

# Massachusetts Commission Against Discrimination

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// 2010 ANNUAL REPORT



# MCAD Annual Report 2010

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# Letter from the Commissioners

Governor Patrick, Lt. Governor Murray, Members of the Legislature and People of the Commonwealth:

It is our pleasure to submit the 2010 Annual Report for the Massachusetts Commission Against Discrimination.

This year, the MCAD – the second oldest state civil rights agency in the nation – marked its sixty-fifth anniversary as the Commonwealth’s civil rights enforcement agency. The agency continues to serve the people of the Commonwealth by investigating, prosecuting and adjudicating cases of discrimination in employment, housing, places of public accommodation, credit and education. The Commonwealth’s anti-discrimination laws remain among the most progressive and far-reaching laws in the country.

## *Reflecting on 2010*

2010 was a year of significant transition for the MCAD as the Commission ended the year with new leadership. Commissioner Martin Ebel left the MCAD in early February after serving in our Western Massachusetts office since 2006. In May, the Commission lost Springfield office Senior Enforcement Supervisor, Migdalia Rivera. Her untimely passing left a profound void. In mid-September, Chairman Malcolm Medley left after serving for nearly three years.

In late September, Governor Patrick appointed new Commissioners to the agency. Julian Tynes was named as the new Chairman, and Jamie Williamson was named as the Commissioner responsible for overseeing the central and western regional offices. They join sitting Boston Commissioner Sunila Thomas-George as the MCAD’s new leadership team.

We thank Commissioner Martin Ebel and Chairman Malcolm Medley for their efforts and commitment, and wish them the best in their future endeavors.

## *Looking Forward*

As we begin 2011 with a new team and a fresh array of ideas, we have begun to set goals for our coming year. Our objectives include:

- Issuing new regulations based on our Sexual Harassment, Disability and Maternity Leave Guidelines.
- Proposing new language to the legislature that would modify the Massachusetts Maternity Leave Act to allow for parental leave for all employees regardless of gender.
- Improving the investigation process through the systematic use of investigative conferences.

- Overhauling the Commission's procedural regulations.
- Launching online filing to make our complaint process more accessible.
- Expanding the mediation program to allow greater participation.
- Expanding the Commission's translation and interpretation services.
- Strengthening collaboration with community and advocacy groups.
- Ensuring a greater MCAD presence throughout the Commonwealth.
- Enhancing outreach to the business community and to underserved communities.

As Commissioners, we recognize that we can only enforce the Commonwealth's civil rights laws and process complaints effectively with the help of those groups and stakeholders who support our mission. We thank the members of the bar, community group leaders, and advocates for civil rights who, along with Governor Patrick and Lieutenant Governor Murray, are our daily partners in achieving our mandate to eradicate discrimination. We thank the MCAD Advisory Board for their ongoing efforts and commitment to the agency's success. We thank our dedicated staff for their determination, drive, and tireless work.

We look forward to 2011!



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Sunila Thomas-George  
*Commissioner*

Julian Tynes  
*Chairman*

Jamie Williamson  
*Commissioner*

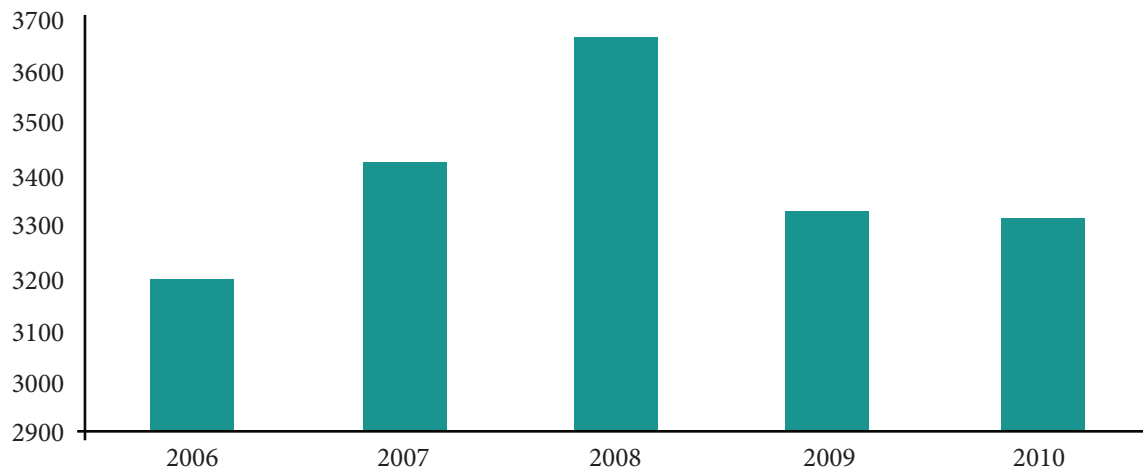
# Enforcement

The Enforcement Division had a productive year processing and investigating cases despite significant personnel changes. The unexpected passing of Migdalia Rivera, longtime MCAD employee and Springfield Enforcement Supervisor, brought a tremendous personal and professional loss to our office. We were also without our Chief of Enforcement, Joel Berner, who was serving in the military for 14 months. At the close of 2010, the Commission's Enforcement Division, located in four geographic offices – Boston, New Bedford, Springfield and Worcester, is comprised of six administrative assistants, eighteen investigators, three supervising investigators, four unit supervisors, six attorney advisors, and the Chief of Enforcement.

## *Cases Processed in 2010*

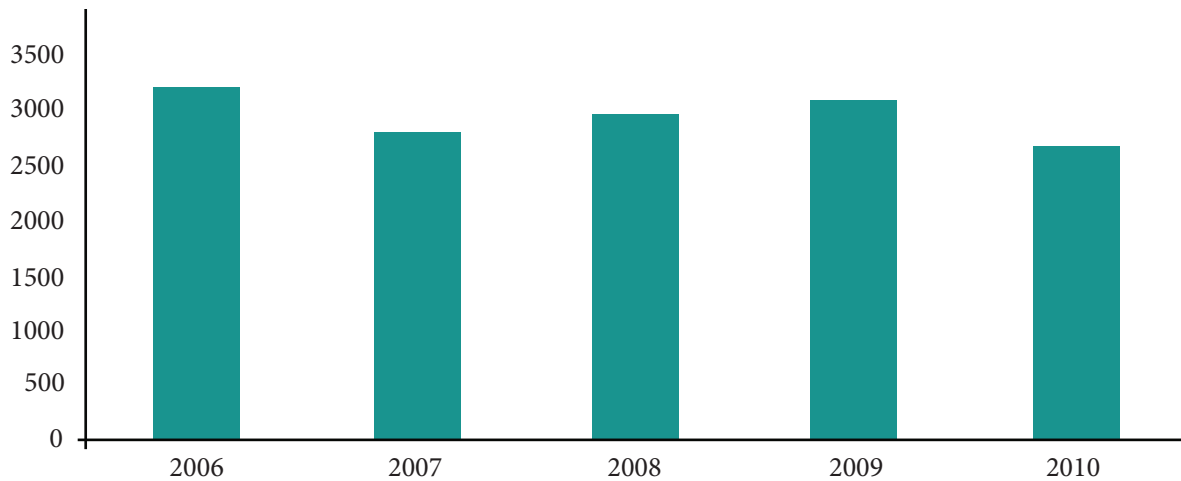
The MCAD Enforcement Division received a total of 3,308 new complaint filings in 2010. Compared to the two previous years, this is a slight downturn in filings.

### CASES FILED



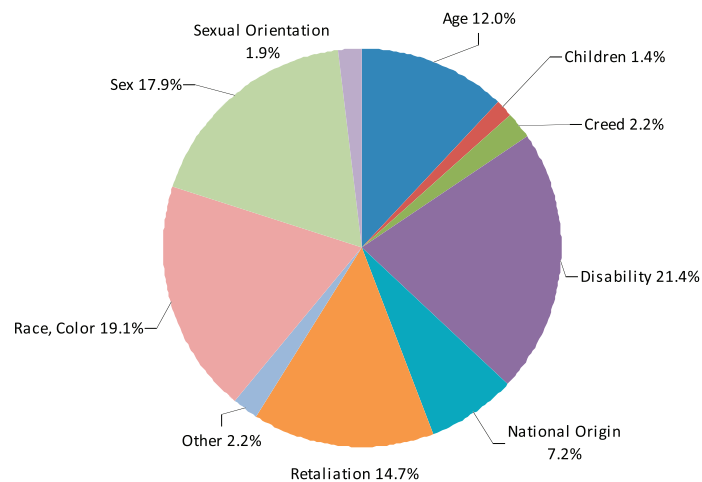
There were over 2,700 cases resolved at the MCAD in 2010

## CASES RESOLVED



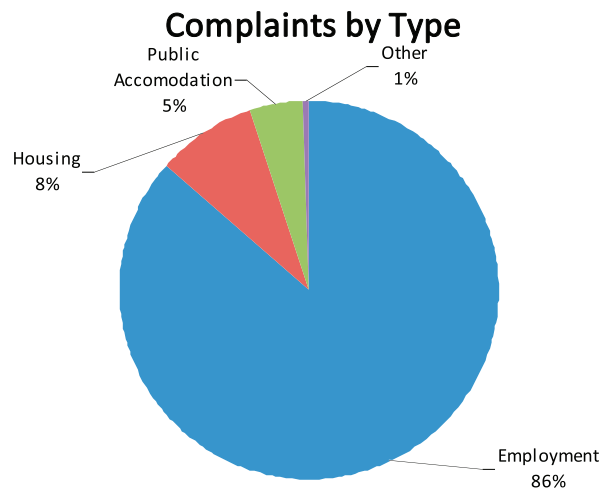
Cases filed under Disability (1,185) topped the claims filed in 2010 followed by Race, Color (1,053) and Sex (991).

## COMPLAINTS FILED BY PROTECTED CATEGORY



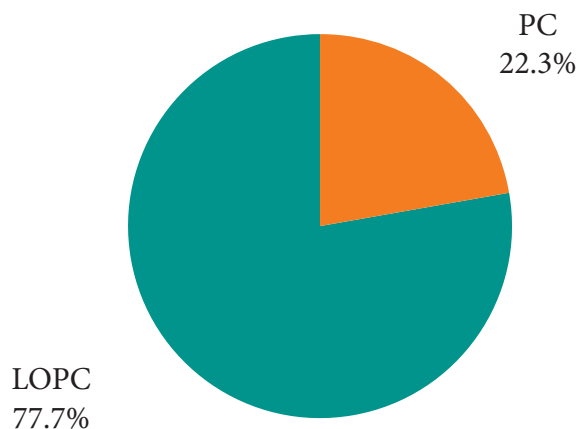
In 2010, 2,861 employment complaints and 278 housing cases were filed at the MCAD. This is a decrease from 2009.

## COMPLAINTS FILED BY JURISDICTION



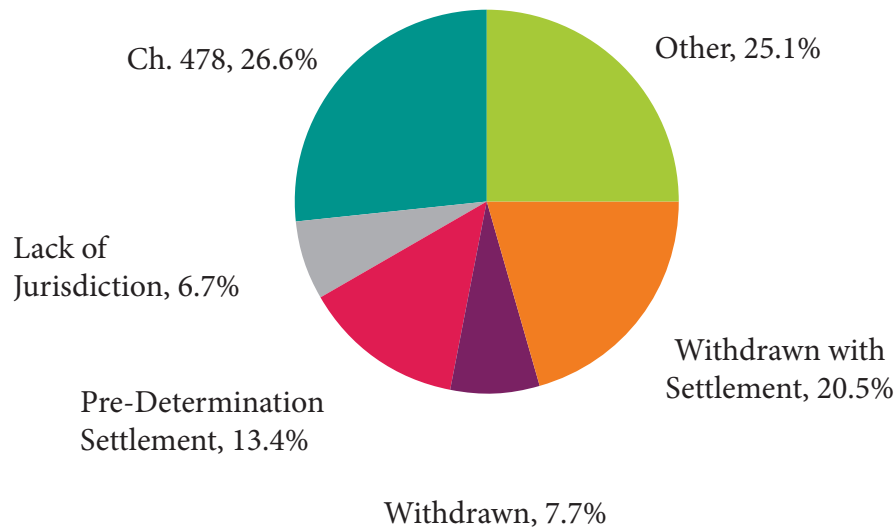
Of completed investigations during 2010, 375 (22.3%) resulted in a Probable Cause finding, an increase over 2009 (17.1%).

## SUBSTANTIVE RESOLUTIONS 2010



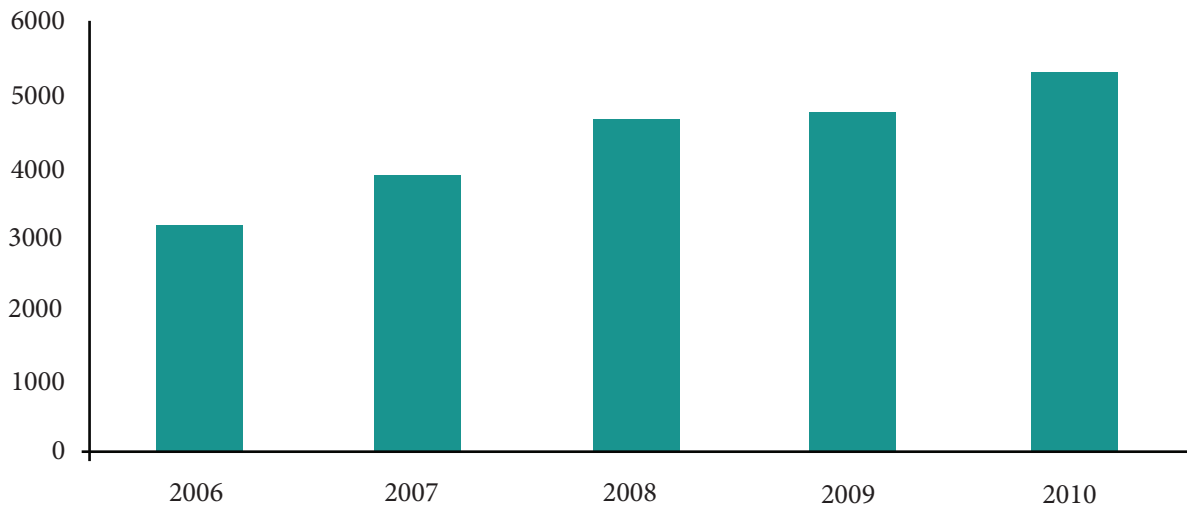
The MCAD resolved an additional 1,421 cases through pre-determination settlement, lack of jurisdiction findings, removal to court, and other withdrawals.

## ADMINISTRATIVE RESOLUTIONS 2010



Each Boston investigator maintained an average caseload of 355 cases. The Enforcement Division processed and investigated an average of 275 new complaints each month. The Springfield and Worcester offices continue to be a vital resource for the central and western Massachusetts communities. The Worcester office has now completed its third full year as a fully operational office for intake, information calls and investigations. This year, an average of 25 new complaints were filed there each month. The New Bedford office has now completed eighteen months of operation, taking in fifteen to twenty new complaints each month, and increasing access to the Commission's services for residents of southeastern Massachusetts. In 2010, there were 5,390 active cases at the Commission, 3,980 of which were active in the Enforcement Division.

## INVENTORY OF CASES



### *Noteworthy Events*

The Commission's continuing practice of ensuring that attorney advisors review investigations has resulted in more thorough investigations, more accurate cause determinations, and greater efficiency. Improved intake tools, a carefully structured approach to case assignment, and increased opportunities for all investigative staff to provide input for innovative change and participate in the implementation of new processes and procedures have led to more effective case processing.

In December 2010, the new Commissioners approved a multipronged plan, recommended by the Chief of Enforcement, to effectively eliminate the backlog of old active cases, end the backlog cycle, and achieve fairer case distribution among all investigators. A special assignment team of three of our highly talented investigators took on the charge of closing 150 old cases in four months. This effort is further supported by unit supervisors and all investigators through prioritization of aging cases on their individual dockets.

The same month, the Commissioners announced, after a six year hiatus, the MCAD will reinstitute the automatic scheduling of Investigative Conferences in spring 2011. This will ensure that most of the new cases filed after January 1, 2011 will receive an investigative conference.

### *Training and Outreach*

To achieve the Commission's mission of eliminating discriminatory policies or practices in employment, housing and public accommodation, members of the Enforcement Division participated in numerous educational outreach programs to public and private organizations throughout the Commonwealth during 2010. MCAD enforcement staff provided education in all areas of discrimination in conjunction with some of our community advocates, federal counterparts and area businesses. In addition, enforcement

staff played key roles in developing and delivering internal training programs for MCAD staff and interns. (See Training Unit report for more information.)

### ***Goals for 2011***

In early 2011, the Enforcement Division staff will commence in-house refresher training on the use of investigative conferences. The Enforcement Division will begin scheduling automatic investigative conferences in January 2011, and conferences will commence in April 2011. To increase human resources for the Commission's alternative dispute resolution efforts, the agency is actively considering utilizing Enforcement Advisor attorneys who are certified mediators to serve as mediators and conciliators. Finally, plans are being reviewed to provide Enforcement staff with more direct and active responsibility with regard to Commission-initiated complaints and special investigations.

## **Legal**

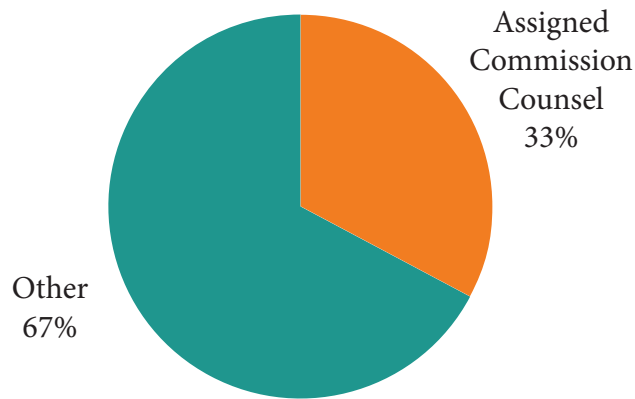
The MCAD's Legal Division is responsible for enforcing and litigating the Commonwealth's anti-discrimination laws, including the Fair Employment, Fair Education and Fair Housing Practices Acts, as well as the Maternity Leave and Public Accommodations laws. After a finding of probable cause, the legal unit proceeds in the public interest to eradicate discriminatory practices, and to obtain victim-specific relief for pro se complainants.

The Legal Division also defends all final agency decisions if judicial review is sought in Superior Court pursuant to G.L. c. 30A, § 14(7) or, thereafter, in the State's appellate courts. The Division defends challenges to the Commission's jurisdiction, files enforcement actions seeking compliance with the Commission's final orders, and submits amicus briefs on important issues arising under the anti-discrimination laws.

### ***Pro Se Cases***

In 2010, the Legal Unit was assigned over 164 cases filed by pro se complainants. The majority (127) alleged violations of the Fair Employment Practices Act. Commission Counsel participated in 73 conciliations in 2010, settling thirty-eight pro se discrimination complaints. They settled an additional 28 cases that were pending for litigation. This totals 66 settlements on behalf of pro se complainants, resulting in over \$1,167,000 in monetary damages (lost wages, emotional distress or other compensable injury). A number of these settlements contained provisions directed at preventing future violations of anti-discrimination laws (such as mandatory training or policy development) or making the complainant whole (such as reinstatement to a position or awarding a promotion).

## PROBABLE CAUSE FINDINGS ON PRO SE CASES ASSIGNED TO MCAD COMMISSION COUNSEL



## NOTEWORTHY SETTLEMENTS

- A municipal employee's complaint alleging discrimination because of age and retaliation settled for approximately \$175,000, with a retroactive grant of two months' service to the employee for purposes of pension eligibility.
- An applicant with a disability, whose conditional offer of employment by a health care provider was retracted upon receipt of medical information, received \$45,000. The employer agreed to conduct staff training, and to revise its policies and processes relating to conditional offers of employment and reasonable accommodations.
- A state employee alleging sexual harassment by a supervisor received \$75,000. The agency agreed to conduct training of its management staff, the individual harasser, and their EEO officer, and permitted the MCAD to review their internal investigation policy.
- A Type 1 diabetic Graduate Record Examination (GRE) test-taker who uses an insulin pump to regulate her blood sugar and a meter to monitor her blood sugar level, was told she could not take her monitor and a beverage (a glucose supplement) into the test room, and was only permitted to enter with her insulin pump after she bared her back to show that the device was surgically implanted. The settlement requires the respondent, a company that administers the GRE nationally, to develop and implement procedures for accommodating physical disabilities at test sites, including communication protocols to handle requests on-site; train all on-site personnel on these new measures; implement

changes to better inform test taking applicants about the advantages of seeking accommodations for physical disabilities before the test date. The settlement grants relief of \$8,000 in emotional distress damages to the complainant, nullification of her test score, return of test costs, and the right to take the test and obtain test preparation materials cost-free.

- A woman with dyslexia was denied a reasonable accommodation of additional time while taking the Law School Admission Test (LSAT), despite the recommendation of her neuropsychological evaluator. The respondent, a private entity that administers the LSAT nationwide, agreed to change its procedure for evaluating requests for reasonable accommodation due to cognitive disabilities by giving due deference to the clinical judgment of an applicant's evaluator; provide timely notice to an applicant of the denial of an accommodation request with a clear written explanation of the reason(s); and implement a "reconsideration" of the denial process that allows an applicant to submit additional information and obtain a timely decision. Additionally, relief included an award to the complainant of \$10,000 and additional time.
- An amusement park that refused to allow a person with a disability access to a ride for alleged safety reasons agreed to implement a training program and update its policy regarding use of facilities by customers with disabilities, disseminate the policy to park patrons, and pay \$1,000 to the complainant. The park also agreed to donate park tickets valued at \$2,500 to a foundation for persons with limb disabilities.
- The complainant, a resident of a substance-free housing program, filed a race discrimination complaint against the organization that ran the program, claiming that he was discharged for nonpayment of rent in retaliation for complaining of discrimination under Chapter 151B, while other persons who could not pay their rent were allowed to remain in residence. The settlement requires that respondent train its managerial staff on the fair housing laws and the prohibition against retaliation; adopt and provide incoming residents with an anti-discrimination policy; and modify the appeal process for termination/eviction decisions to allow continued residency until a decision is rendered.
- A woman with a disability was denied her request for an assigned handicapped parking space closer to her apartment because, despite having a disabled parking placard, the two designated disabled parking spaces near her building were often occupied by other tenants. The settlement requires that the complex owner/manager adopt and distribute a reasonable accommodation policy; provide anti-discrimination training to its employees; pay \$1,000 to the complainant for emotional distress; and assign her a parking space closer to her building.

- A woman with two young children (ages 2 and 4) was denied the opportunity to apply for a two-bedroom apartment advertised on Craigslist after a management company agent asked about the ages of her children, failed to follow up on her request for information about the presence of lead, and later falsely told her that the apartment was already leased. The settlement included an award of \$6,500 to the complainant; a requirement to adopt an antidiscrimination policy; and mandatory fair housing training for its personnel with a focus on familial status discrimination and the lead abatement responsibilities of property owners.

## ***Public Hearings***

Commission Counsel prosecuted four cases at public hearing in 2010: MCAD & Nicholas v. Bridgewater State College (age discrimination and retaliation); MCAD & Barnes v. Sleek MedSpa (sexual harassment and retaliation); Abreu v. University of Massachusetts, Amherst (national origin discrimination), and MCAD & Annette Whitehead-Pleaux v. Shriners Hospital for Children (sexual orientation and gender).

## ***Court Litigation***

### ***HARVARD VANGUARD v. MCAD & ANOTHER (APPEALS COURT)***

The Appeals Court affirmed the Hearing Officer's finding that the respondent engaged in discriminatory acts against the complainant based on her age and disability, but also affirmed the Superior Court's reduction of the emotional distress award from \$350,000 to \$100,000. The Commission's petition for further Appellate Review was denied.

### ***MCAD & ANOTHER v. FATOU SY (APPEALS COURT)***

Following the Superior Court's decision to vacate a Hearing Officer's order (affirmed by the Full Commission) finding that the complainant was denied the opportunity to rent an apartment because she had children under the age of six who would reside with her and possibly trigger the lead abatement requirement set forth in G.L. c. 111, §199A, the Commission appealed arguing that its findings were based on reasonable interpretations of the Fair Housing statute and supported by substantial evidence. A decision has not yet issued.

### ***BOSTON HOUSING AUTHORITY v. MCAD & ANOTHER (SUPERIOR COURT)***

The Superior Court affirmed the Hearing Officer's decision in favor of the Complainant, a former housing authority police officer, on his claim of retaliation and discriminatory refusal to reinstate him based upon a record or perception of his disability, even though the officer had been medically cleared to return to work. The court also affirmed the Hearing Officer's award to Complainant of \$123,000 in lost wages, the value of his pension contributions for a five year period; credit for five additional years of service for retirement purposes; and \$50,000 in emotional distress damages.

*MCAD & ANOTHER V. CHELSEA CLOCK COMPANY (APPEALS COURT)*

This case was settled while pending in the Appeals Court for \$40,000 if paid to complainant by a date certain; and if payment was not made by that date, for \$75,000, now secured by a mortgage obtained by the complainant on real property owned by respondent.

***Criminal Offender Records Information (CORI) Reform***

On August 6, 2010, Governor Deval Patrick signed into law Chapter 256 of the Acts of 2010, “An Act Reforming the Administrative Procedures relative to Criminal Offender Record Information and Pre- and Post-Trial Supervised Release” (“CORI Reform”). The bill added a provision to Chapter 151B, which became effective November 4, 2010. The Commission developed a Fact Sheet to help employers comply with the statute, and to apprise applicants of their rights. The Fact Sheet is available on the MCAD’s website. The new law, G.L. c. 151B, sec. 4(9½), prohibits employers from seeking disclosure of a job applicant’s criminal record information prior to the interview stage of the hiring process, with two exceptions that are set forth in the Fact Sheet.

***Commission Initiated Complaints***

In 2010, as part of the Commission’s enforcement efforts, the Legal and Enforcement Units worked with an Investigating Commissioner to draft and investigate Commission Initiated Complaints based on testing results. Many of these Commission Initiated Complaints were resolved by consent decree when the investigation and testing resulted in evidence of discriminatory practices. The consent decrees included affirmative relief in training, reporting, monitoring, policy changes and specific performance.

## **Hearings**

The Hearings Unit is comprised of the three Commissioners and three full-time Hearing Officers, who conduct administrative hearings pursuant to § 5 of the statute on all claims of discrimination that are certified to public hearing and render comprehensive written decisions with findings of fact and rulings of law. The Hearings Unit is also very active in conciliation efforts and the post-probable cause motion practice. The Hearings Unit held 70 prehearing conferences and 39 public hearings in 2010 and issued approximately 29 decisions.

# Significant MCAD and Court Decisions

## *Single Hearing/Commissioner Decisions*

### **MCAD & DALY V. CODMAN & SHURTLEFF, 32 MDLR 18 (2010)**

#### *Discrimination on the basis of disability*

This case is significant because the Hearing Officer found that Complainant proved that Respondent's purported attempts to address Complainant's request for a reasonable accommodation for coronary artery disease were nominal and not substantive, and that the employer's failure to substantively address Complainant's request to lessen her areas of responsibility and reduce her duties caused Complainant's constructive discharge. The Hearing Officer also ordered payment of damages for emotional distress in the amount of \$100,000, back pay of close to \$30,000, and training.

### **MCAD & ANDERSON V. UPS, 32 MDLR 45 (2010)**

#### *Discrimination on the basis of disability*

This decision is noteworthy because of the Hearing Officer's determination that a transfer to another position was a reasonable accommodation given the particular facts and circumstances of the case. Complainant's request to be transferred to a different job was deemed to be a reasonable accommodation to his disability, where the company was very large, there were other positions available, and there was evidence the company frequently reassigned employees from one job to another. The Hearing Officer also found that the Respondent's process for addressing accommodation requests was unduly rigid and formulaic. The decision is also noteworthy because the Hearing Officer awarded substantial front pay to a relatively young Complainant who was not close to retirement.

### **MCAD & DUSO V. ROADWAY EXPRESS, 32 MDLR 131 (2010)**

#### *Discrimination on the basis of disability*

This decision is significant in part because of the Hearing Officer's interpretation of the threshold question of whether Complainant had a disability within the meaning of the law. In finding the Complainant disabled, the Hearing Officer relied in part on MCAD's consistently more expansive view of disability under c. 151B, and cited the recent Americans with Disabilities Amendments Act language and proposed federal regulations defining disability in favor of broad coverage. The Officer focused less on the threshold question of whether Complainant was a person with a disability, and more on whether a qualified person has been discriminated against based on a disability. The Officer also found that Respondent relied on unduly bureaucratic and rigid processes to determine whether a request for accommodation was justified, while ignoring a history of successful accommodation. The case is also significant because of an award to Complainant of \$100,000 for emotional distress.

**MCAD & CONNORS V. LUTHER & LUTHER, 32 MDLR 71 (2010)**

***Discrimination on the basis of age and disability***

This case is noteworthy because the Hearing Officer found egregious harassment directed at Complainant based on her age and disability and the existence of a hostile work environment based largely upon stereotyping by a younger non-disabled supervisor and coworkers that ostracized an older/disabled individual in the workplace. The Hearing Officer awarded substantial emotional distress damages to Complainant in the amount of \$200,000, and back pay in the amount of \$183,000.

**MCAD & LUSTER V. MASSACHUSETTS DEPARTMENT OF CORRECTION, 32 MDLR 5 (2010)**

***Discrimination on the basis of disability***

This case is significant because the Hearing Officer concluded that the employer failed to accommodate Complainant's disability despite having granted him several medical leaves of absence and light duty assignments, because it failed to explore and address the need for a more permanent accommodation to his chronic condition.

**MCAD & NAGLE & SEASTRAND V. FAIRFIELD FINANCIAL MORTGAGE GROUP, INC. ET. AL., 32 MDLR 235 (2010)**

***Discrimination on the basis of sex and sexual harassment***

This case is noteworthy because the Hearing Commissioner ruled in favor of one plaintiff on a claim of sexual harassment, but declined to find that a second plaintiff was sexually harassed by the same individual, given her relationship to the harasser, her financial dealings with him and the fact that she followed him to another company. The Commissioner found that while a reasonable woman would have been offended by the harasser's conduct, this Complainant was not subjectively offended by the conduct for these reasons.

**MCAD & ROUGHNEEN V. R.C. HOMES, INC., ET AL., 32 MDLR 197 (2010)**

***Discrimination on the basis of sex and sexual harassment***

This case is significant because, in addition to imposing liability for sexual harassment on the corporate Respondents who defaulted in the case, the Hearing Officer held two individuals liable: a principal in the corporation and the general manager. The Officer ruled that it was appropriate to pierce the corporate veil to find the principal liable. She determined that Complainant's termination was not retaliatory, but awarded the Complainant \$50,000 for emotional distress, assessed a civil penalty of \$5,000 against both individuals, and ordered the company owner to conduct training.

**MCAD & ANNETTE WHITEHEAD-PLEAUX V. SHRINERS HOSPITAL FOR CHILDREN, 32 MDLR 205 (2010)**

***Discrimination on the basis of sex and sexual orientation***

In a case of first impression, the Hearing Commissioner found that an employee's

sexual orientation discrimination claim based on the denial, delay and extra steps she was required to take to obtain non-ERISA benefits for her same-sex spouse after their marriage, was cognizable, and awarded emotional distress damages of \$30,000. The Hearing Commissioner held, however, that the employee did not have a claim of gender discrimination based on her association with a member of the same sex, and further held that the Commission was preempted by federal law from ruling on state law claims of discrimination as to employee benefit plans covered by ERISA.

### **MCAD & GRZYCH V. AMERICAN RECLAMATION CORP. & IULIANO, 32 MDLR 238 (2010)**

#### ***Discrimination on the basis of race and association***

This case is significant because the Hearing Officer found that Complainant, a white man, was specifically targeted and subjected to a racially hostile work environment by the company President, who was also white, based on Complainant's association with his fiancée, a black woman of Jamaican national origin, and their son. Complainant was awarded \$50,000 in emotional distress damages resulting from the hostile work environment, and the Respondents were ordered to pay a \$10,000 civil penalty.

## **Full Commission Decisions**

### **KOCHIS V. MASS. DEPT. OF SOCIAL SERVICES, 32 MDLR 162 (2010)**

#### ***Discrimination on the basis of denial of maternity leave***

The Complainant filed a claim of gender discrimination for denial of certain benefits related to her maternity leave. The Respondent contended that it provided maternity leave benefits consistent with the Massachusetts Maternity Leave Act (MMLA), c. 149, s. 105D and its collective bargaining agreement. Two questions of law were certified to the Full Commission: (1) whether the MMLA requires an employer to provide an employee who gives birth to twins double the length of maternity leave, and (2) whether the MMLA requires an employer who provides gratuitous paid benefits to employees on family leave pursuant to the terms of a collective bargaining agreement to provide double the allocation of such paid benefits for an employee who gives birth to twins.

The Full Commission declined to rule on the issue of whether a woman who gives birth to twins is entitled to twice the statutory maternity leave or sixteen weeks. The Commission held that since the Complainant had been granted twenty weeks of leave pursuant to a collective bargaining agreement (CBA), the Commission need not reach this issue. Consistent with the recent Supreme Judicial Court decision in *Global Naps v. Awiszus, et al.*, 457 Mass.489, 494-495 (2010), the Full Commission recognized that the statute is silent on this issue and its Guidelines represent only the Commission's

interpretation of the law, and while entitled to substantial deference, do not carry the force of law. The Full Commission also noted that the appellate courts have not reviewed this particular guideline, nor has a decision on the legal issue it presents been rendered. Notwithstanding, the Full Commission determined that Respondent had complied with its obligations under the MMLA.

As to the second issue, the Commission also declined to rule on the question. Consistent with the holding in *Global Naps*, supra, the Commission stated that disputes arising from the CBA's provision of benefits that exceed MMLA requirements are not within the purview of the MMLA. Thus claims for additional benefits that are separate from the protections afforded by the MMLA are not actionable under the statute.

### **MCAD & ROTTENBERG V. MASS. STATE POLICE, 32 MDLR 90 (2010)** *Discrimination on the basis of sex*

This Full Commission decision upheld a decision of the Hearing Officer concluding that the Massachusetts State Police discriminated against the then sole female police officer at Logan Airport barracks in the terms and conditions of her employment by not providing her with equal access to accommodations that the male officers enjoyed for a two year period, i.e. access to the Sergeant's lounge, a separate changing area, and a locker at the barracks. The fact that the Respondent was ultimately able to redesign quarters to give the Complainant equal access to these amenities was evidence that the accommodation was feasible and reasonable.

### **MCAD & DANIEL STEPHAN'S V. SPS NEW ENGLAND, INC., 32 MDLR 223 (2010)** *Discrimination on the basis of disability*

The Full Commission upheld the decision of the Hearing Officer who, pursuant to an order of the Superior Court under G.L. c. 32A, § 14(6), took additional evidence of an employee's post-termination earnings – evidence which the employer failed to present at the adjudicatory hearing – but declined to reduce her original back pay award on the grounds that the employer failed to meet its evidentiary burden under MCAD regulation, 804 CMR 1.23(1)(g), for reopening the evidentiary record. This decision discusses the identical judicial and agency standard of materiality and “good reason” for failure to present the evidence in the proceeding before the Hearing Officer as a condition precedent to supplementing an evidentiary record after a hearing officer has rendered a decision.

Here, the Hearing Officer found that SPS was liable for a discriminatory employment practice based on disability and awarded Stephan \$483,720. SPS appealed the decision to the Full Commission on various issues, and also asked the Full Commission to order that additional evidence mitigating the back pay award be taken. SPS argued that through “inadvertent” error it had failed to present the evidence at the public hearing. The Full Commission denied SPS's request after concluding that “inadvertent” error did not establish the “good cause” required by MCAD regulation, 804 CMR 1.23(1)(g) for taking additional evidence, and otherwise affirmed the Hearing Officer's finding of liability, but reduced the back pay award to \$371,200 for unrelated reasons. SPS filed a complaint

seeking judicial review of the final agency decision under G. L. c. 32A, § 14(7), including the Full Commission's refusal to order the Hearing Officer to take the additional evidence of interim earnings. SPS also filed a motion under G.L. c. 32A, § 14(6) in the superior court action seeking an order that the MCAD be required to take the additional evidence under the court's independent authority. Though the Court agreed that "good reason" was absent, it allowed the motion citing *Northeast Metro. Voc. School Distr. v. MCAD*, 35 Mass. App. Ct. 813 (1994) as authority for deviating from standard to prevent Stephan from obtaining a "windfall," and remanded the case to the Commission with an order that the Commission take the mitigating evidence. The Hearing Officer duly complied with the order, but declined to modify the monetary award based on controlling case law, *J.C. Hillary's v. MCAD*, 27 Mass. App. Ct. 204 (1989), which affirmed the Commission's decision that inexperience and mistake did not amount to the "good cause" required as a condition precedent for taking additional evidence under 804 CMR 1.23(1)(g). SPS appealed the Hearing Officer's decision to the Full Commission, arguing that the judge had "clearly ruled" that the MCAD was not only required to take the evidence of interim earnings, but also to modify the back pay award by reducing it by that amount. This argument was rejected by the Full Commission, which reasoned that the purpose of the Court's limited authority under § 14(6) to order an agency to take additional evidence is to perfect the record for judicial review of the final agency decision under § 14(7), and the language of the statute explicitly states that an agency "may" modify its decision, but is not required to do so. The Full Commission affirmed the Hearing Officer's refusal to reduce the monetary award because the standard required under 804 CMR 1.23(1)(g) of a "good reason" for failing to present the evidence at the evidentiary hearing was not met.

### **MCAD & KACAVICH V. HALYCON HILLS CONDOMINIUM TRUST, 32 MDLR 148 (2010)**

#### ***Discrimination on the basis of disability and reasonable accommodation***

The Full Commission affirmed the Hearing Officer's decision that Halcyon Hill Condominium Trust discriminated against a unit owner by refusing to construct and pay for a building entrance ramp to allow her ingress and egress from her home. Following a decision not to appeal the Full Commission's order, the Trust rebuilt the entrance ramp at its own expense and paid the aggrieved unit owners \$25,000 in emotional distress damages. In addition to the Hearing Officer's Order, the Full Commission added additional relief requiring the Trust to conduct annual training of trustees and property management personnel on the fair housing laws as they pertain to disability and reasonable accommodation and adopt a reasonable policy which informs owners and tenants with disabilities of their rights under the law which establishes a process for reasonable accommodation and/or modification of premises requests.

## Other Court Actions of Interest

### **PRE-DISPUTE ARBITRATION AGREEMENTS AND MCAD JURISDICTION**

The Commission has intervened in several court actions under the state arbitration act that seek to limit the Commission's jurisdiction under G.L. c. 151B, § 5 to investigate, prosecute, adjudicate and enforce the Commonwealth's anti-discrimination law in the public interest through private agreements signed by employees as a condition of employment between an employer and employee to arbitrate employment discrimination disputes. In three cases that the Commission is aware of, employers have filed motions to compel their former employees to withdraw MCAD charges and instead, privately arbitrate their discrimination claims, thus interfering with the MCAD's ongoing investigation and/or enforcement efforts.

### **IN JOULE, INC. & OTHERS V. RANDI SIMMONS (SUPREME JUDICIAL COURT)**

The Superior Court allowed the Commission to intervene, and denied Joule's motion to compel Simmons to arbitrate her sex discrimination claim, arguing that the arbitration agreement between them "waived" her right to file a charge of discrimination and to participate as a "litigant" in the MCAD's proceeding. The Superior Court denied the motion, concluding that the MCAD is not bound by private arbitration agreements, and that its investigation and public enforcement efforts under G.L. c. 151B, § 5 could not be interfered with. Joule appealed the denial of its motion to compel, and both parties successfully sought direct appellate review in the Supreme Judicial Court. A decision has not yet been issued.

### **IN MASS. BAR ASSOCIATION ("MBA") V. MARILYN WELLINGTON (APPEALS COURT)**

The Commission intervened in the court action filed by the MBA, and successfully prevented it from obtaining an order compelling its former director to arbitrate her sex discrimination claims and to withdraw her complaint from the MCAD. The MBA has appealed the denial of its motion, and currently the case is stayed in the Appeals Court pending the outcome in Joule.

### **IN LIA NORTHAMPTON, INC. V. MANTHA (APPEALS COURT)**

The Commission again was permitted to intervene in court action seeking to compel arbitration. In this case, however, the Superior Court allowed the employer's motion to compel, relying on a footnote in *Warfield v. Beth Israel Deaconess Med. Ctr., Inc.*, 454 Mass. 390, 399 n. 11 (2009), which said in dicta that by submitting a dispute to binding arbitration, an employee waived a right to pursue administrative and judicial remedies. The Commission appealed this decision, and the case is currently stayed in the Appeals Court pending the outcome in Joule.

# The First Amendment and MCAD Jurisdiction over Employment Discrimination Claims

## **MCAD, ET AL. V. TEMPLE EMANUEL OF NEWTON, (SUPREME JUDICIAL COURT)**

This appeal arises from the decision of the Superior Court to permanently enjoin the Commission from investigating a charge of age discrimination filed by a pro se Complainant against her former employer, a religious school at Temple Emanuel, on the ground that the Religious Clause of the First Amendment of the United States Constitution constituted an “absolute” bar to the Commission’s investigation into the reasons for an employment action. In the underlying charge filed at the Commission, the Complainant alleged she was unlawfully terminated because of her age and subject to a hostile ageist work environment. She claimed further that she was one of nine part-time classroom teachers with at least eighteen years of employment at the school who were over the age of forty; that in January 2008, she and the other teachers were told to reapply for their positions; she was terminated and of the nine other teachers over aged 40, only three were retained; and that the school hired replacement teachers who were considerably younger. The Commission appealed the Superior Court’s decision, which included a declaration under G.L. c. 231A, § 3 that the Commission lacked subject matter jurisdiction over the age discrimination complaint against the religious school, and the Supreme Judicial Court sua sponte took the case on direct appellate review. The Commission argued in its Brief that the United States Supreme Court specifically held that the First Amendment is not implicated by a state anti-discrimination agency’s investigation of an alleged statutory violation, nor does a religious organization like Temple Emanuel suffer constitutional harm under the Religion Clause of the First Amendment by participating in an agency proceeding, where judicial review of the final agency decision is available. Ohio Civil Rights Agency v. Dayton Christian Schools, 477 U.S. 619 (1986). Additionally, the Commission argued that the Superior Court lacked jurisdiction over Temple Emanuel’s court action while a Charge of discrimination was pending at the MCAD; invaded the Commission’s fact-finding province, usurping the Agency’s authority to decide its own jurisdiction in the first instance; and applied an erroneous standard in reaching its conclusion that a non-clergy, part-time Hebrew teacher was unprotected from age discrimination and harassment under G.L. c. 151B, § 1(5), as a matter of law. The case has not yet been scheduled for argument.

## *Briefs of Amicus Curiae*

### **GLOBAL NAPS, INC. VS. MARTHA AWISZUS & OTHERS (SUPREME JUDICIAL COURT)**

The Commission argued that a Superior Court judge properly entered summary judgment in the matter according substantial deference to a “guideline” published by the MCAD, that employers provide written notice to a female employee who is allowed to take maternity leave in excess of the eight weeks required by the Massachusetts Maternity Leave Act (MMLA), G.L. c. 149, § 105D, that the employer guarantees continuation of the employee’s statutory maternity leave benefits, particularly the right to return to work. The Court held that while it grants deference to the MCAD’s Guidelines when called on to interpret a particular term or phrase in chapter 151B, the interpretations cannot serve as the source of a new remedy. The court further held that to the extent that the MCAD Guidelines suggest that a female employee may be entitled to MMLA rights beyond the eight-week period, it is inconsistent with G.L. c. 149, § 105D.

### **EDWARD MARTINO V. FORWARD AIR, INC. (FIRST CIRCUIT)**

This case involved an interpretation of G.L. c. 151B, § 4(16), specifically whether the portion of the statute that bars pre-employment inquiries regarding a job applicant’s disability creates an independent cause of action under state law. The Commission argued that G.L. c. 151B, § 4(16) did in fact create a separate and distinct cause of action for unlawful pre-employment inquiries related to disability. The First Circuit ruled that while the Commission’s interpretation of G.L. c. 151B was entitled to deference, it need not reach the legal issue because (as the MCAD argued) the plaintiff is required to show some proof of injury resulting from unlawful inquiry to recover damages, and in this case the jury had already concluded that the plaintiff had suffered no harm.

### **PELLETIER VS. TOWN OF SOMERSET & ANOTHER (SUPREME JUDICIAL COURT)**

The Court held that the MCAD’s failure to consider claims raised by the complainant that were within the scope of its investigation did not bar these claims in a subsequent proceeding in Superior Court under G.L. c. 151B s. 9. However, other claims not deemed to be within the scope of the agency’s investigation were barred. While evidence of certain acts outside the statute of limitations might have been deemed admissible as a continuing violation, evidence that was temporally and substantively beyond the scope of the MCAD’s investigation should have been excluded by the judge in the s. 9 proceeding.

### **SCHIVE V. PSYCH. ED. (SUPREME JUDICIAL COURT)**

This case addresses the issue of whether claims of retaliation that allege post-employment retaliatory conduct by a former employer are actionable under G.L. c. 151B, §§ 4(4) and 4(4A). The Commission argued that an employer’s conduct after the employment relationship ends (i.e. sabotaging the former employee’s prospects for future employment) that is reasonable likely to hinder a charging party or others from engaging in protected activity can constitute retaliation. A decision is pending.

# Administration and Finance

The Administration and Finance Division is comprised of four units overseen by the Chief of Administration and Finance.

The Business Office/Management Information Systems (MIS) Unit is staffed by a financial officer, and two part-time MIS contractors. This office handles all operational, budget and computer matters.

The Training Unit is comprised of the Director of Training, and one part-time trainer. Other MCAD staff members who have completed the Commission's Discrimination Prevention Train-the-Trainer program often deliver internal and external training sessions under the direction of the Training Unit.

The Alternative Dispute Resolution Unit consists of two programs. The Conciliation program is overseen by a full-time attorney conciliator and a part-time non-attorney conciliator. Other staff members also assist in conducting conciliations. The Early Mediation program uses contract mediators to provide mediation prior to investigative findings on cases where Complainants are pro se.

The Testing Unit is staffed by the Director of Testing and a part-time legal intern. The program also maintains a panel of part-time testers who are recruited and trained by MCAD staff.

## *Training*

During 2010, the MCAD Training Unit and other staff conducted 124 external employment and housing discrimination prevention training sessions and presentations, nearly matching the 2008 record of 125. Our audiences included human resources professionals, supervisors and managers, line staff, landlords, and realtors, and the sessions ranged from two hours to four days in length.

Highlights of this year's external training programs included an ongoing partnership to provide discrimination prevention training to current and future stewards for the Ironworkers Local 7, including conducting ten sessions this calendar year. The Local 7 is poised to become the first union in the country (to our knowledge) to contractually require completion of discrimination prevention training prior to serving as a steward. The Training Unit led two sessions at the EEOC's fall regional conference, one on "Innovations in Training" and one on "Building a Successful Internship Program," and assisted with conference planning and administration. In addition, the MCAD conducted a session on "Discrimination Prevention Training: Best Practices" at the annual conference of the National Staff Development and Training Association.

The MCAD outreach program, "Spreading Education to End Discrimination" or "SEED" continued to expand this year. The S.E.E.D. program completed a record 122 presentations in 2010, reaching 2,590 individuals in a variety of settings. Spring, summer, and fall interns participated in intensive training, established contacts at organizations across the state that serve populations likely to experience discrimination, and scheduled

and conducted free presentations on discrimination in employment, housing and public accommodations in English, Spanish, and Haitian Creole.

The Commission held its eleventh annual employment Discrimination Prevention course this year, including five half-day prerequisite sessions, two two- to three-day train-the-trainer modules, and two two- to three-day EEO practitioner modules. In addition, we held our third 3½-day train-the-trainer program for municipal personnel officers and other key managers in partnership with the Massachusetts Interlocal Insurance Association.

The Training Unit designed, facilitated and/or managed numerous internal training sessions for the Commission's staff this year, including two three-day initial training sessions for new interns held in January and June, and one three-day initial training session for new interns and employees held in September. Other 2010 internal training programs included sessions on transgender issues in collaboration with the Massachusetts Transgender Political Coalition; supervision skills training for supervisors and managers; and a brown bag lunch series held monthly during the spring and fall, and weekly during the summer. This year's brown bag lunch series included a special session on meeting the needs of Deaf complainants conducted by the Massachusetts Commission for the Deaf and Hard of Hearing. MCAD enforcement staff also participated in external training sponsored by the U.S. Department of Housing and Urban Development and Massachusetts Continuing Legal Education.

The MCAD's internship program has continued to grow in size and scope, with nearly seventy undergraduate, law student, and attorney volunteers working at the Commission during 2010. Interns completed hundreds of dispositions, hundreds of intake meetings with complainants, and dozens of outreach presentations. The George Napolitano Scholarship, awarded each year to a law student summer intern who shows both academic achievement and a dedication to work in public service, was awarded this year to Elizabeth Marshall from Boston College Law School.

The Training Unit oversees the Commission's internship program, working closely with a team of intern supervisors from across the agency. The Enforcement Advisor Supervisor plays a central role in the ongoing development of the internship program, and design and delivery of the intern training. The internship program relies upon several members of the MCAD enforcement staff to provide expert supervision and coaching, and to assist with classroom and on-the-job training.

As of the close of 2010, the Training Unit has monitored compliance for a total of 310 cases where the hearing decision or settlement included a training requirement. Of those, 262 cases are no longer active, generally because the training was completed and occasionally because the respondent organization no longer exists.

The Training Unit has continued to support YWCA Boston's Community Dialogues on race this year (formerly, the City-Wide Dialogues on Boston's Ethnic and Racial Diversity). In the spring of 2010, the MCAD's Director of Training co-facilitated a four-session dialogue series for members of the Boston City Council and conducted training for new Dialogue facilitators in June. The Director of Training continues to serve as a member of the Dialogues' Advisory Committee. In addition, the MCAD has begun assisting with

program development for the National Center on Race Amity's June 2011 conference, and participating in strategic planning for the Union of Minority Neighborhoods' truth and reconciliation efforts regarding the history of school desegregation in Boston.

## *Mediation/Conciliation*

Agency-wide, the Conciliation Unit scheduled 557 cases in 2010. Approximately 75% of these conciliations were Boston cases, and 25% were cases from the Springfield office. Of the 557 cases scheduled, 315 sessions were held with 171 settlements reached. This results in a 55% settlement rate, which is slightly higher than last year. Every case that settles, translates into one less case being advanced to the adjudication phase.

The number of parties electing to participate in the mediation process has increased from 15% in 2009 to over 20% in 2010. Agency-wide, in 2010, the early mediation program was offered to 700 parties, approximately 151 more than the previous year. The Mediation Unit conducted 160 sessions and achieved 86 settlements.

The MCAD continued to distribute User Surveys after each conciliation and mediation session this year. Parties are asked to mail or hand deliver their response to us anonymously. According to the 2010 User Survey, 91% rated the MCAD mediation/conciliation program as "Excellent" or "Very Good." Seven percent rated the program "Somewhat Good," 2% rated the program "Fair," and none of the participants rated the program as "Poor."

## *Testing*

The goal of the MCAD's testing program is to identify barriers that contribute to discrimination in employment, housing, credit, mortgage lending, education, and public accommodations, explore strategies that will enable the Commission to improve the litigation of discrimination claims, and enhance public awareness of discrimination. The Testing Unit identifies, tests, and potentially initiates claims against entities in Massachusetts that engage in discriminatory practices.

The MCAD utilizes the technique known as "Matched Pair Testing" whereby two or more similarly situated job seekers matched in credentials – qualifications, income, appearance – except for membership in a protected group such as race, sex, or age, apply for similar positions. The employer's response is then analyzed to determine if there was discriminatory treatment of the members of the protected class. This process assists victims of covert forms of discrimination while highlighting pervasive unlawful employment practices. Once the data is analyzed, the MCAD assesses whether the tests reveal discriminatory hiring or placement patterns and/or if further testing should be conducted. If discriminatory hiring patterns exist, the MCAD publicizes the results and prosecutes the responsible parties.

During 2010, two employers reached settlements with the MCAD after complaints were brought against them based on testing evidence. The MCAD further used testing to help determine the accuracy of employment discrimination complaints brought by individual complainants in several cases. Testing was also used in public accommodation cases to

verify discrimination complaints and monitor compliance with existing settlements. MCAD initiated or continued testing investigations of 66 employers, employment agencies, and public accommodation providers during 2010. Of these, significant evidence of discriminatory practices has been found with respect to 22 employers thus far. Many of these investigations will continue into 2011 including one case in which a Commission-initiated complaint has been issued, one case that has been referred to the Commission for issuance of a complaint, and two cases where testing evidence is being used to verify an individual complaint.

# MCAD Budget for Fiscal Year 2010

## Overview

### July 1, 2009 – June 30, 2010

#### **Budgetary Direct Appropriation**

Line Item 0940-0100

State Appropriation \$ 2,563,587

#### **Retained Revenues Collected**

Line Item 0940-0101

Fees and Contracts \$ 1,884,013

Line Item 0940-0102\*

Train the Trainer Program \$ 71,160\*

Total FY10 Budget

Total: \$ 4,518,760

#### **Total FY2010 Expenses**

Payroll \$ 3,739,052

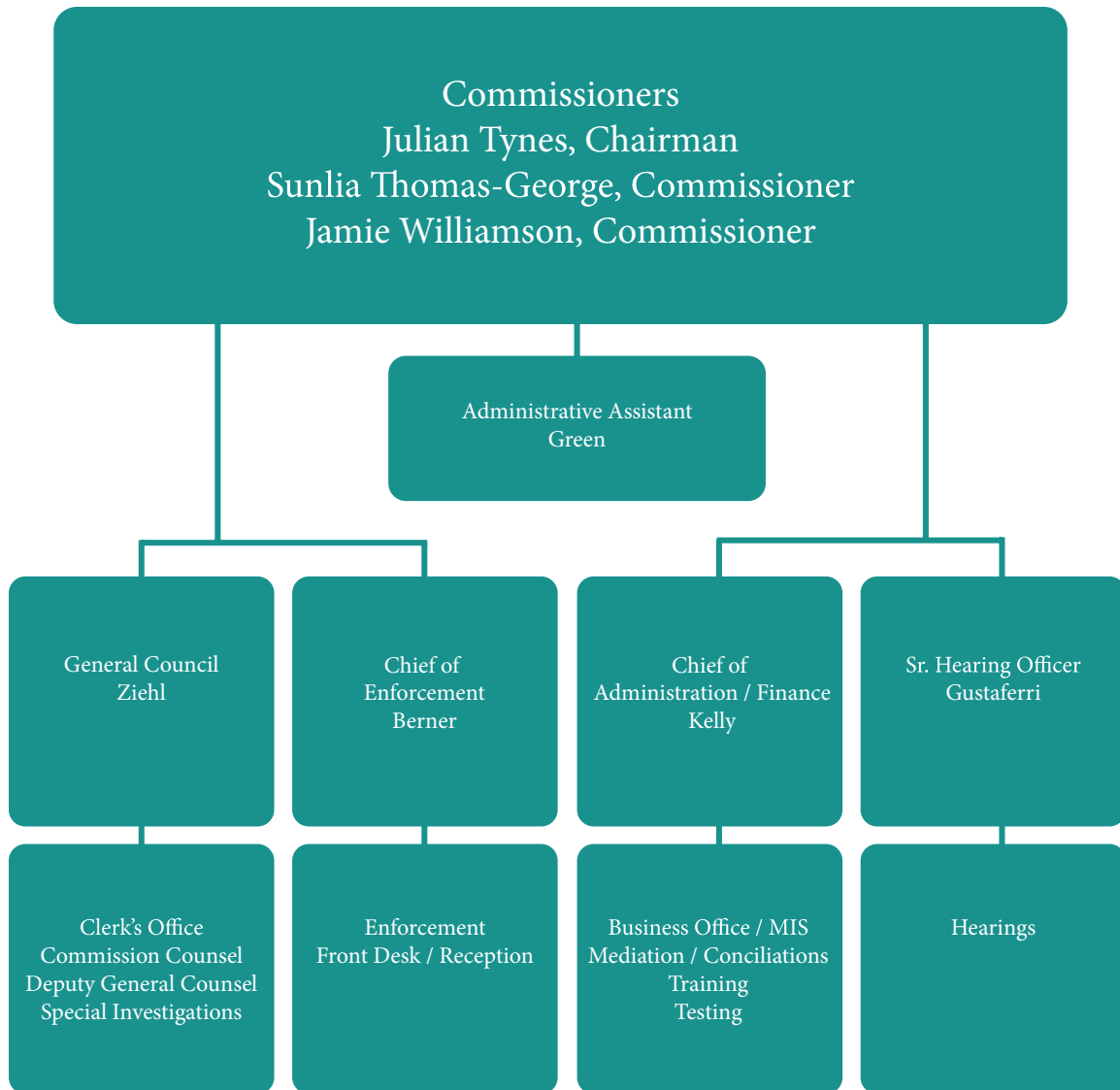
Rent \$ 88,682

Administrative Costs \$ 635,407

Total: \$ 4,463,141

*\* This retained revenue account allows the MCAD to retain and spend revenue from the MCAD Train the Trainer Program. However, the account is capped at \$70,000. Any revenue received in excess of that amount is deposited into the general fund. In 2010, revenues collected in that account exceeded the cap of \$70,000 and \$1,160. was deposited into the general fund.*

# MCAD Organizational Structure



# Remembering Migdalia Rivera

On May 22, 2010, the Massachusetts Commission Against Discrimination lost one of the most effective and beloved employees in its sixty-five year history. Migdalia Rivera, known to family, friends, and colleagues as “Dolly,” was a housing advocate before she began her work as an investigator at the MCAD in 1984. Through her hard work and dedication, she earned a promotion to the position of supervisor in 1999. In that role, she supervised most Springfield office employees, heading up the intake, administrative, and investigative units. In 2010, she was promoted to senior supervisor as her leadership role continued to grow, overseeing both the Springfield and Worcester MCAD offices. Her untimely passing was a terrible loss to all those who have known her, and to the Commission’s work.



We asked MCAD employees, interns, and attorneys who practice before the Commission to send us their remembrances of Dolly, and were grateful – but not surprised – when we received a flood of comments. Their observations captured Dolly’s essence, and certain phrases and themes surfaced again and again:

a vigorous, intelligent, and dogged enforcer of the law / courteous and professional  
a person with inner beauty / well-respected colleague, coworker and friend  
remarkable work ethic / warm spirit strong faith / unsundering love for her family  
led the office with grace and courage / unwavering commitment to the cause of equality  
greeted everyone with a warm smile / a go-to person / fair, respectful, and kind to all  
responsive to concerns / always remained neutral / highly regarded / a great leader  
heart and soul of the Springfield MCAD officer / truly inspirational / always supportive  
beautiful, caring, and intelligent / genuine, kind and honest  
carried out her responsibilities at the MCAD in a way we all ought to admire

We will miss Dolly for years to come.

# Staff

The following individuals were members of the MCAD staff during 2010.  
Asterisks indicate individuals with ten or more years of service at the Commission.

Sabrina Acloque  
Melvin Arocho\*  
Deborah A'vant\*  
Joel Berner  
Eric Bove  
Kimberly Boyd\*  
Maryann Brunton\*  
Marlania Bugg\*  
Wendy Cassidy\*  
Jean Clanton\*  
Leona Clark  
Vanessa Davila\*  
Gordon Davis  
Martin Ebel  
Karen Erickson  
Geraldine Fasnacht\*  
Lynn Goldsmith\*  
Brian Gnandt  
Barbara Green  
William Green  
Eugenia Guastaferrri\*  
Yaw Gyebi, Jr.  
Keith Healey  
Elizabeth Hickey  
Marzella Hightower\*  
June Hinds\*  
Judith Kaplan\*  
Theresa Kelly  
Nomxolisi Khumalo  
Cynthia Kopka  
Johnny Lainé  
Jennifer Laverty  
Shirley Lee\*  
Kristen Librera  
Simone Liebman\*  
Melanie Louie-Tso\*  
Katherine Martin\*

Sheila Mathieu  
Gilbert May\*  
Malcom Medley  
Lynn Milinazzo-Gaudet\*  
Ying Mo\*  
Carol Mosca  
Carol Murchison\*  
Pamela Myers  
Carolyn Packard\*  
Joshua Papapietro  
Keith Parrett  
Yudelka Peña\*  
Michelle Phillips  
Victor Posada\*  
Marytsa Reyes\*  
Jeannine Rice\*  
Migdalia Rivera\*  
Lila Roberts  
Caitlin Sheehan  
Rebecca Shuster\*  
Andre Silva  
Myrna Solod\*  
Abigail Soto-Colon\*  
Ethel Stoute\*  
Tania Taveras  
Sunila Thomas-George\*  
Nancy To\*  
Julian Tynes  
Francisco Villalobos\*  
Beverly Ward\*  
Betty Waxman\*  
Jamie Williamson  
Paul Witham\*  
Patty Woods\*  
Carmen Zayas  
Cathy Ziehl

## Interns/Volunteers

The following individuals were interns or volunteers at the MCAD during 2010.

Marielle Abou-Mitri  
Sabrina Acloque  
Dora Agyare  
Ashley Auger  
Quinn Brown  
Kelli Burton  
Heather Catherwood  
Andrew Cheis  
Joseph Conway  
Erin DeBobes  
Calliope Desenberg  
Patrice Dixon  
Catherine Drislane  
William Edwards  
Han Fang  
Brian Fleming  
Allison Flood  
Robert Forster  
Victoria Giuliano  
Laurie Ann Goren  
Amanda Griner  
Yana Grishkan  
Carol Guerrero  
Amy Hien  
Christopher Hurst  
Samantha Jones  
Allyssa Joseph  
David Karman  
Tracy Kelley  
Ron Kendler  
Connie Kong  
Diana Kramer  
Sharon Legall  
Lijing Li  
Tony Lu  
Jonathan Lynch  
Xiao Hong Ma

Tammy Mak  
Elizabeth Marshall  
Mariel Martin  
Miki Matrician  
Michaela May  
Ashley McDonough  
Kathryn Meehan  
Juliette Miller  
Nora Mitnick  
Ashley Mompont  
Paul J. Mower  
Andrea Najemy  
Cassandra Paul  
Naya Pessoa  
Cori Phillips  
Gina Plata-Nino  
Joel Posner  
Carla Reeves  
Christine Rizk  
Hillary Rosenzweig  
Benjamin Scott  
John Selden  
Michael Shepsis  
Orly Shoham  
Erin Slone-Gomez  
Minyoung Song  
Jennifer Stapleton  
Michael Steinberg  
Tai Marie Stephens  
Alice Tang  
Claire Valentin  
Jennifer Wilson  
Shu Fen Wu  
Ying Mei Wu  
Chae-Yeong Yoo  
Emma Youndtsmith

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# MCAD 2010 Annual Report

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