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31ST ANNUAL LABOR & EMPLOYMENT LAW SPRING CONFERENCE
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DISCRIMINATION: SURVEY & HOT TOPICS

Overview: This panel will cover developments in employment discrimination law both in Massachusetts and on the federal front. This particular outline will focus on significant state law cases as well as notable decisions by the Massachusetts Commission Against Discrimination.

SUPREME JUDICIAL COURT

Topics: Punitive Damages & Front Pay

I. Haddad v. Wal-Mart, 455 Mass. 91 (2009): A Berkshire County jury found Wal-Mart liable under M.G.L. c. 151B for gender discrimination based on two separate theories: unequal pay and wrongful termination. In total, the jury awarded $972,774 in compensatory damages and $1 million in punitive damages.

With respect to the unequal pay claim, the jury awarded the Plaintiff $1,767 for her economic loss. With respect to the wrongful termination claim, the jury awarded the Plaintiff the following: (i) $95,000 in back pay, (ii) $733,307 in front pay, (iii) $125,000 for emotional distress, (iv) $17,700 in special damages, and (v) $1 million in punitive damages. The jury also found Wal-Mart liable for defamation, but awarded no damages. The trial judge vacated the punitive damages award and denied Wal-Mart's motion for JNOV. The parties cross-appealed and the SJC granted Plaintiff's motion for direct appellate review.

Cynthia Haddad worked at Wal-Mart as a pharmacist for 10 years prior to her termination. During most of her tenure, she received "consistently excellent evaluations." In March 2003, she accepted a temporary position as a pharmacy manager. Over a period of 13 months, she received an hourly rate that was "considerably lower" than her male counterparts in the same region. In April 2004, after she lodged several complaints, Wal-Mart finally issued Haddad a check for the bonus that other pharmacy managers had received months prior. Wal-Mart never compensated Haddad for the difference in her hourly rate. That same month, Wal-Mart discharged Haddad because she had allegedly "briefly left the pharmacy area unsecured."

The SJC found that "[t]he evidence was sufficient for the jury to find that Wal-Mart acted with a discriminatory animus in terminating the plaintiff's employment" and that "[t]here was also evidence that the plaintiff's base pay was significantly less per hour than all the male pharmacy managers in the Pittsfield region." Most significantly, the SJC also upheld the jury's 19 year front pay award and reinstated

the punitive damages award. In doing so, the SJC articulated a new standard for punitive damages under M.G.L. c. 151B.

A. Affirmed 19 Year Front Pay Award Totaling $733,307

> "The plaintiff testified to her **difficulty in obtaining a new job**. There was evidence that Wal-Mart's allegations concerning her alleged responsibility for drug losses became generally known. After **more than six months of seeking employment**, she eventually secured a position at a **small pharmacy with less advancement potential**, **significantly fewer benefits, and fewer available hours**. She remained in that position at the time of trial; the evidence suggested that the plaintiff **intended to stay in the Pittsfield area** and to continue working at her present type of job as a pharmacist. Her tendency to job stability was supported by evidence that **she had worked at Wal-Mart for ten years**." Haddad, 455 Mass. at 103 (emphasis added).

1. *Purpose:* Front pay is intended to compensate a plaintiff for the loss of future earnings caused by the defendant's discriminatory conduct; it is not a punitive award and should not generate a windfall for the plaintiff. Haddad, 455 Mass. at 102.

2. *Proper Jury Instruction:* Mass. Sup. Ct. Civ. Prac. Jury Instr. § 5.3.3
   a. Loss of future benefits attributable to employer's misconduct
   b. Can not speculate
   c. Award must be proven with "reasonable certainty"
   d. Reduction to present value
   e. Factors for consideration
      i. Earnings between now and retirement date from former employer
      ii. Probable date of retirement
      iii. Earnings plaintiff "probably" would receive from another employer
         Note: Haddad presented two possible scenarios to the jury:
         (1) She has only lost her seniority and opportunity to become a Wal-Mart pharmacy manager **[Damages = $733,307.52]**
         (2) She lost the opportunity to become a Wal-Mart regional manager beginning in 2012 **[Damages = $1,557,467.61]**
      iv. Availability of other employment opportunities
      v. Possibility of inflation/future wage increases

3. *Expert Testimony:* Expert testimony is not required to support an award of front pay. Haddad, 455 Mass. at 103.

> "Nonetheless, the plaintiff introduced testimony from an expert in economics and finance whose qualifications were not challenged by Wal-Mart. The plaintiff's expert testified that, depending on various assumptions, the plaintiff would suffer a loss of front pay, discounted to present value, of **between $700,000 and $1,600,000**. These figures were based on the difference between the plaintiff's salary at Wal-Mart and the salary she earned at her new job; the assumption that she would work from her age at the time of trial (forty-six) until her estimated retirement age of sixty-five; the **length of her employment at Wal-Mart** and the **excellent nature of her reviews**; the **limited geographic market** in which she worked (Pittsfield, a city with a limited number of pharmacies); and the **difficulty in finding other employment**. The expert testified also that it would be **impossible for the plaintiff to recoup the ten years of seniority** the plaintiff had earned at Wal-Mart or to find a position with comparable seniority. Wal-Mart introduced no contrary evidence." Haddad, 455 Mass. at 104 (emphasis added) (internal citations omitted).

4. *Reliability:* The longer the time period of the award, the less likely it is that the loss of future earnings can be demonstrated with any degree of certainty or can reasonably be attributed to the illegal conduct of the employer. Haddad, 455 Mass. at 104 (citing Conway v. Electro Switch Corp., 402 Mass. 385, 389 (1988)).

> "[T]he jury could have determined that the **small number of comparable employment opportunities**, aggravated by the plaintiff's difficulty in obtaining other employment because **her reputation in the local pharmacist community had been harmed** by Wal-Mart's allegations, justified the nineteen-year award." Haddad, 455 Mass. at 104 (emphasis added).

5. *Mitigation:* The duty to mitigate does not require a plaintiff to: (i) switch to full-time employment where the she only worked part-time at the time of termination, (ii) re-apply to a prospective employer that had already rejected her once. Haddad, 455 Mass. at 105 – 106.

B. Articulated New Standard For Punitive Damages

> "To sustain an award of punitive damages under G. L. c. 151B, § 4, **a finding of intentional discrimination alone is not sufficient**. An award of punitive damages requires a **heightened finding beyond mere liability and also beyond a knowing violation of the statute**. Punitive damages may be awarded **only where the defendant's conduct is outrageous or egregious**. Punitive damages are warranted where the conduct is **so offensive that it justifies punishment** and not merely compensation. In making an award of punitive damages, the fact finder should determine that the award is needed to deter such behavior toward the class of which plaintiff is a member, or that the defendant's behavior is so egregious that it warrants public condemnation and punishment." Haddad, 455 Mass. at 110 – 111 (emphasis added).

1. *Factors under New Standard:* In determining whether the defendant's conduct was so outrageous or egregious that punitive damages are warranted, the fact finder should consider all of the factors surrounding the wrongful conduct. Such factors may include:
   a. Whether there was a conscious or purposeful effort to demean or diminish the class of which the plaintiff is a part (or the plaintiff because he or she is a member of the class)
   b. Whether the defendant was aware that the discriminatory conduct would likely cause serious harm, or recklessly disregarded the likelihood that serious harm would arise
   c. Actual harm to the plaintiff
   d. Defendant's conduct after learning that the initial conduct would likely cause harm
   e. Duration of the wrongful conduct and any concealment of that conduct by the defendant

2. *Timing of New Standard:* The new standard applies to all claims for punitive damages under M.G.L. c. 151B commenced after the date of the rescript, and (2) all pending claims that have not gone to judgment in the trial court by such date.

3. *Haddad Redux:* Did evidence support punitive damages award for Haddad under new standard? Yes. "The jury were warranted in concluding that Wal-Mart's **pattern of unequal treatment of male and female pharmacists** was outrageous and reprehensible." Haddad, 455 Mass. at 109.

4. *Comparison to Old Standard:* Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. See Dartt v. Browning-Ferris Indus., Inc., 427 Mass. 1, 17 – 17a (1998) (quoting Restatement (Second) of Torts §

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908(2) (1979)). "That the defendant acted with the knowledge that it was interfering with the plaintiff's right to be free of unlawful discrimination, however, has been only one circumstance warranting an award of punitive damages. If the defendant's act was otherwise **outrageous, egregious**, evil in motive, or undertaken with reckless indifference to the rights of others, an award of punitive damages has been allowed." Haddad, 455 Mass. at 108 (emphasis added).

5. *Due Process:* The same constitutional considerations apply in determining whether a punitive damages award is excessive:
   a. Degree of reprehensibility of the defendant's conduct
   b. Ratio of the punitive damage award to the actual harm inflicted
   c. Comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct

Topic: Forced Arbitration

II. Warfield v. Beth Israel Deaconess Medical Center, 454 Mass. 390 (2009): The SJC concluded "that an employment contract containing an agreement by the employee to limit or waive any of the rights or remedies conferred by [M.G.L.] c. 151B is enforceable only if such an agreement is stated in **clear and unmistakable terms**." Warfield, 454 Mass. at 398 (emphasis added).

Since 1980, Carol Warfield has been an anesthesiologist on the medical staff of Beth Israel. In March, 2000, she entered into an employment agreement in which she agreed to serve as the anesthesiologist-in-chief for Beth Israel. The agreement set out the terms of Warfield's employment, including her duties, compensation, and the circumstances under which she could be terminated with or without cause. At issue was Paragraph 17 of the agreement, which purported to force Warfield to submit certain claims to arbitration: "Any claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration." Warfield, 454 Mass. at 392.

In July 2008, the hospital terminated Warfield's appointment as anesthesiologist-in-chief. In March 2008, she filed a complaint in Superior Court in which she alleged that Beth Israel engaged in a relentless pattern of gender-based discriminatory animus in violation of M.G.L. c. 151B. The defendants moved to dismiss the case and to compel arbitration pursuant to M.G.L c. 251, §2. The Superior Court (Borenstein, J.) denied the defendants' request, concluding that: (1) the arbitration clause did not apply to Warfield's claims under M.G.L. c. 151B because the arbitration agreement governed disputes arising from her duties as chief of anesthesiology, and (2) the claims of discrimination were not arbitrable because the agreement ended on Warfield's termination, thereby extinguishing any obligation to arbitrate.

The SJC agreed that the forced arbitration agreement did not reach Warfield's statutory claims under M.G.L. c. 151B. In so doing, the Court observed that "doubts

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whether a particular dispute comes within the scope of the clause should be resolved in favor of arbitration" while also noting "[o]ur State law principles of contract interpretation make clear that considerations of public policy play an important role in the interpretation and enforcement of contracts." Warfield, 454 Mass. at 397. Relying on unambiguous language under M.G.L. c. 151B, §9 calling for the Commonwealth's antidiscrimination law to "be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of [c. 151B] shall not apply," the SJC resolved its balancing test in favor of Warfield.

The SJC rejected the lower court's second rationale, noting that "[a]greements to arbitrate are separable from and generally survive the termination of the underlying contract." Warfield, 454 Mass. at 402.

The dissent (Cowin, J.) acknowledged that "arbitration cannot be imposed unilaterally" and must "a product of a mutual understanding" but criticized the "special approach" with respect to claims under M.G.L. c. 151B taken by the majority. Warfield, 454 Mass. at 404. In particular, the dissent characterized the majority as "exaggerat[ing] the significance of antidiscrimination claims as opposed to other claims of equal importance to those who assert them." Id. at 405. The dissent concluded that the agreement's language forcing arbitration was sufficiently broad to reach Warfield's discrimination claims, noting that the statute's liberal purpose "cannot fairly be interpreted to place G.L. c. 151B in a special category insofar as arbitration clauses are concerned." Id.

A. Statutory Presumption & Exceptions: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties **shall** be valid, enforceable and irrevocable, **save upon such grounds as exist at law or in equity for the revocation of any contract**." M.G.L c. 251, §1 (emphasis added).

B. Two-Part Analysis

1. *Contract of Adhesion:* "A contract presented on a take-it-or-leave-it … [basis] whose provisions the party bringing the action was compelled to accept without argument or discussion." Restatement (Second) of Conflict of Laws § 80, Comment c (1989).

2. *Public Policy:* "[C]ontracts [of adhesion] are enforceable unless they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances." Chase Commercial Corp. v. Owen, 32 Mass. App. Ct. 248, 253 (1992) (citing Lechmere Tire & Sales Co. v. Burwick, 360 Mass. 718, 721 n.3 (1972).

   a. Unilateral Arbitration Obligation: Enforcement can be disfavored where only the employee is required to arbitrate his or her claims. See Stirlen v. Supercuts, Inc., 51 Cal.App.4th 1519 (1997); see also id. at 1535 (noting

"that experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms"). But see Dixon v. Perry & Slesnick, P.C., 75 Mass. App. Ct. 271, 277 (2009) ("Despite her attempts to portray herself as being in an unequal bargaining position with the defendants, Dixon is an educated professional.").

b. Fee-Splitting: "In sum, we hold that Cole could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses." Cole v. Burns Int'l Sec. Serv., Inc., 105 F.3d 1465, 1485 (D.C. Cir. 1997).
   i. AAA Rules: "Unless the parties agree otherwise, arbitrator compensation, and expenses as defined in section (vi), shall be borne equally by the parties and are subject to reallocation by the arbitrator in the award."
   ii. JAMS, Rule 31: "If an arbitration is based on a clause or agreement that is required as a condition of employment, the only fee that an employee may be required to pay is the initial JAMS Case Management Fee."

Topics: Sexual Harassment & Settlement Discussions

III. Dahms v. Cognex Corp., 455 Mass. 190 (2009): The SJC affirmed a defense verdict in a sexual harassment case. In doing so, it held that the trial court did not abuse its discretion or commit legal error in admitting evidence regarding: (1) plaintiff's dress, speech, and conduct, and (2) settlement discussions.

Kimberly Dahms began working at Cognex in 1990 and by 1996 became its Director of Customer Satisfaction. In September 1997, she alleged to the company's founder, Robert Shillman, that an officer of the company, John Rogers, subjected her to sexual harassment and making advances toward her. To help substantiate her claim, she played inappropriate voicemails that Rogers had left for her. She testified that Shillman was "outraged" and "distraught" that "Rogers had gotten involved with a female at Cognex against [his] specific orders." Earlier in his employment at Cognex, Rogers had romantic relationships with two female direct reports. Although there were no allegations of sexual harassment, Cognex determined that his romantic involvement with subordinates was inappropriate and fined him $10,000 for the first relationship and $100,000 for the second.

Following Dahms's report, Shillman began an investigation. In response to Shillman's inquiries, Rogers lied and maintained that he had not "asked anybody out at Cognex." Shillman sought advice from Cognex's then-Vice President of Corporate Employee Services, Jo Ann Woodyard, who provided examples suggesting that Dahms and Rogers "had a very close relationship." As a result, Shillman concluded that Rogers' "voice-mails were wanted, not unwanted" and that Dahms was "making a false claim." Over the next several months, Shillman checked in with Dahms and confirmed that Rogers was not bothering her.

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In August 1998, Dahms filed a Charge of Discrimination in which she alleged sexual harassment claims against both Rogers and Shillman. At that point, Shillman began gathering evidence for his defense and e-mailed Woodyard requesting copies of photographs and videotapes of Dahms as well as descriptions of any complaints employees had made about her.

Thereafter, the respective attorneys for each party attempted to negotiate a settlement. In one particular letter, Dahms's attorney challenged the enforceability of her non-compete agreement, stated that she will not agree to abide by its terms, and made clear that Dahms did not wish to remain employed with Cognex.

In October 1998, Shillman wrote Dahms a letter in which he stated that, because she had stated an intention to leave the company and compete with it, her access to the physical facility and proprietary information would be restricted such that she would be required to leave Cognex by 6:30 pm and also disengage from meetings when strategic discussions began. In that letter, Shillman offered to lift the restrictions if Dahms re-affirmed her non-compete obligations, to which she agreed in November 2008. Shillman's letter was admitted into evidence.

In June 1999, Dahms filed a civil complaint in Superior Court and, among other claims, alleged that Shillman's work restrictions constituted retaliation. In June 2000, the company terminated Dahms's employment because she allegedly "spent a large portion of each day at Cognex working on her legal case."

A. Manner of Dress

1. *Subject Matter Already In Question:* "Where her attorney **was the first to elicit testimony about Dahms's clothing**, and introduced photographs of Dahms, Shillman, and Cognex employees dressed in party costumes, the judge did not abuse his discretion in concluding that the defendants' evidence on this subject also should be admitted." Dahms, 455 Mass. at 202 (emphasis added).

    a. Opening Statement: Dahms's attorney said that Shillman once told Dahms, "You're partially at fault for this. You dress provocatively. You turn men on. You're responsible for Mr. Rogers' behavior."

    b. Direct Exam: Dahms's attorney called Shillman as the first witness, and specifically raised the issue of Dahms's clothing in questions to him, asking him several times whether he had told Dahms "that her appearance and work attire were provocative and seductive."

    c. Exhibits: Dahms's attorney introduced: (1) five photographs of Dahms at Halloween parties stating, "These are the costumes you complained were too provocative or seductive, right?" and (2) photographs of Dahms at other Cognex functions, (3) several photographs of other Cognex employees

wearing Halloween costumes, and (4) and a photograph of Shillman wearing a dress at a Cognex event.

2. *Relevance*

   a. Subjectively Offended: "The evidence of Dahms's language apparel, and conduct … was probative of whether she was subjectively offended by her work environment or by Rogers's conduct." Dahms, 455 Mass. at 202.

   b. State of Mind: "Some evidence of Dahms's apparel was relevant … to show Shillman's state of mind when he sent the e-mail to Woodyard asking for photographs and videotapes of Dahms taken at company events. Dahms alleged that this e-mail was part of 'Cognex's and Shillman's brutal campaign of retaliation and harassment.' ... In these circumstances, Shillman was properly permitted to explain that he believed the photographs would show that Dahms was an 'active participant in the environment at Cognex' (including the company parties), and that her claims of a hostile work environment were therefore 'totally false.'" Dahms, 455 Mass. at 201 – 02.

B. Settlement Discussions

1. *General Rule:* Offers of settlement are inadmissible to prove or disprove a defendant's liability. The goal is to encourage settlements by limiting the collateral consequences of a decision to compromise.

2. *Exceptions:* (1) Factual statements made during the course of settlement negotiations are admissible, and (2) Any other information revealed during the course of settlement bearing on some issue in the case other than damages.

3. *Application:* "The evidence admitted in this case was relevant … [and] probative of whether the work restrictions imposed by Shillman subsequent to the filing of that claim were imposed for a nonretaliatory purpose. Specifically, the statements made in settlement negotiation correspondence were properly admitted for the purpose of demonstrating Shillman's state of mind at the time he imposed the work restrictions on Dahms." Dahms, 455 Mass. at 199.

IV. Other Noteworthy Cases

A. Augis Corp. v. MCAD, 75 Mass. App. Ct. 398 (2009): "[A] supervisor who calls a black subordinate a 'fucking nigger' has engaged in conduct so powerfully offensive that the MCAD can properly base liability on a single instance. That term inflicts cruel injury by its very utterance. It is degrading, it is humiliating, and it is freighted with a long and shameful history of humiliation, the ugly effects of which continue to haunt us all. The words have no legitimate place in the working environment – indeed, they have no legitimate place – and there is no conceivable

justification for their use by a workplace supervisor." Augis, 75 Mass. App. Ct. at 408 – 09.

B. Everett v. The 357 Corp., 453 Mass. 585 (2009): The decision to terminate and the failure to rehire are discrete, separate acts that do not draw other allegedly discriminatory acts into its scope, either prospectively or retrospectively. As such, each such claim must be made explicit when filing with the MCAD.

C. Visnick v. Caulfield, 73 Mass. App. Ct. 809 (2009): The defense of absolute privilege applies to: (1) statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding provided such statements relate to that proceeding, (2) a communication to a prospective defendant that relates to a proceeding which is contemplated in good faith and which is under serious consideration. Such statements/communications cannot support a claim of defamation, even if uttered with malice or in bad faith.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

Topics: Front Pay & Duty to Accommodate

I. Anderson v. United Parcel Service, 2010 Mass. Comm. Discrim. LEXIS 5 (Docket No. 08-SEM-00376) (Mar. 16, 2010) (H.O. Waxman): The Commission found United Parcel Service liable for handicap discrimination and awarded approximately $872,490 in compensatory damages itemized as follows: (i) $143,970 in back pay, (ii) $603,520 in front pay, and (iii) $125,000 for emotional distress.

William Anderson began his employment with UPS in 1986 and worked in a variety of positions during his more than 20 year tenure with the company. In 2005, he was diagnosed with bipolar illness which, in 2007, changed to bipolar depression and anxiety disorder. As a result of these conditions, Anderson was prescribed several medications, was hospitalized between 2005 and 2007, and took medical leaves from his job in 2005 and 2006.

Following his second medical leave, in January of 2007, Anderson was assigned to the night shift in Springfield, Massachusetts as the pre-load manager. As such, he was responsible for the unloading, sorting, and reloading of packages for daily delivery out of UPS's distribution centers. This resulted in a greater workload than his previous position such that he was required to work about 55 to 60 hours per week. Due to his bipolar condition, Anderson had difficulty working at night and sleeping during the day, which led to performance problems for the first time in his career.

In April 2007, Anderson wrote to his Division Manager to say that he wished to step down as pre-load manager due to chronic bipolar illness and the stress of managing pre-load duties. According to Anderson, he was asked to remove from his letter the reference to his bipolar diagnosis. Thereafter, Anderson was hospitalized due to a panic attack. In May 2007, he reiterated his request to step down as a pre-load

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manager and stated that he wanted to be transferred to a daytime supervisory position, "preferably non-operations" as an accommodation for his disability. The last day he went to work was May 8, 2007.

That same month, Anderson's treating psychiatrist, Kenneth Jaffe, M.D., attempted to initiate a dialogue with UPS by: (i) providing UPS with documentation concerning his medical conditions, (ii) requesting accommodations on his behalf (including stepping down from his manager position, generally working no more than 45 hours per week, and not working nights except on rare occasions), and (iii) and informing UPS that he had reviewed the list of essential job functions for supervisors/managers and believed that Anderson would be able to perform the essential job functions with the requested accommodations. In June 2007, Dr. Jaffe sent UPS health care authorizations completed by Anderson releasing his health information.

Over the next several months, UPS insisted that Anderson's request for accommodations could only be evaluated after Dr. Jaffe completed a particular medical questionnaire, which Dr. Jaffe believed was impractical because the form was inapplicable to Anderson's situation. Notably, UPS failed to consider Anderson's request for accommodations unless Dr. Jaffe completed the medical questionnaire. UPS also failed to respond to a substantive letter from Anderson's attorney: (i) stating that Dr. Jaffe had already provided information regarding Anderson's bipolar illness, (ii) enclosing Dr. Jaffe's letter concerning the "essential job functions" that Anderson could perform with accommodations, (iii) noting that Dr. Jaffe could be contacted to discuss the information, and (iv) describing specific positions that Anderson could perform.

In July 2008, UPS rejected Anderson's accommodation request on the basis of insufficient medical information and terminated his employment. By that point, Anderson had secured seasonal, full-time employment.

The Commission found the Complainant to be a qualified handicap person based on the fact that he suffers from bipolar depression and anxiety disorder, which caused panic attacks, fatigue, decreased energy, inability to concentrate, difficulty sleeping, and suicidal feelings. The MCAD ruled that the Respondent engaged in handicap discrimination based on failure to accommodate due to its refusal to participate in the interactive process and its failure provide the Complainant with reasonable accommodations. As a result, the Complainant had no choice but to leave his job, which the Commission determined constituted a constructive discharge. Notably, the MCAD awarded approximately 16 years in front pay damages.

A. Finding of Qualified Handicapped Person

1. *Medical Conditions:* The Commission found that Complainant's bipolar disorder and depression had an adverse impact on his **cognitive** functions, on his **interpersonal relationships**, and his ability to **work**.
   a. Cognitive: Complainant became forgetful and had difficulty concentrating.
   b. Interpersonal: Complainant and wife had been married since 1987 and separated in late 2008; within about 18 months after Complainant was forced to step down from the pre-load manager position and within about 6 months after her was terminated.
   c. Work: Complainant "was forced to take a seven-month leave in 2005, another leave in 2006, and an ongoing leave from May of 2007 until his termination in 2008." Anderson, 2010 Mass. Comm. Discrim. LEXIS 5, at *25.

2. *Reliance on ADA Amendments:* The MCAD rejected Respondent's attempt to focus on the specific nature of the requested accommodations (i.e., a less stressful daytime position and reduced work schedule) as evidence that Complainant is not disabled. Instead, the Commission noted the broad definition of "disability" under the ADA Amendments.

> "According to 2008 amendments to the ADA, the term 'disability' is to be construed in a manner that favors broad coverage and disfavors extensive analysis." Anderson, 2010 Mass. Comm. Discrim. LEXIS 5, at *26 (citing ADA Amendments Act of 2008, Public Law # 110-325, §2(b)(5).

3. *ADAAA vs. M.G.L. 151B:* The principle that the term "disability" is to be construed broadly is also consistent with M.G.L. c 151B. The ADA Amendments can also influence the interpretation of M.G.L. c. 151B.

> "The Legislature has directed that the provisions of G. L. c. 151B 'shall be construed liberally' for the accomplishment of the remedial purposes of the statute." Dahill v. Police Department of Boston, 434 Mass. 233, 240 (2001).

> In interpreting M.G. L. c. 151B, Massachusetts courts "consider Federal case law construing the cognate Federal unlawful discrimination statutes, unless we discern some reason to depart from those rulings." New Bedford v. MCAD, 440 Mass. 450, 463 n.26 (2003); see also Dahill, 434 Mass. at 237 – 38.

B. Transfer to Different Position as Reasonable Accommodation

1. *Transfer as Reasonable Accommodation:* The Commission found that "the frequent and routine transfers of managerial and supervisory employees at the discretion of the company makes a job transfer … a reasonable accommodation." Anderson, 2010 Mass. Comm. Discrim. LEXIS 5, at *27. Notably, the "Complainant testified that he moved from one job assignment to another at the behest of management and that it was the **culture of the company to transfer employees into a variety of positions** in order for them to gain broad experience within the company." Anderson, 2010 Mass. Comm. Discrim. LEXIS 5, at *2 (emphasis added).

   a. MCAD Guidelines: The Guidelines appear to limit the circumstances under which a transfer to a vacant position can be a reasonable accommodation, but nevertheless acknowledge that an employer may have a duty to provide such an accommodation.

> "Reassignment or transfer to a vacant position is **usually** only a reasonable accommodation where it involves a change in work site or location within the same job category." MCAD Guidelines, §II.C. fn. 5 (emphasis added).

   b. Judicial Interpretation: Several decisions have held that the term "reasonable accommodation" under M.G.L. c. 151B does not impose an obligation upon an employer to reassign a handicapped employee to a vacant position when the employee, even with a reasonable accommodation, can not perform the present job.

> "Under Massachusetts law, an employer is barred from dismissing employees who are 'capable of performing the essential functions **of the position involved** with reasonable accommodation.' In this aspect, the Massachusetts statute is less generous than the ADA, which defines 'reasonable accommodation' to include reassignment to vacant positions. Moreover, it is undisputed that there was no vacant position in either the laundry or the linen department of the hospital in the summer of 1995. The hospital was under no obligation to create a new position for the plaintiff. Even under the more permissive ADA, the hospital would not have been required to fashion a new position for the plaintiff." Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 454 (2002) (emphasis in original).

> "The employer's duty of reasonable accommodation exists **only with respect to a particular job** – this duty obligates the employer to make reasonable adjustments or adaptations to permit a handicapped person to perform the essential functions of a particular job." Sattler v. Natick Animal Clinic, 14 Mass. L. Rep. 45, at *10 – 11 (Sept. 20, 2001) (Gants, J.) (emphasis added).

> "The language of the statute itself therefore **limits its application to Beane's transfer car operator position**. Accordingly, MCC was not required to offer Beane another position in the company, regardless of whether it was available or whether MCC had to create it." Beane v. Mass. Container Corp., 18 Mass. L. Rep. 388, at *16 (Sept. 8, 2004 (Locke, J.) (emphasis added).

> "Despite this definition, though, the ADA specifically declares that 'reasonable accommodation' 'may include … reassignment to a vacant position.' G.L. c. 151B, in contrast, **provides no definition of 'reasonable accommodation**.' … No such language exists in G.L. c. 151B, so no duty derived from this statutory language exists under Massachusetts law. Nor will this Court, in the absence of such statutory language, interpret 'reasonable accommodation' as that term is used in G.L. c. 151B to impose an obligation upon an employer to reassign a handicapped employee to a vacant position when the employee, even with reasonable accommodation, cannot perform his present job." Hayward v. Mass. Water Res. Auth., 13 Mass. L. Rep. 239, at *15, *17 – 18 (May 25, 2001) (Gants, J.) (emphasis added).

c. Deference to MCAD: The Superior Court decisions cited above appear to create a *per se* rule that an employer is not required to consider a transfer to a vacant position as an accommodation. These decisions are in conflict with the MCAD Guidelines, which are entitled to "substantial deference."

> "The guidelines represent the MCAD's interpretation of G. L. c. 151B, and are entitled to substantial deference, even though they do not carry the force of law. … It is particularly appropriate to defer to the MCAD's interpretation where, as here, the legislative policy is 'only broadly set out in the governing statute.'" Dahill, 434 Mass. at 239, 240 (internal citations omitted).

2. *Distinguished Fiumara:* The Commission drew a distinction with Fiumara v. Harvard University, where the First Circuit "did not consider an injured bus driver's request to drive a van to be a reasonable accommodation on the basis that the bus and van positions required different training and qualifications." Anderson, 2010 Mass. Comm. Discrim. LEXIS 5, at *28. In contrast, the MCAD found that Anderson's "requested transfers in this case were both feasible and reasonable" and that "had the necessary qualifications and could have functioned successfully in a variety of daytime supervisory positions." Id.

C. Front Pay Damages: Relying on Haddad, the MCAD awarded a front pay award totaling $603,520 based on the following factors:

1. *Time Span:* Complainant was approximately 49 years at the time of public hearing (i.e., Nov. 2009) and planned to work until 65 years old (i.e., Feb. 13, 2025), which represents a time span of 16 years and 3 months.

2. *Differential:* Complaint earned approximately $35,000 per year in his new position, but would have earned approximately $72,000 per year had UPS transferred him to a supervisory position.

3. *Limited Education:* "Because Complainant's education is limited to high school, he testified credibly that his salary would be difficult to duplicate elsewhere." Anderson, 2010 Mass. Comm. Discrim. LEXIS 5, at *41 – 42 (citing Kelley v. Airborne Freight Corp., 140 F.3d 335, 355 – 56 (1st Cir.), cert. den., 525 U.S. 932 (1998) (million dollar front pay award granted under Massachusetts law for 46-year old plaintiff because his lack of education made comparable work difficult to obtain)).

4. *Present Value Discount:* No present value discount because the parties presented no evidence on what the discount rate should be, noting "[s]ince it is Respondent's burden to establish mitigation, I conclude that the front pay award is entitled to stand in the absence of evidence allowing me to discount the award to its net present value." Anderson, 2010 Mass. Comm. Discrim. LEXIS 5, at *42 – 43.

Topics: Emotional Distress Damages & Retaliation

II. DiIorio v. Willowbend Country Club et al., 32 MDLR 34 (Docket Nos. 06-BEM-01392; 06-BEM-02651) (Oct. 21, 2009) (H.O. Waxman): The Commission found Willowbend Country Club liable for age discrimination and retaliation. The Complainant was awarded approximately $653,440 in compensatory damages itemized as follows: (i) $322,280 in back pay,[1] (ii) $131,160 in front pay,[2] and (iii) $200,000 for emotional distress.

With respect to the emotional distress award, "Complainant testified that she did not go to a psychotherapist because the cost was prohibitive, because she thought she could overcome her symptoms on her own, and because psychotherapy was not part of her cultural background." Willowbend, 32 MDLR, at *44. Complainant,

[1] This amount represents the sum of Complainant's annual salary of $62,000.00 per year plus one-half of her 2005 commissions (i.e., approximately $27,938.50) from the date of her layoff on October 17, 2005 through the commencement of her public hearing on May 11, 2009. This equals a period of about 43 months.

[2] This amount represents the sum of Complainant's annual salary of $62,000.00 per year plus one-half of her 2005 commissions (i.e., approximately $27,938.50) from the date the commencement of her public hearing on May 11, 2009 through the time she turns 65 on October 31, 2010. This equals a period of about 17.5 months. Some publications reporting on the Willowbend decision have characterized the front pay award as six years, which is inaccurate. See Willowbend, 32 MDLR 34 at *47 (2009) ("I conclude that … front pay is appropriate in this case from the date of public hearing [i.e., May 11, 2009] until October 31, 2010, the date on which Complainant reaches sixty-five years old.").

however, was evaluated by a clinical psychologist approximately two years after her termination, who testified in the proceeding. Complainant's own description of the emotional distress she suffered appeared to leave the strongest impact with the hearing officer, who described her testimony as "sincere, credible, and utterly convincing." Willowbend, 32 MDLR, at *44.

Virginia DiIorio (DOB: 10/31/45) is a licensed real estate broker who began working at the Willowbend Country Club in 1991. She was originally hired to sell golf memberships and, within a few years, began to sell real estate. By 1996, she was promoted to Vice President of Sales and, in addition to selling real estate, became responsible for staffing Willowbend's real estate office.

Willowbend terminated DiIorio's employment in October 2005 as part of an alleged re-structuring in an effort to cut costs, "even though the profit which the real estate department realized in 2005 was derived mostly, if not solely, from her sales and despite the fact that she was the only licensed real estate broker on staff." Willowbend, 32 MDLR, at *38. In so doing, Willowbend retained two other real estate agents who were approximately 15 years younger than DiIorio. In total, Willowbend terminated 13 employees, 10 of whom were over 50 years old. The MCAD further noted that "[w]hile some individuals who were in their fifties or older survived the layoffs, the employees who remained in the real estate, fitness, and reception areas were, on average, younger than they were prior to the layoffs." Willowbend, 32 MDLR, at *42.

According to the testimony of a Willowbend member, the company's General Manager stated that Complainant was "out of here [because] I need to bring in some younger blood" and "younger, more attractive people" in order to create "some energy and enthusiasm." Willowbend also ran a newspaper advertisement inviting applications to apply for positions following the layoffs containing the following language: "OUR NEW ERA BEGINS NOW." Willowbend, 32 MDLR, at *41.

The Commission found both direct and circumstantial evidence of age discrimination. Regarding direct evidence, the MCAD held that "[e]xpressing a preference for 'younger blood' constitutes explicit age animus" and that "references to 'energy,' 'enthusiasm,' and the start of a 'new era,' while less explicit, also provide direct evidence of age discrimination because they serve as veiled references to, or code words for, age animus." Willowbend, 32 MDLR, at *41. Regarding circumstantial evidence, the Commission noted that the Complainant satisfied the elements of a *prima facie* case for age discrimination and described the numerous factors demonstrating pretext such as, for example, the fact that Complainant was not offered the opportunity to take a pay cut in contrast to her younger colleagues.

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Finally, the Commission found Willowbend liable for retaliation, stating that certain company officials sought to prevent DiIorio from visiting the club for golf tournaments and other events, thereby ostracizing her from her social network. In doing so, the MCAD noted that "retaliation can be directed at individuals in a non-employment capacity" and that the "retaliatory conduct towards Complainant did not have to relate to her status as an employee." Willowbend, 32 MDLR, at *42.

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