MASSACHUSETTS LAWYERS WEEKLY

SJC: Jury must hear officer's handicap discrimination claim

Plaintiff given 'desk job' because of past concussions

By: Pat Murphy April 27, 2017

A Boston police officer consigned to a desk job is entitled to a jury trial on his claim for handicap discrimination, even though the department may have had a good-faith belief that it was no longer safe for him to patrol the streets due to the effects of off-duty head injuries, the Supreme Judicial Court has determined.

The city argued it was entitled to summary judgment because it carried its burden of showing that it acted for nondiscriminatory reasons in establishing a defense in a "pretext" case under G.L.c. 151B.

But Chief Justice Ralph D. Gants, writing for the unanimous court, said the pretext standard did not apply. In reversing summary judgment, Gants wrote that the city at trial "may present the evidence that caused the department to believe that the officer cannot safely assume the full duties of a police officer, but that determination rests with the fact finder based on the preponderance of the evidence, not with the department based on its informed, good faith belief."

The 26-page decision is *Gannon v. City of Boston*, Lawyers Weekly No. 10-059-17. The full text of the ruling can be found here.

Dueling experts

Boston attorney Harold L. Lichten, who represented the plaintiff police officer, said the decision helps clarify in which cases the pretext standard applies.

"The [pretext] framework doesn't fit that category of handicap discrimination cases where the employer admits that its actions were based upon the disability," Lichten said. "The only question in those cases is whether or not the person could do the job."

The city was represented by Nicole I. Taub from the Office of the Legal Advisor for the Boston Police Department. The department declined to make Taub available for comment.

Simone R. Liebman, an attorney with the Massachusetts Commission Against Discrimination, filed an amicus brief on behalf of the agency.

"We felt that it was important to reject the *McDonnell Douglas* framework in cases of this type," Liebman said, referring to the 1973 U.S. Supreme Court ruling that established a three-stage, burden-shifting paradigm. "The real focus of these cases is whether the plaintiff is qualified to do the essential functions of the job."

Brian J. MacDonough of Boston agreed that *Gannon* does a good job placing the *McDonnell Douglas* framework into a proper context.

"The SJC is reiterating that this isn't a rigid model for all discrimination cases," MacDonough said. "*McDonnell Douglas* is not a one-size-fits-all test."

Boston attorney Robert S. Mantell, who filed an amicus brief on behalf of the Massachusetts Employment Lawyers Association, likewise sees *Gannon* as an important decision on the issue of pretext.

"The court found that the good-faith belief of the employer is not a defense, even when that good-faith belief is supported with medical information from a medical expert," Mantell said, "If [the employer is] incorrect in evaluating the disability or how that disability impairs the ability to do the job, the employee wins."

While saying the SJC "got it right" under the facts of the case, Boston employment attorney Joseph P. McConnell said the suit illustrates the predicament for employers when faced with "dueling" medical experts who have conflicting opinions as to whether an employee can safely perform a job.

McConnell also expressed concern that the decision may signal that there is a jury issue whenever there are "dueling doctors' notes" in such cases.

"It gives the plaintiffs' bar another weapon to get a settlement in a case," he said. "If you have dueling doctors' notes, [an employer's] ability to get a summary judgment is very proscribed under this decision."

But MacDonough rejected the suggestion that *Gannon* somehow opens the proverbial floodgates to handicap discrimination cases.

"At the end of the day, the ultimate burden of proof is still on the employee," he said.

Mixed martial arts injuries

Plaintiff Sean Gannon began working as a Boston police officer in 1996. For the first 10 years of his career, he was a patrolman.

The plaintiff also was an avid participant in mixed martial arts, a full-contact combat sport. He started fighting in amateur bouts in 2002 and subsequently became a professional MMA fighter in 2004.

According to court records, the plaintiff suffered a number of head injuries in the course of his short professional career. He was diagnosed with a concussion following his first professional fight in August 2004 in which he took a roundhouse kick to the head. The plaintiff suffered another concussion while beating the MMA fighter "Kimbo Slice" in a bare-knuckle boxing match in October 2004.

The plaintiff's professional career ended when he lost by a technical knockout in an October 2005 fight in which he suffered a broken eye socket.

As a result of his eye injury, the plaintiff missed a week of work and spent another six days on restricted “inside-only” duty upon returning to the BPD.

On Feb. 1, 2006, the plaintiff failed to show up for work. Officers sent to his home to check on him allegedly found him in an incoherent and confused state. According to the plaintiff, he had simply overslept because of treatment he was receiving for obstructive sleep apnea and insomnia.

The department nonetheless placed the plaintiff on administrative leave pending a fitness evaluation by the department’s psychiatrist. Neuropsychological testing indicated the plaintiff had trouble processing information quickly and clearly.

The department’s psychiatrist recommended against the plaintiff returning to full-time duty. She concluded in an October 2008 follow-up report that the plaintiff suffered from “serious mental deficits that interfere with his ability to do the essential functions of an armed police officer.”

However, the plaintiff eventually was permitted to return to modified duty. He currently holds a desk job as a booking officer, but is prohibited from carrying a service weapon.

Meanwhile, the plaintiff saw his own doctors for treatment of anxiety and attention difficulties. While the plaintiff’s doctors initially recognized that he suffered from symptoms relating to his sports injuries, they subsequently reported improvement in his condition.

In 2008, the plaintiff’s psychiatrist reported that his psychiatric and neurologic condition had improved to the point where he could be reinstated to full duty.

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— Joseph P. McConnell, Boston

In 2011, after consulting another neuropsychologist, the department filed an application to place the plaintiff on involuntary retirement. The Public Employee Retirement Administration Commission denied the application, concluding based on three independent medical evaluations that the plaintiff could perform the essential functions of his job.

The plaintiff’s union thereupon filed a grievance to return him to full-time duty. After an arbitrator ruled against him and after bringing a complaint with the MCAD, the plaintiff sued in Suffolk Superior Court.

According to the plaintiff, by refusing to return him to full duty, the city violated G.Lc. 151B, §4(16), which prohibits discrimination against a "qualified handicapped person" who is "capable of performing the essential functions of the position involved with reasonable accommodation." Judge Douglas H. Wilkins granted the city's motion for summary judgment, citing the fact that the city had relied on "ample expert support" to conclude that the plaintiff could not perform the duties of a patrol officer.

The SJC granted direct appellate review.

Jury issue

In addressing the lower court's decision, Gants explained that handicap discrimination cases fall into two basic categories. The first category, which he described as a "pretext case," involves the application of the familiar *McDonnell Douglas* framework where, once the employee makes a prima facie showing of discrimination, the burden shifts to the employer to show that the real reason for the adverse employment action was not the employee's handicap but a lawful reason unrelated to the handicap.

The second category, Gants observed, is the handicap discrimination case in which the employer admits that the adverse action was taken because of the employee's handicap. The employer contends the employee was unable to perform the essential functions of the job even with reasonable accommodation and, therefore, is not a qualified handicapped person protected under G.Lc. 151B, §4(16).

Gants found that the lower court erred in analyzing *Gannon* as a pretext case. The chief justice wrote that that error impermissibly shifted the plaintiff's burden of proof.

"By mischaracterizing this as a pretext case, the judge determined that Gannon could not prevail on his claim of handicap discrimination because he had failed to rebut the department's contention that the real reason for its refusal to return him to full duty was that it 'honestly' had concerns about Gannon's reaction time and his decision-making during crisis," Gants wrote. Instead, Gants said, the case should have been analyzed as a "qualified handicapped person case" in which "the employer does not prevail simply because it indisputably acted in good faith; it can prevail only if the handicapped employee fails to prove by a preponderance of the evidence that he or she was able to perform the essential duties of the position with reasonable accommodation."

Because the evidence revealed a genuine issue of material fact concerning whether the plaintiff was capable of performing the essential duties of a patrol officer, the chief justice concluded, the city's motion for summary judgment should have been denied.

Looking ahead to trial, Gants recognized that implicit in the city's contention that the plaintiff was not capable of performing patrol duties was the belief that he would pose a safety risk to the public, his fellow officers and himself.

Gants outlined how that issue was to be addressed at trial: The employer had the burden of producing specific evidence showing that the employee would pose an "unacceptably significant" safety risk.

“Where the employer has satisfied this burden of production, the plaintiff employee must 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,” he wrote.

Gannon v. City of Boston

THE ISSUE Is a Boston police officer consigned to a desk job entitled to a jury trial on his claim for handicap discrimination, even though the department may have had a good-faith belief that he could no longer safely patrol the streets due to the lingering effects of off-duty head injuries?

DECISION Yes (Supreme Judicial Court)

LAWYERS Harold L. Lichten and Adelaide Pagano, of Lichten & Liss-Riordan, Boston (plaintiff)
Nicole I. Taub of Boston Police Department Office of the Legal Advisor (defense)