Employment Law Advisor

November 2006

Significant Changes at the MCAD Impact Claim Defense

The Massachusetts Commission Against Discrimination ("MCAD") is the first place many disgruntled Massachusetts employees turn when they believe they have a discrimination or harassment claim against their employer. These claims can result in significant back pay, emotional distress, and attorneys' fees awards. This edition of the ELA will summarize recent changes in procedure at the MCAD that may impact employers' ability to effectively defend against such claims.

There have recently been some significant changes in practice at the MCAD, including:

- ✔ Increased reliance on employer position statements
- ✔ Upfront discovery requested from employers
- ✔ Elimination of investigative conferences in most cases

Read on for details and to learn how to handle these changes...

General Procedures

An employer's first notice that an employee has filed an MCAD claim is usually when the employer receives the complaint in the mail. The employer is then asked to submit a response to the complaint, generally referred to as a "position statement." This document should set forth the employer's side of the story and give the MCAD all the relevant facts it needs to make a decision. By regulation, the position statement must provide all the legal arguments in the employer's defense or those defenses will be deemed waived. The employer is also required to provide a copy of the position statement to the complainant or his/her counsel.

The complainant is usually required to file a rebuttal, but the complainant need not provide a copy of the rebuttal to the employer or its counsel. In the past, the MCAD would then hold an investigative conference to hear the parties' positions (more on investigative conferences below). At the end of this investigatory phase, the MCAD decides whether there is sufficient evidence upon which a fact-finder could form a reasonable belief that it is more probable than not that the employer committed discrimination – if so, a finding of "probable cause" is entered, and the case continues to discovery (i.e., document requests, interrogatories, and depositions) and then to a public hearing (i.e., trial before a Commissioner or Hearing Officer). Every employer's goal, upon receiving a complaint, is to avoid a "probable cause" finding, and instead through its submissions persuade the MCAD that there is a lack of probable cause, resulting in an early dismissal of the case.

Upfront Discovery

Until recently, the only document the MCAD required from an employer at the outset of the case was the position statement. In prior practice, employers and their counsel often elected to file a "bare bones" position statement setting forth only the basic facts and arguments, to avoid giving away too much information and committing itself to a detailed statement of facts. However, beginning in the summer of 2006, the MCAD adopted a new practice of issuing requests for interrogatory answers and document production simultaneously with service of the complaint on the employer.

These discovery requests are similar to those used in court litigation and are supposed to be tailored to the type of case at issue (such as sexual harassment, disability discrimination, or retaliation). They generally require the employer to provide, under oath, a range of information about the employer and its treatment of the complainant compared to other employees. The employer may also make legal objections to the discovery. Recent requests we have received from the MCAD have required the employer to produce the following documents and information:

- ✔ The complainant's entire personnel file;
- ✔ Job descriptions;
- ✔ Employee handbooks and policies;
- ✔ Information regarding whether a complainant had requested a reasonable accommodation, and when;
- ✔ Information regarding complainant's replacement, if any;
- ✔ Information regarding complainant's complaints of discrimination/retaliation to the employer;
- ✔ Information regarding all warnings given to complainant; and
- ✔ Information regarding complainant's superiors and others involved with his termination.

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The MCAD has also requested wide-ranging information concerning how the employer had treated other employees, such as detailed information regarding other employees terminated for the same or similar reasons as complainant in the past three years.

The MCAD requires an employer to file both its position statement and its answer to interrogatories and document requests within 21 days of receiving the complaint. While we have found that speaking with the investigator can often result in a short extension of that time period, no extension is guaranteed.

How Does This Change Affect Employers?

Requiring employers to produce detailed information and specific documents at the outset of the case is a significant change in the agency's approach to investigating complaints. In order to fare well in this new environment, an employer must be ready to put its best foot forward from the moment it receives the complaint. No longer may an employer file just a brief position statement and depend upon later proceedings to fill in the blanks; instead, the employer must conduct a thorough investigation at the beginning of the case. Because the employer must produce more information and documents right away, it must be sure to develop a theory of defense that is consistent with the many questions being asked by the MCAD, and produce interrogatory responses and documents which support this theory.

While common sense obviously suggests that all filings with the MCAD be as complete and persuasive as possible, some employers may not be aware that the existing regulations governing the investigative process impose requirements upon employers as well. Specifically, the employer's answer to the complaint (the position statement) must include any jurisdictional or other defenses which the employer wishes to raise; if the employer does not raise defenses in its position statement, it may waive the right to them. These defenses often include legal or jurisdictional grounds for dismissal, which, if properly raised, could result in an immediate dismissal of the case.

Elimination of Investigative Conferences

The need for employers to file a thorough and convincing set of initial pleadings is heightened further by the MCAD's recent decision to eliminate investigative conferences in most cases. In the past, after the employer filed its position statement, the MCAD would conduct an investigative conference at which both parties (and their attorneys, if represented by counsel) would appear. The investigative conference gave the MCAD and the parties a chance to size each other up, and, in many cases, allowed a well prepared employer's counsel to press the strengths of their position and expose the weaknesses of the complainant's case.

Without this opportunity (which we believed in most cases favored our clients over the complainants), the MCAD will have only the parties' paper submissions to rely upon when deciding whether there is probable cause that discrimination occurred. Furthermore, the lack of an investigative conference will make it more challenging for employers to defend themselves, as employers will have only the complainant's charge (which may be quite brief and devoid of detail) to rely upon in determining what, precisely, the complainant is alleging.

For these reasons, it is even more critical that the employer investigate the charge fully to determine what other facts might be relevant, anticipate any arguments that may be made by the complainant and his/her counsel (such as those which may appear in the rebuttal, never seen by the employer and its counsel) and submit a carefully thought out and persuasive position statement at the outset of the case.

Going Forward

The MCAD has several new people in the lead: Marty Abel, General Counsel, and John Losado, Chief of Enforcement. Whether they will continue to make changes in MCAD case processing procedure remains to be seen. However, in the meantime, we suggest that employers think constructively about how to best prepare and present their position, given the increased requirements placed upon employers at the outset of the case, and the elimination of investigative conferences in most instances. The dangers to employers involved in MCAD cases remain significant — although the MCAD cannot impose punitive damages, it has historically awarded large amounts of emotional distress damages to prevailing complainants. In the first half of 2006 alone, the MCAD affirmed three six-figure emotional distress awards (of $100,000, $125,000, and $195,000). Moreover, the MCAD recently hit one employer with an emotional distress award of $350,000, plus over $200,000 in back pay and attorneys' fees.

Given the possibility of significant emotional distress liability involved in discrimination cases, plus awards of front and back pay, attorneys' fees, and interest, employers are well advised to make the most of their opportunities to defend themselves against employee claims. If the MCAD changes the nature of those opportunities, as it has just done, employers must reformulate their responses to maximize their persuasive effect. With so much riding on the employer's initial submission, employers should work closely with their in-house or outside counsel to make sure that its responses to interrogatories, documents produced, and position statement are all designed to put forth the best possible defense.

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