

## CBA trumped by MBTA settlement

By David E. Frank

Published: June 15, 2009

In a decision that is expected to create a stir in the labor and employment field, the Supreme Judicial Court has ruled that public policy interests in favor of preventing work-place discrimination outweigh a union's right to enforce a collective bargaining agreement.

The case of first impression - Massachusetts Bay Transportation Authority v. Boston Carmen's Union, Local 589, Amalgamated Transit Union - finds that even though the MBTA failed to inform the union of a settlement it had reached with a hearing-impaired job applicant, it did not violate the terms of the CBA.

Jody L. Newman, of Dwyer & Collora in Boston, said that the SJC had to balance "two strong public policies against one another and decided that the anti-discrimination public policy trumps the strong deference usually given to arbitrators' decisions in labor disputes."

Newman, who was not involved in the case, added that "this ruling is going to shake up the labor world a bit because, until now, there has been such a strong tradition of favoring arbitration of labor disputes and promoting the lack of court interference with the decision of arbitrators."

Boston employment lawyer David Conforto, who also was not involved in the case, said that the court found a "presumption of legitimacy" attached to the controversial settlement, which allowed the terms of the agreement to stand. That presumption, he said, was bolstered by the fact that the MCAD had made a probable cause determination against the MBTA.

"Just because an employee filed a claim wouldn't be enough; there has to be some type of finding in his favor," Conforto said. "What the union was doing was just asking for a seat at the table. They took the position that management must bargain with the union before settling individual complaints of unlawful discrimination where the terms of the settlement could affect its members."

The 24-page decision is Massachusetts Bay Transportation Authority v. Boston Carmen's Union, Local 589, Amalgamated Transit Union, Lawyers Weekly No. 10-095-09. [The full text of the ruling can be found by clicking here.](#)

### Policy extension

In ruling in favor of the employee, the SJC sent a clear message that public agencies like the MBTA have the right to proactively address allegations of discrimination, said Mary Jo Harris, who represented the employee.

"What the SJC has said is that, in cases like this where there is significant evidence to believe a violation has occurred, the MBTA has the right to reach a settlement and the collective bargaining agreement has to yield to the interests of remedying discrimination," said Harris, who practices at Morgan, Brown & Joy in Boston. "What's really significant here is the SJC has now held there are instances that are so important they are willing to extend the public policy exception to encompass discrimination claims."

Harris said the SJC found that lawyers are authorized to enter into such settlement agreements without violating the CBA as long as there is a sufficient basis to believe that discrimination occurred.

While no appellate courts in Massachusetts have weighed in on the competing public policy interests at play, Harris said other jurisdictions have addressed the issue, particularly in the context of class-action litigation.

Douglas Taylor, who represented the union, said he was unable to find any precedent in Massachusetts "that was close or gave us the guidance that we could use to assist the court."

Moving forward, he said, the SJC's ruling will serve as a road map for how lawyers and their clients should proceed when faced with allegations of work-place discrimination.

While Taylor said the decision may be limited to cases involving the MBTA, no one disputed the fact that the plaintiff should be protected. The lawyer disagreed, however, with how the court arrived at its decision on the granting of seniority status.

"What this does is it allows all the parties to navigate through the process when they're confronted with an unusual situation and figure out which bases to touch in order to get the problem resolved," he said. "Our position in this case was that seniority does not exist in a vacuum. It's strictly a contractual concept, and when there is a need to modify it or apply it in a different way, it has to be represented to the employees."

### **Mea culpa**

In 1999, William Wick, who wears a hearing aid, was offered a position with the MBTA on the condition that he pass a physical examination. The exam was conducted without allowing him to use his hearing aid.

When the MBTA notified him that he had failed the hearing test and withdrew his job offer, he filed a complaint with the MCAD alleging that he should have been allowed to wear his hearing aid at work.

An investigating commissioner with the MCAD found probable cause. In exchange for a general release, which did not require an admission of discrimination, the MBTA settled the case in 2004. The settlement included a \$16,000 payment to Wick and a grant of seniority under the CBA that was retroactive to the date he was first offered the job.

An arbitrator concluded that the retroactive seniority violated the CBA. Where there had been no finding of discrimination by the MCAD, the arbitrator ruled that the settlement was a "private" agreement, which must yield to the CBA.

The arbitrator's finding against the MBTA was confirmed by Superior Court Judge Diane M. Kottmyer.

### **'Well-defined and dominant'**

In reversing Kottmyer, Justice Francis X. Spina, writing for the court, said the interests of the employee and MBTA outweighed that of the unions. Calling the public policy "well defined and dominant," he said the awarding of retroactive seniority was the most meaningful remedy for discriminatory hiring.

"We conclude that a presumption of legitimacy arose from the settlement agreement that the union did not rebut by showing that the settlement was an attempt to subvert the collective bargaining agreement," he wrote. "[A]nd that because retroactive seniority is a presumptive remedy for discrimination in hiring, public policy requires the arbitrator's award be vacated."

Spina said the arbitrator's decision effectively perpetuated the MBTA's likely discriminatory conduct by depriving Wick of the remedy of retroactive seniority. He said a ruling to the contrary would violate policy favoring settlement of discrimination claims.

"Where the settlement is presumptively legitimate, and where the union has not shown that the settlement was a sham and in derogation of the collective bargaining agreement, public policy required the collective bargaining agreement to yield to Wick's settlement agreement," he wrote.

Although there had not been a finding or admission of discrimination against the MBTA, the judge said that fact alone did not control.

"The union has cited no case that holds either must be made before the terms of a collective bargaining agreement must yield," he said. "Nor has it cited any authority for its claim that settlement of an individual complaint, as here, requires the approval of the tribunal before whom the discrimination complaint is pending as a precondition to overriding the terms of a collective bargaining agreement."

In a companion case, Spina affirmed an arbitrator's judgment that the MBTA violated the CBA. The judge found in that case that the agency unilaterally created a new inspector list without the union's consent.

Where there had not been a finding that actual discrimination had occurred, Spina said the union was entitled to notice.