunity Commission, and instead adopting a narrow definition. The Court held that a "supervisor" is one who can take a "tangible employment action" towards an employee, such as hiring, firing, promoting, and disciplining. It rejected the EEOC's expansive view which of a supervisor as one who has the ability to direct another employee's work. Who is a supervisor is an important issue in proving sexual harassment under Title VII. Employers are vicariously liable for harassment engaged in by supervisors (because they are their "agents) even if the employer has no knowledge of the harassment (*i.e.*, even if the employee has not complained). By contrast, employers are not liable for harassment engaged in by coworkers unless they are on notice (*i.e.*, unless the employee made a complaint).

A decision in a class action case last week will also benefit employers. In *American Express Co. v. Italian Colors Restaurant*, the Court ruled that a court cannot invalidate a class action waiver on the ground that the plaintiff's cost of individually arbitrating the federal claim exceeds the potential recovery. This is the latest in a series of Supreme Court decisions upholding waivers of class actions in arbitration agreements.