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IMPORTANT OPINIONS OF THE WEEK

Attorneys — Crime-fraud exception

A law firm must produce privileged documents because of a reasonable basis to believe that the attorney-client communications "were intended by the client to facilitate or conceal criminal or fraudulent activity," the 1st U.S. Circuit Court of Appeals holds.

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Employment — Overtime

Dunkin' Donuts should not have been awarded summary judgment in a suit by two store managers, as material factual disputes remain concerning the applicability of the "bona fide executive" exemption to the Fair Labor Standards Act, the 1st U.S. Circuit Court of Appeals determines.

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Mortgages — Notice

The SJC's July 17 ruling in *Pinti v. Emigrant Mortgage Co.* — that a failure to comply strictly with the notice of default provisions in a mortgage renders a foreclosure sale void, not merely voidable — is applicable to cases pending on appeal at the time of the *Pinti* decision's release, the Appeals Court says.

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Criminal — Probation

The fact that marijuana has been decriminalized did not preclude a judge from revoking a defendant's probation based on 12 positive urine screens for marijuana, a Superior Court judge states.

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ALSO INSIDE

Noncompete nullified by new employment contract

No reference to restrictive covenant in later agreement

MLW The full text of the ruling in *Meschino v. Frazier Industrial Company* can be found at masslawyersweekly.com.

By Eric T. Berkman
Lawyers Weekly Correspondent

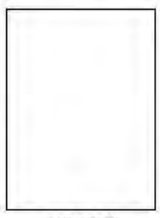
A confidentiality agreement that an employee signed in 2005 in conjunction with a separate employment agreement was no longer enforceable after the employee executed a new employment agreement in 2012 that made no reference to any existing confidentiality agreement, a U.S. District Court judge has ruled.

Claiming that the plaintiff employee had breached the confidentiality agreement by disclosing proprietary information in the course of litigation over allegedly unpaid commissions, the defendant employer argued that it had intended to preserve the confidentiality agreement all along.

Because the issue of intent is a question of fact to be left to a jury, the employer contended that its counterclaim for breach of the agreement should be permitted.

Judge Richard G. Stearns disagreed.

"[T]here is no hint of such an intention in the plain language of the 2012 employment agreement that [the employer] itself drafted," Stearns wrote, pointing out that the court determines the interpretation of a contractual term as a matter of law unless the meaning is unclear and relies on conflicting testimony.



BERMAN
Successfully represents employee

"The 2012 agreement states on its face that it contains 'the terms of [the employee's] employment' without any reservation or reference to any other document or agreement," Stearns said.

The 14-page decision is *Meschino v. Frazier Industrial Company*, Lawyers Weekly No. 02-553-15. The full text of the ruling can be found at masslawyersweekly.com.

'Material change'

Plaintiff's counsel Pamela E. Berman of Boston declined to comment due to ongoing litigation in the case.

But John R. Bauer, a Boston business litigator with experience handling

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Condo owner only entitled to 'reasonable' counsel fees

Despite the promise of 'actual' fees in provision

KAFKER
Authors ruling for Appeals Court

An "actual attorney fees" provision in a condominium owner's affordable housing covenant entitled him only to "reasonable" fees he incurred fighting an action brought by the Boston Redevelopment Authority, the Appeals Court has decided.

The BRA had accused the defendant condo owner, who traveled frequently for work, of violating the covenant by not using the condo as his primary residence. The authority also claimed he violated the covenant by leasing the unit for "business purposes" when he took on roommates to help defray costs.

MLW The full text of the ruling in *Boston Redevelopment Authority v. Pham, et al.* can be found at masslawyersweekly.com.

The defendant prevailed in the action but argued on appeal that, pursuant to a covenant provision promising "actual attorneys [sic] fees and costs" to the prevailing party in any action to enforce covenant terms, he should get the entire $100,000 he incurred in the case rather than the approximately $97,000 the trial judge deemed reasonable.

The Appeals Court disagreed, likening the case to its 2007 decision in *Citizens Bank of Mass. v. Travers.*

In *Travers*, the court upheld an award of reasonable counsel fees a bank spent collecting on a note despite a contractual provision requiring the borrower to pay all costs incurred. The court reasoned that the provision was a non-negotiated part of a "contract of adhesion" drawn entirely in the bank's favor.

"Here, the attorney's fee provision at issue is part of an affordable housing covenant, drafted by the BRA, in favor of the BRA and its program objectives, and we too consider it appropriate to limit an award of attorney's fees to an amount that is fair and reasonable," Judge Scott L. Kafker wrote for the court.

The 21-page decision is *Boston Redevelopment Authority v. Pham, et al.*, Lawyers Weekly No. 11-184-15. The full text of the ruling can be found at masslawyersweekly.com.

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APIMAGES

Petitioner Abigail Fisher with lawyers Edward Blum (left) and Bert Rein (rear) outside the U.S. Supreme Court on Dec. 9

Local lawyers lend voices to 'Fisher II'

But affirmative action support may be in vain

By Kris Olson
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Massachusetts attorneys authored three amicus briefs in the closely watched affirmative action case *Fisher v. University of Texas,* argued for the second time before the U.S. Supreme Court on Dec. 9.

But while those briefs offer full-throated support for considering race in a limited, non-quota-based way in college admissions, optimism is not high that their arguments will hold sway with the court as currently constituted.

The seeds of the case were sown when petitioner Abigail Fisher failed to place within the top 10 percent of her graduating high school class. If she had, she would have gained automatic admission to the University of Texas under a program the school instituted after its previous policy, which accounted for race, was struck down by the 5th U.S. Circuit Court of Appeals in 1996.

The "top 10 percent" program fills approximately 75 percent of the seats in each incoming class and, according to Fisher's brief, succeeded in bringing to the school "'real diversity' without classifying applicants in a way the 'Constitution abhors.'"

"The idea was to take a step back [and say], 'If [affirmative action in admissions] goes away, here's what's going to be lost.'"

— Matthew T. Henshon, Boston

UT had been filling the remaining seats in its incoming class in a race-neutral way until the Supreme Court's 2003 decision in *Grutter v. Bollinger*, which gave the school license to reintroduce racial preferences as part of its admissions criteria, an opportunity UT "leapt at" despite its "dubious" utility, according to Fisher.

"Since then, UT's fundamental problem has been its inability to justify that unfortunate decision," Fisher argues, adding that the bar — surviving "strict scrutiny" by demonstrating the absence of race-neutral alternatives and that the policy is narrowly tailored — is high.

Boston attorney Matthew T. Henshon traveled to Washington, D.C., to hear the oral arguments in *Fisher*

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Local attorneys lend voices to Supreme Court's 'Fisher II'

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II firsthand, having authored a brief on behalf of the National Association of Basketball Coaches. Henshon himself was a starter on Princeton University's basketball team, whose David-and-Goliath battle with Georgetown in 1989 became the subject of an ESPN documentary.

In tackling his brief-writing assignment, Henshon said he consulted a book by Supreme Court Justice Antonin Scalia that stressed the importance of the names on the cover page.

On that front, Henshon had some powerful allies, at least in basketball circles: 11 Hall of Fame inductees, representing dozens of other men's and women's coaches who also lent their names to the effort.

But more than their names, Henshon hopes their stories, instructive of the impact of diversity on black and white students alike, will move the justices.

"The idea was to take a step back [and say], 'If [affirmative action in admissions] goes away, here's what's going to be lost,'" Henshon said.

The lead amici include four African-American coaches who overcame race-related obstacles to blaze trails for others. One is Georgetown coach John R. Thompson Jr., whose mother was not allowed to teach in the Washington, D.C., public school system despite having her teaching certificate.

Henshon said the baritone of Thompson was a voice he "heard a lot" as he composed the brief, having met the imposing 6-foot, 10-inch legend a time or two while playing on the same team at Princeton as Thompson's son.

Noting that the *Grutter* decision had highlighted "broadening perspectives" as a permissible motivation for seeking a "critical mass" of minorities on campus, Henshon's brief highlights examples in which athletics have done just that.

There was the Mississippi State basketball team that dodged an injunction to play in the 1963 NCAA Tournament, after missing out on that opportunity the year before due to a state rule preventing Mississippi public colleges from taking the court against integrated teams. That led to a chance interaction between the white players and a group of black girls at the team hotel. One of the players recalled one of the girls saying to him, "Well, you don't look like a monster to me. You look normal."

That interaction, the brief states, "demonstrates what the *Grutter* court was referencing: the interplay between people with different backgrounds that can increase perspectives."

Another prominent example cited is the 1966 NCAA championship game, in which an all-white Kentucky team was beaten by a Texas Western team with five African-American starters, earning them a new level of respect.

Future NBA superstars and rivals Earvin "Magic" Johnson and Larry Bird, too, "both needed to interact and rely on teammates from diverse backgrounds," the brief notes.

And those are just the conspicuous examples, the brief notes. More often, the educational benefits "occur slowly, hidden away in classrooms or dining halls."

While some may think "it's just sports," Henshon writes in the brief that college basketball has already arrived at the destination to which society is headed: a "majority-minority" environment.

Thus, it can already demonstrate the impact of individuals for whom basketball may have opened the doors to college, such as Ed Hightower, a college basketball referee turned school superintendent, and Peter Roby, former Harvard coach and current Northeastern University athletic director. Now, these men are role models, and not just for those of the same race, the brief notes.

Athletics also fosters "good citizenship," the brief states, pointing to, among others, former Sen. Bill Bradley, who found his time in a "black world," the NBA, "one of the most enlightening experiences" of his life and good preparation for his work in the U.S. Senate.

The brief also highlights Jim Cash, who broke the color barrier in the Southwestern Conference and went on to attain his Ph.D. and teach at Harvard Business School while serving on several large company boards, and Robin Roberts, a star at Southeastern Louisiana University, who would become a broadcaster and host of ABC's "Good Morning America."

"It is just as important to remember the other teammates and classmates who met, interacted with, and ultimately were influenced by, each of these individuals — and the many others like them," the brief states.

Other voices

Meanwhile, a brief drafted by Jonathan M. Albano on behalf of the Boston Bar Association focuses on the moral and practical imperative of maintaining diversity at undergraduate institutions, lest the pipeline of candidates of different races and ethnicities into law schools and ultimately the legal profession be choked off.

"Without diversity, the legal profession cannot reflect the society it serves, an outcome that ultimately erodes public confidence in the judicial system," said Albano, a partner at Morgan, Lewis & Bockius in Boston and BBA board member.

Within the practice of law, lawyers have come to "depend on a diverse set of views to do their jobs," Albano said, noting that it is now almost second nature for attorneys preparing for trial to seek out people of different backgrounds and perspectives to see how their arguments will land.

The brief further urges the Supreme Court to "be respectful of" and consider yielding to the expertise of educators in creating the most successful diverse student body.

A coalition of organizations similarly committed to advancing diversity in the legal profession also endorsed the brief.

While going beyond the legal profession and looking at the global economy as a whole, Attorney General Maura T. Healey's brief strikes similar chords in arguing for the need to retain admissions policies that permit race to be "one of many relevant factors" at public colleges.

Of particular concern to Healey and her colleagues in 17 other jurisdictions who signed onto the brief are members of "historically disadvantaged communities," given the ever-rising cost of college and the importance of a degree in lifting families out of poverty.

Henshon, meanwhile, said he was struck during oral arguments that Solicitor General Donald B. Verrilli Jr. went "all in on national defense," arguing that affirmative action in admissions policies was needed to maintain a diverse officer corps in the military, a deficiency that may have contributed to the country's failure in Vietnam.

Potential fallout

While none of the amici would predict how the Supreme Court might decide *Fisher II*, Boston College Law School professor Mark S. Brodin believes the case "may well turn out to be the death knell of affirmative action and race-sensitive policies (at least at public institutions)," he wrote in an April 2014 Buffalo Law Review article.

Fisher I suggested that admissions programs that account for race are subject to an "intrusive dissection," leaving them "vulnerable" to being picked apart by "clever attorneys," Brodin wrote. Now, *Fisher II* may finish the job.

Henshon's brief notes that there already is a case study in what happens when race is eliminated as a consideration in admissions. In California, after Proposition 209 passed, the ensuing freshman class at UCLA included just 96 African-Americans out of a class of 5,000.

Irrespective of the *Fisher II* decision, athletics will continue to integrate college campuses.

"For us, Ferguson, Missouri and Baltimore, Maryland are not just troubling images on the nightly news, but places where we go to recruit prospective student-athletes," the coaches' brief notes.

But athletics cannot be the sole source of diversity, the coaches urge. Henshon draws a parallel to France's nominally "color-blind" society, where politicians embraced a diverse World-Cup-winning soccer team but not the broader concept of equality.

France in the past year had seen a "marked increase in racial and religious-based violence," Henshon writes.

The kicker is that the brief was filed two weeks before the deadly attacks in Paris.

France's situation is contrasted with South Africa, where rugby "was the vehicle to help unify and heal a post-apartheid nation," Henshon writes. The sport could function that way because it was part of a wider societal embrace of racial healing and progress, he argues.

Yet with the *Fisher II* decision, the Supreme Court could take another step toward "paper-thin diversity" on college campuses, Henshon fears.

Already, Brodin said, many admissions offices may have received the message from *Fisher I* that the consideration of race should be scaled back to "avoid the considerable expense and unwanted media attention" of defending their programs in court.

Henshon closes his brief with the story of future President Gerald Ford standing up for an African-American teammate at the University of Michigan after opponent Georgia Tech said it would not take the field if a black man were allowed to play.

"Tolerance and diversity are not 'conservative values' or 'liberal values,'" Henshon writes. "They are not 'Democratic values' or 'Republican values.' They are not 'black values' or 'white values.' They are American values."

Henshon asks the court to honor those values but acknowledges that *Fisher* implicates another fundamental value: fairness, or at least the perceived unfairness of basing college admissions on anything but "merit," which Brodin would argue is an inaccurate and thus unfair juxtaposition in its own right.

However, the majority of the current court has shown little willingness to adjust its world view. MLW

THIS WEEK'S DECISIONS

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SUPERIOR COURT

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possession remains a civil offense and ... subjects the offender to a civil penalty and forfeiture of the marijuana.' ... Marijuana continues to be an 'illegal' drug under civil and criminal law.

"Second, probation routinely requires and prohibits conduct of probationers that is not required of, or prohibited for, citizens who are not on probation. Probationers, for example, may reasonably be prohibited from consuming alcohol, which other members of the public can consume freely; and probationers may be required to report in person to probation, to be randomly tested for illegal substances without particularized cause, to have their whereabouts monitored electronically, and to disclose certain information to probation. Probation may require or prohibit such conduct because probation is, among other things, a form of criminal punishment. ...

"Third, defendant knew that he was not permitted to possess and use marijuana. The probation contract from 2009 and the set of probation conditions signed in 2013 prohibited defendant from possessing and using illegal, non-prescribed drugs. In addition, when defendant violated probation, in part, because he tested positive for marijuana and he was returned to probation, the court found him in violation of probation for, among other things, his use of marijuana and ordered that he attend Narcotics Anonymous meetings. From these events, defendant should have been fully aware that his possession and use of marijuana were violations of his probation.

"Finally, finding defendant in violation of his probation conditions for his possession and use of marijuana, and imposing a sanction as a result, does not transgress the prohibition contained in G.L.c. 94C, §32L, para. 2. A sanction following the finding of a violation of probation is not a punishment for the offending conduct, but the imposition of a punishment for the underlying offense for which the defendant is on probation. ...

"In support of his position, defendant does not point to any case arising in the context of a probation violation. Instead, he relies on the recent cases barring law enforcement from basing probable cause to conduct a search on the odor of marijuana or on possession of less than an ounce of marijuana. ... These decisions are inapplicable. In the context of probation supervision, drug testing is a routine procedure and use of marijuana may reasonably be prohibited.

"For the foregoing reasons, I have found defendant in violation of his probation and returned him to probation on the same conditions, but with his probation extended for an additional six months and with additional conditions."

Commonwealth v. Ward (Lawyers Weekly No. 12-135-15) (4 pages) (Krupp, J.) (Suffolk Superior Court) (Criminal No. 08-10492) (Nov. 18, 2015).

Criminal

Victim impact statements - Sentencing

Where the family members of the victim of a defendant's criminal offenses have recommended that the defendant be sentenced to probation instead of three to four years in prison, the District Attorney must be provided with a recording of the victim impact statements and then explain whether a sentence of three-four years will continue to be recommended.

Judge's rationale

"Defendant is charged with aggravated rape of a child, indecent assault and battery on a child under 14, and related charges. Because of the age differential between the defendant and the victim, defendant faces a ten-year minimum mandatory penalty under G.L.c. 265, §23A(b). Without this aggravating factor, I would have discretion to sentence defendant to any sentence between probation and life.

"On October 27, 2015, I conducted a lobby conference with the Assistant District Attorney and the defense attorney. ... The prosecutor indicated that the District Attorney was willing in his discretion, and had agreed, to dismiss the aggravated portion of