

Cases in Point

2009 Disability and Discrimination Lawsuits Provide Powerful Lessons

By KEVIN V. MALTBY, Esq.

The close of 2009 has brought about several developments in employment law that have had an impact on claims involving disability and sex discrimination under Massachusetts law and federal law. While the facts outlined below may be similar to something experienced in your own business, it is critically important that you review the facts of any particular employment decisions with employment counsel to assure a proper analysis.

Employers in Massachusetts must comply with both state and federal law. The federal courts are empowered to handle claims under federal law and Massachusetts law when the claims are brought together. Typically, the laws are very similar, so this case law can be helpful in guiding employers.

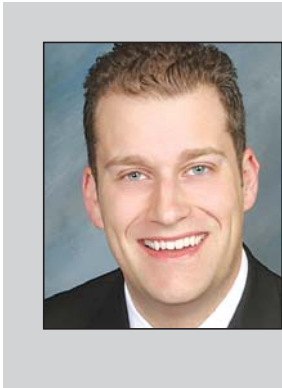
In *Sensing v. Outback Steakhouse of Florida*, the First Circuit Court of Appeals examined the issue of constructive discharge. In this case, the court found that the plaintiff had established facts demonstrating that she was constructively discharged when her employer modified her work schedule, making it impossible for her to comply despite her disability.

In addition, regardless of the schedule modification, the court found that the employer engaged in discriminatory action when it removed the employee from her work schedule after she missed her last two shifts and offered her a light-duty position with reduced salary, hours, and responsibilities. The lesson learned is that the employer should work with the employee in establishing a work schedule that accommodates an apparent handicap or disability. In addition, employers should be aware that their actions will be judged by the court and that actions taken by an employer may be perceived as retaliatory or illusory when regarded as a whole.

In a Massachusetts District Court case titled *Kinch v. Quest Diagnostics*, the court found in favor of the employer when the employee alleged that the employer had failed to reasonably accommodate him under Massachusetts and federal law. The employee

was suffering from hepatitis C and was on a certain type of medication that had potential side effects. The employee provided the employer with a pamphlet and did not provide any information about the medication potentially having a negative impact on the employee's work. In light of these facts, the court found that the employee neither requested an accommodation nor sufficiently put the employer on notice that such accommodation was required.

The court further reiterated federal and state law that requires an extensive back-and-forth between the parties regarding a handi-



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cap. This back-and-forth is required to help determine what reasonable accommodation will be provided, if any. Furthermore, the case reiterated the position that an employer may be required to act when the disability and accommodation is obvious. The lesson learned in this case is that an employer should work with an employee toward a reasonable accommodation in light of appropriate and relevant medical information regarding the employee's apparent disability.

The following case was decided by the Massachusetts Supreme Judicial Court (SJC), the highest court in Massachusetts, and it addresses issues related to gender discrimination. In *Haddad v. Wal-Mart*, an employee filed a claim for gender discrimination alleging unequal compensation and termination based on gender. The employee worked as a pharmacist at Wal-Mart for 10 years. In March 2003, she accepted a promotion to pharmacy manager on a temporary basis. At that time, and until her termination 13 months later, she was paid at an hourly rate considerably lower than any male pharmacy

manager in the Pittsfield region and did not receive a differential in hourly rate or other benefits. After numerous complaints, she finally received a check for the pharmacy manager bonus that others received earlier that year, but she never received the 13 months' worth of additional hourly pay.

Sometime thereafter, Wal-Mart commenced an investigation regarding a prescription that had been fraudulently written and filled by a pharmacy technician.

The pharmacy technician later admitted her guilt. The plaintiff denied any knowledge of the fraudulent prescriptions but told Wal-

Mart that it could have occurred while she briefly left the pharmacy area to purchase a soda at a nearby counter, when she was in the restroom, when she was in the front of the pharmacy talking to customers, or when she was in the back of the pharmacy eating lunch or counting narcotics. Wal-Mart terminated the plaintiff that same day, based on her statement, because she "fail[ed] to secure the pharmacy," in violation of an unspeci-

fied company policy.

After the employee was terminated, she brought an action against Wal-Mart for employment discrimination. At trial, the jury found in favor of the employee and awarded \$972,774 (19 years of front pay) in compensatory damages and \$1 million in punitive damages. The trial judge struck the punitive damages award, and the employee appealed. The SJC took direct appellate review of the matter and reinstated the \$1 million award.

The SJC has made numerous rulings that may provide significant guidance to employers regarding gender discrimination, including the ruling that, in order to obtain an award of punitive damages, a plaintiff need not prove that the defendant's agents were aware of specific laws, because a generalized understanding that gender discrimination is wrong is sufficient. In addition, the court went on to rule that punitive damages are available only if, considering all of the factors surrounding the wrongful conduct, the conduct is found to be outrageous and egregious. Those factors include:

- Whether there was a conscious or purposeful effort to demean or diminish a class of which the plaintiff is a part, or the plaintiff because he or she is a member of that class;

- Whether the defendant was aware that the discriminatory conduct would likely cause serious harm, or if it recklessly disregarded the likelihood that serious harm would arise;

- The actual harm to the plaintiff;

- The defendant's conduct after learning that the initial conduct would likely cause harm; and

- The duration of the wrongful conduct and any concealment of that conduct by the

defendant.

The *Haddad* case provides a strong illustration of how an employer's conduct can result in a court proceeding and a jury awarding punitive damages. Therefore, it is critically important for employers to take steps to ensure that any employment-based decision is grounded in good faith and not based on gender, handicap, disability, or any other reason protected by law.

While the above cases are good examples of actions that you should beware of taking as an employer, it is always good practice to discuss any specifics that arise with a qualified employment-law attorney. Discriminatory

conduct, however innocently done, is grounds for legal action, and you may find yourself on the losing end of a court battle. This is certainly a case where an ounce of prevention is worth more than a pound of cure. ■

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