

MCAD Ruling Highlights Importance of Discrimination 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 summarizes a recent MCAD decision awarding significant damages to a former employee and reviews the procedures employers must follow at the MCAD to respond to such claims.

DiIorio v. Willowbend Country Club

In *DiIorio v. Willowbend Country Club*, the MCAD found that Willowbend Country Club, a private golf club and resort on Cape Cod, engaged in age discrimination and retaliation when it laid off its 59 year-old VP of Sales, Virginia DiIorio. Ms. DiIorio was terminated along with twelve other employees as part of a layoff in Willowbend’s real estate department. Ten of the twelve employees Willowbend selected for layoff were over age fifty, and the resulting workforce in the real estate department included no employees over age 50. During the MCAD’s investigation, Willowbend argued that DiIorio was selected for layoff because she: (i) earned a higher salary than other employees and (ii) wintered in Florida. However, the MCAD credited testimony that Willowbend’s General Manager had remarked concerning the layoff that he wanted to

“bring in some younger blood.” The MCAD also found that, after DiIorio filed her complaint of discrimination against Willowbend, the General Manager retaliated against her by barring her from entering Willowbend as a guest.

After a hearing, the MCAD awarded DiIorio \$200,000 in emotional distress damages, her \$62,000 salary from the date of her layoff until her 65th birthday (a sum in excess of \$372,000), and an additional yearly amount equal to one-half of the commissions she earned in 2005. This award of substantial damages highlights the stakes of an adverse ruling by the MCAD and underscores for employers the importance of defending against such claims effectively.

The MCAD Process

An employer’s first notice that an employee (“complainant”) has filed a 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 the legal arguments in the employer’s defense or those defenses may be deemed waived. The employer is also required to provide a copy of the position statement to the complainant or his/her counsel.

The position statement must be affirmed by an authorized representative of the employer, who must sign the position statement under the pains and penalties of perjury. This requirement makes it even more important that the position statement be entirely accurate and carefully prepared. Any inaccuracies or admissions can be used against the employer in subsequent proceedings.

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. At the end of this investigatory phase, the MCAD decides whether there is sufficient evidence upon which a factfinder 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 formal discovery (*i.e.*, document requests, interrogatories, and depositions) and then to a public hearing (*i.e.*, trial). 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 several years ago, 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, the MCAD now follows a 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.

The MCAD generally requires an employer to file both its position statement and its answer to interrogatories and document requests within 21 days of receiving the complaint.

How MCAD Practice Should Affect Employers' Approach to Defending Against Discrimination Claims?

Because the MCAD requires employers to produce detailed information and specific documents at the outset of the case, an employer must be ready to put its best foot forward from the moment it receives the complaint. An employer files a poorly drafted position statement and answers to discovery requests at its peril. Employers should 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 elimination of 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 the employer's 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 now has 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 makes 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 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.

Conclusion

Given the possibility of significant emotional distress liability involved in discrimination, harassment and retaliation 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. Employers must respond to MCAD complaints as effectively as possible to maximize the likelihood of an early dismissal by the MCAD.

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