

Cases in Point

Recent Discrimination Developments in Employment Law Provide Poignant Lessons

By KEVIN V. MALTBY, Esq.

Over the past year, there have been several decisions in Massachusetts employment law that may have an impact on how business owners and managers hire, terminate, or address an accommodation. And they offer some practical, and important, lessons.

It is important to note that, while the facts outlined below may be very similar to circumstances regarding your employees, every employment-based decision is unique and must be reviewed on a case-by-case basis.

The following two cases were decided by the Massachusetts Supreme Judicial Court (SJC), the highest court in the Commonwealth of Massachusetts. They deal directly with issues of accommodation and religious discrimination.

In *Massachusetts Bay Trans. Auth. v. Massachusetts Commission against Discrimination*, the court addressed the issue of whether an employee must engage in an interactive process with a prospective employee to determine a reasonable accommodation for religious beliefs. In this case, the complainant applied for work as a part-time bus driver with the Massachusetts Bay Transportation Authority (MBTA). Despite being qualified in all other aspects of the job, the MBTA refused to hire the complainant because he could not accept shifts that interfered with his religious observation of the Sabbath.

When the MBTA refused to hire the employee, he filed a complaint with the Mass. Commission Against Discrimination (MCAD) alleging discrimination based on religion. The employee demonstrated that he had a religious belief and that he was a piquant in his church. The MCAD found in favor of the employee because the MBTA failed to introduce any evidence it engaged in any effort to accommodate the employee, and that the MBTA was required, without exception, to engage in an interactive process with the employee.

The MCAD's ruling in favor of the

employee was ultimately upheld by the SJC. However, the SJC stated that "there is no obligation to undertake an interactive process if an employer can conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business." The SJC stated that such a demonstration would be extremely difficult without interacting with the employee.

The SJC also addressed the issue of undue

hardship found its way to the SJC. The SJC was asked to address whether an employer can claim an undue-hardship defense when it is not engaged in an interactive process with the employee and whether granting an exception to a grooming policy would pose an undue hardship on the business. The SJC held that an employee's initial request for an exemption to the grooming policy did not relieve the employer of its obligation to attempt to provide the employee a reasonable accommodation. The SJC also held that an exemption from the employer's grooming policy could not constitute an undue hardship as a matter of law.

The second-highest court in Massachusetts addressed an issue relating to race-based discrimination.

In *Thomas O'Connor Construction Inc. v. MCAD*, the complainant was an employee of a subcontractor. The complainant filed a charge with the MCAD alleging that the job superintendent of the general contractor had discriminated against him and a coworker by using offensive and explicitly racist comments and epithets when referring to them.

After the hearing, the MCAD found in favor of the complainant and ordered that the general contractor pay \$50,000 in emotional distress damages and a civil penalty in the amount of \$10,000, and was required to conduct annual training sessions for five years regarding race-based discrimination.

The general contractor appealed on the premise that it was not liable to the complainant because the complainant was an employee of the subcontractor. The Court of Appeals held that the general contractor could be liable under Massachusetts law for the hostile work environment created by its job superintendent where it had notice of the allegations, corroborated some of the allegations, and failed to take corrective action.

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hardship in accommodating a religious belief. In *Brown v. F.L. Roberts*, an employee worked for an oil/lube service/car-repair center. He was a devoted Rastafarian, and as part of his religious practice, he neither shaved nor cut his hair. His employer was aware of his religious beliefs. The employee's job responsibilities included working in the bay under the car as well as in the facility greeting customers and performing various sales duties.

Several years after the employee started working at the location, a new vice president of operations implemented a personal-appearance policy requiring that all employees remain clean-shaven with their hair trimmed. The employee informed the manager that he was unable to comply with the personal-appearance policy. In response, the manager told the employee that he would not be permitted to have any contact with customers and would work solely in the lower bays, away from the customers. The conditions in the lower bays were significantly worse than anywhere else.

Based on these facts, the lawsuit began in the MCAD and the Equal Employment Opportunity Commission, and then ulti-

There were also cases in the Massachusetts Superior Court where the court addressed various issues relating to employment law including age and handicap discrimination.

In *Woldemariam v. Pilgrim Parking*, the complainant was an assistant manager of a parking company. During the course of his employment he sustained a work-related injury and was subsequently laid off. The complainant alleged that when the employer terminated him after he sustained the work-related injury, he was discriminated against based on a handicap.

Ultimately, the case found its way to the Massachusetts Superior Court. The court found in favor of the employer because the employee was unable to demonstrate that the suspected reasons for his layoff were in fact the cause. The employer had alleged that the employee was a poor worker and that his termination was an economic necessity. While the complainant was able to demonstrate a solid case for discrimination, the employer was able to demonstrate that there was a work-related reason for termination outside

of the complainant's injury.

In *Somers v. Converged Access Inc.*, the complainant alleged that he had been discriminated against based on age. The employee had been asked to be considered for two open positions within the company. When the employer filled the positions with other individuals, the complainant believed he had been passed over by the employer because of his age.

The Superior Court ruled in favor of the employer because it maintained that it had selected other individuals based upon qualification and experience, and also because the complainant was unable to demonstrate that either hiring decision was the result of discrimination, and had failed to demonstrate he possessed the skills for the position.

In *Fischer v. Pres. & Fellows of Harvard College*, the complainant alleged that she had been discriminated against based on age because she was terminated and replaced with a younger employee. The Superior Court was not persuaded by the plaintiff offering statistics that older employees were not hired

as often as younger employees.

In addition, the court was not persuaded by a few stray remarks regarding the complainant's age, because those remarks did not create a sufficient basis for a discrimination claim. However, the court denied the employer's motion to dismiss because it found that her successor had been given a higher rate of pay despite having less experience, and the number of complaints made by the plaintiff against her supervisor were potentially indicative of a vendetta.

These cases clearly demonstrate that every employment decision made by an employer must be reviewed carefully. The facts and circumstances surrounding a hiring or firing must be made for reasons related to the business. ■

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