



Annual Report 2017

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

About the MCAD

The Massachusetts Commission Against Discrimination (MCAD) is the independent state agency that enforces the anti-discrimination laws of the Commonwealth through training, mediation, investigation, prosecution and adjudication.

The people of Massachusetts, its workers, and visitors may file a Discrimination Complaint if they believe they were treated differently or unfairly based on their identity as a member of a protected class (e.g., race, disability, age, national origin, gender, sexual orientation, or veteran’s status).

The MCAD has four offices, Boston, New Bedford, Springfield, and Worcester, where one can meet with an intake specialist for a free consultation and file a Complaint. In most cases, there is a 300-day statute of limitations on filing a complaint at the MCAD from the last discriminatory act. Complaints filed at the MCAD will be investigated by an MCAD staff member to determine if the treatment alleged constitutes unlawful discrimination. The MCAD conducts its investigation as a neutral entity.

The MCAD also offers training and outreach to address and prevent discrimination. The Commission also conducts policy reviews, drafts model policies, and issues guidance on Acts that affect the work of the Commission.

Organization Chart

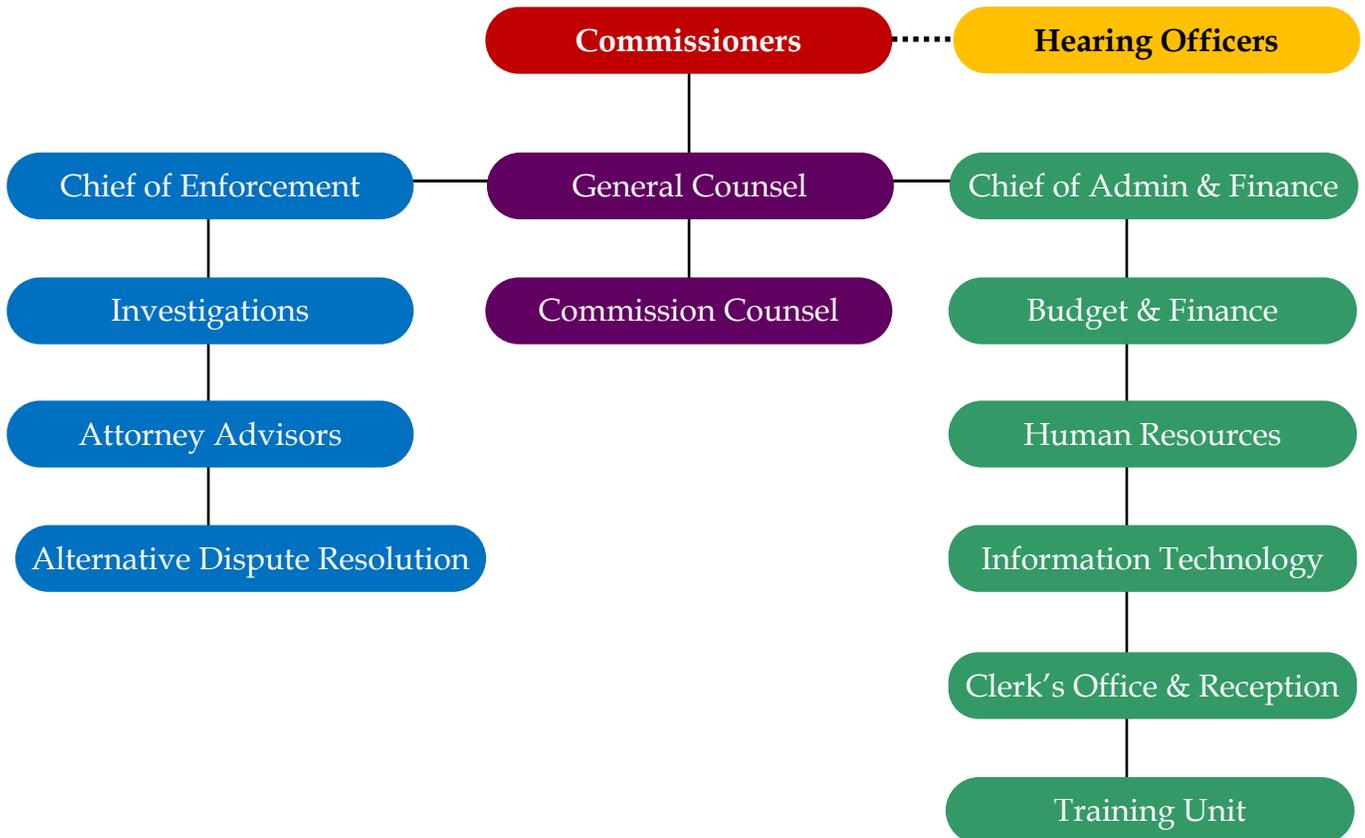


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Commissioners

Sunila Thomas George
Chairwoman

Sheila A. Hubbard

Monserate Quiñones

MCAD Locations

Boston MCAD
1 Ashburton Pl. Ste. 601
Boston, MA 02108
P: 617.994.6000
F: 617.994.6024

New Bedford MCAD
128 Union St. Ste. 206
New Bedford, MA 02740
P: 774.510.5801
F: 774.510.5802

Springfield MCAD
436 Dwight St. Rm. 220
Springfield, MA 01103
P: 413.739.2145
F: 413.784.1056

Worcester MCAD
484 Main St. Rm. 320
Worcester, MA 01608
P: 508.453.9630
F: 508.755.3861

TTY 617.994.6196

Web www.mass.gov/mcad

Lisa Adams
Eric Allbright
Melvin Arocho *
Deborah Avant *
‡Abigail Avoryie
Sarah Biglow
Eric Bove
James Brislin
‡James Brown
‡Maryann Brunton *
Emily Caplan *
◇Daniel Carr
Wendy Cassidy *
‡Janet Cha
◇Ellen Cobb
Joseph Cohen
Evan Coleman
‡Jamie Cosme
Ethan Crawford
Beth Crosby
Kristen Dannay
◇Elizabeth Davey
Vanessa Davila *
‡Alexandria de Aranzeta
‡Lennie De Sousa Smith
Karen Erickson
Andrew Espinosa
Geraldine Fasnacht *
◇Caroline Galiatsos
Cynthia Garcia
Sunila Thomas George *
‡Lynn Goldsmith
Karlyn Greene
Joseph Greenhalgh
Eugenia Guastaferrri *
Devin Guimont
Yaw Gyebi
SuJin Han
H Alex Harrison
‡Keith Healey *
‡Elizabeth Hickey
Winnie Hien
Marzella Hightower *
Deirdre Hosler
Sheila A. Hubbard
Cromwell Johnson
◇Judy Kalisker
Judith Kaplan *
Kristina Khoury
Nomxolisi Khumalo *

Letter from the Commissioners

Dear Governor Baker, Lieutenant Governor Polito, and Members of the General Court, in accordance with Chapter 151B, §3 (10) of the Massachusetts General Laws, we hereby submit the 2017 Annual Report of the Massachusetts Commission Against Discrimination (MCAD).

The MCAD was established in 1946 by Act of the General Court as the state's chief civil rights agency charged with enforcing the state's anti-discrimination laws. As an independent agency led by three Commissioners, one who serves as Chair, the MCAD has the authority to investigate, prosecute, adjudicate and resolve cases of discrimination in employment, housing, credit, public accommodations and access to education on behalf of individuals in numerous protected categories, including race, color, creed, national origin, age, disability, gender, sexual orientation, and veterans status. These anti-discrimination laws provide the legal framework that enables Massachusetts to be a leader in the nation in protecting individuals from discrimination. The MCAD receives funding from the state, and earns revenue through state-wide training courses, and from workshare agreements with the U.S. Department of Housing and Urban Development (HUD) and the U.S. Equal Employment Opportunity Commission (EEOC).

We owe the successes of 2017 to dedicated Senior Managers and staff of the agency who, confronted with fewer resources and a growing mission, continue to serve the Commonwealth to advance the mission of the agency. We salute their considerable achievements that often go unrecognized and owe them our thanks and a debt of gratitude. We could not, however, achieve our mission through the efforts of agency personnel alone. We acknowledge and give thanks to Governor Baker, Lieutenant Governor Polito, the Legislature, the MCAD Advisory Board, our federal counterparts, and the wider civil rights and advocacy community for their efforts and support. We also acknowledge the countless volunteers and interns who make this work possible.

We stand on the shoulders of many who, in the past, have made significant contributions to the agency. We especially wish to thank our most recent predecessors, former Chairwoman Jamie R. Williamson and former Commissioner Charlotte Golar Richie for their tireless efforts on behalf of the agency. Chairwoman Williamson successfully led the agency's initiatives to reduce its case backlog to historically low levels and significantly increase the resources flowing to the agency from our federal partners. Commissioner Richie successfully oversaw the overhauling of the Commission's Language Assistance Services, including the issuance of the 2016 Language Access Plan. This administration's leadership team is committed to building on MCAD's rich legacy.

The Commission has significant achievements and changes to report this year.

Leadership

The MCAD ended 2017 under new leadership. Sunila Thomas George, a 20-year veteran of the agency, with 10 years serving as a Commissioner, was designated Chairwoman by Governor Baker in September 2017. She is the agency's first Asian American Chair. The two new additional Commissioners appointed in 2017 are Sheila A. Hubbard and Monserrate Quiñones.

New members were appointed to the MCAD Advisory Board in 2017 bringing the total to 18.

In April, the MCAD co-hosted the 11th Annual Fair Housing and Civil Rights Conference in Springfield, MA. This event is the largest annual civil rights conference in the Northeast region. In 2017, the conference hosted over 600 attendees representing 26 states. This free two-day symposium featured workshops, panel discussions, and career development opportunities, led by distinguished civil rights activists, government officials, trainers, and non-profit organizations.

Investigations

In 2017, the MCAD completed 2,717 substantive investigations and completed 3,900 cases, surpassing 2016's record-breaking number of completions.

Jennifer Laverty
 Shirley Lee *
 Nicole Leger
 Simone Liebman *
 Melanie Louie-tso *
 Matthew Marotta
 Angela Matute
 Gilbert May *
 Sheree McClain
 Connie McGrane
 Lynn Milinazzo-Gaudet *
 Ying Mo *
 † Brigid Molloy
 Carol Mosca *
 Korey Moscatelli
 Carol Murchison *
 Pamela Myers *
 ◇ Chanel Ortiz
 Joshua Papapietro
 Yudelka Pena *
 Victor Perez
 Marc Perlman
 Michelle Phillips
 Monserrate Quinones
 † Charlotte Golar Richie
 Lila Roberts
 † Jovonte Santos
 Jeremy Scheiner
 Vera Schneider
 William Scott
 Caitlin Sheehan *
 Dina Signorile-Reyes
 Andre Silva *
 Alexander Smith
 Myrna Solod *
 Abigail Soto-Alvira *
 ◇ Caroline Standke
 Matthew Stewart
 Ethel Stoute *
 Tania Taveras *
 ◇ Laura Terrasi
 Nancy To *
 Jeffrey Turner *
 Reid Wakefield
 Betty Waxman *
 Erik Wellhoff
 ◇ Christopher Wester
 † Jamie Williamson
 Devin Wintemute
 Paul Witham *
 Pattie Woods *
 Carmen Zayas *

† Left the Commission in 2017

* 10+ years of service to MCAD

◇ Independent Contractor

Francine Almeda
Kelly Bentdahl
Pamela Bradford
Yetunde Buraimoh
Ziyang Chen
Maria Katrina Codilla
Juanita Duvall
Ethan Eastwood
Mary Fitzgerald
Samira Haddad
Emily Hamilton
Richard Jordan
Elinor Kirchwey
Lauren Kopec
Bernice Cindy Lee
Logan Levesque
Samantha Loeb
Derek Maka
Miranda Mammen
Bryn McCarthy
Molly McGuire
Emily Miller
Sarah Elizabeth Moccaldi
Anya Nandkeolyar
Michael James Neary
Lily Ongkiko
Eden Phillips
Sam Prose
Siyu Qian
Lauren Raimunde
Timothy Roeper
Kristen Scherb
Cecilia Schirmeister
Nathan Harold Seltzer
Emma Singer
Manjot Singh
Michael Smith
Jessica Spierer
Isabelle Tan
Christina Troisi
Sally Tyre
Sara Wilson
Fanmei Xia
Isabel Yu
Yitao Yu

MCAD's Alternative Dispute Resolution (ADR) Unit reported a 60% resolution rate for parties participating in mediation or conciliation. A total of \$5,834,753 was obtained through settlement efforts in 356 cases.

The number of MCAD cases in investigation longer than 18 months is now at an historic low, having been reduced from 960 at the end of 2016 to 357 at the end of 2017. The agency will continue its efforts to reduce this number, by expediting the handling of investigations without sacrificing the quality of our investigative analysis and soundness of our jurisprudence.

Legal

The Massachusetts Supreme Judicial Court significantly relied upon reasoning articulated in amicus briefs submitted by the MCAD in *Gannon v. City of Boston*, 476 Mass. 786 (2017) and *Barbuto v. Advantage Sales & Marketing, LLC*, 477 Mass. 456 (2017). *Gannon* concerned the standards of proof in a disability claim when an employer explicitly relies upon an employee's impairment in making an adverse employment decision. *Barbuto* recognized that in certain circumstances, the legal use of medical marijuana may be a reasonable accommodation for an employee's disability and that M.G.L. c.151B requires an individualized analysis of the facts to determine reasonableness.

The Commission also prevailed at the Massachusetts Appellate Court in *Massasoit Ind. Corp. v. MCAD*, 91 Mass.App. Ct. 208 (2017). *Massasoit* recognized that illegal disability discrimination may occur when an employer regards an employee as disabled, whether or not the employee actually has a substantial impairment of a major life activity. This case, along with *Gannon* and *Barbuto* further promotes the ability of individuals with disabilities to work in Massachusetts.

Operations

Effective Friday, October 27, 2017, the MCAD New Bedford office opened at a new location in downtown New Bedford, MA. This more centralized location in the Demello International Center, on the corner of Union Street and Acushnet Avenue, will allow the MCAD to

better serve residents of the South Coast, Bristol County and Cape Cod.

In the summer of 2017, a new Director was hired to lead the Training Unit. Training, education, and outreach are essential components of the agency's mission to eradicate and prevent discrimination.

In light of recent developments highlighting and reporting sexual harassment in the workplace, in October of 2017 the MCAD added a half-day training program to its 2018 calendar, focused on "Preventing and Addressing Sexual Harassment in the Workplace." This in-depth training is tailored to provide Massachusetts employers with the tools they need to prevent and remedy sexual harassment in the workplace and to ensure employees are made aware of their rights under state law.

As reflected in the report to follow, we have made great strides in our efforts to address and remedy complaints of discrimination. The agency's year-end inventory of cases was roughly 3,000, down from last year's inventory of 5,303. However, as recent events surrounding racial divides, immigration disputes, and sexual harassment demonstrate, there remains much to do. The MCAD witnessed a rise in sexual harassment complaints over the last several months of 2017.

With the continued support of the Administration and the Legislature, our federal partners and the civil rights community, we approach 2018 with renewed energy in our efforts to prevent, remedy and pursue the eradication of discrimination in the Commonwealth of Massachusetts. We are gratified for the opportunity to continue to serve the people of the Commonwealth in doing this vital work and are privileged and honored to be entrusted with such a worthy mission.

Respectfully submitted,

The Commissioners of the MCAD

Sunila Thomas George, Chairwoman
Sheila A. Hubbard
Monserrate Quiñones

2017 Advisory Board

Thomas J. Gallitano (Chair)

Tani E. Saperstein, Esq.

Margarita Alago, Esq.

Barbara Chandler, Esq.

Nadine Cohen, Esq.

Remona L. Davis, Esq.

Jeff Dretler, Esq.

Gail Goolkasian, Esq.

Jeffrey L. Hirsch, Esq.

Anne L. Josephson, Esq.

Christopher Kauders

Jonathan Mannina, Esq.

Lucinda Rivera, Esq.

Bronwyn Roberts, Esq.

Richard Rodriguez, Esq.

Thomas L. Saltonstall, Esq.

Courtney B. Scrubbs., Esq.

Reena Thadhani, Esq.

Richard L. Wise, Esq.

Administration and Finance Report

The Administration and Finance Division (ANF) is comprised of the Office of Human Resources, Fiscal/Budget, Information Technology (IT), Training, Clerk's Office, Administrative Services and Reception. These functions are overseen by the Chief of Administration and Finance.

Office of Human Resources

The ANF Division provides all aspects of personnel administration and human resource direction and support for the employees of MCAD via the Office of Human Resources. These services include payroll administration, benefits and leave administration, labor and employee relations, handling of ADA requests and accommodations, diversity considerations and opportunities for professional development as well as organizational development.

Fiscal/Budget

The ANF Division is tasked with all the financial and budgetary functions of the Commission. The unit prepares and submits the Commission's annual budget request to ANF and House and Senate Ways and Means.

The Division is also responsible for all of the Commission's procurement, contract management, accounts payable and revenue activities.

Information Technology

The ANF Division also oversees all of the Commission's IT and telephone functions. The Unit is responsible for desktop and application support at all of the Commission's offices. The Unit also procures and supports all of the Commission's hardware and software.

Clerk's Office, Administrative Services and Reception

The administrative Services unit consists of the Clerk's Office and Front Desk/Reception. This unit was created to pool the administrative resources of MCAD and create an efficient and effective administrative support for the departments of MCAD.

Personnel. In FY17 the Commission was successful in increasing its state appropriation and raising one of its retained revenue caps. Increased funding allowed the MCAD to hire a total of 20 staff members. Additionally, the MCAD hired Special Investigators through a contract to work exclusively on reducing the investigative backlog. This hiring effort produced immediate results.

The departure of the Chief of Operations and Finance in March of 2017 resulted in the reorganization of some of the ANF responsibilities. It is expected that the Commission will backfill this position in FY18 with slight changes to the Division's overall scope.

MCAD Budget for FY17

July 1, 2016 – June 30, 2017

Direct State Appropriation (Line Item 0940-0100)

State Appropriation Total \$ 3,048,657

Retained Revenue Collected (Line Item 0940-0101)

HUD \$ 897,386
 EEOC \$ 1,846,700
 Training fees \$31,587
 Audit/Copying fees \$ 2,442
 Attorneys' Fees \$ 0
Retained Revenue Total **\$ 2,778,115**

Training Program (Line Item 0940-0102)

Training Program Total \$ 225,305

**Total FY17 Appropriated Funds
And Collected Retained Revenue** **\$ 6,052,077**

Expenses

Payroll (\$ 5,245,752)
 Rent (\$ 113,805)
 Administrative Overhead (\$ 649,419)

Total FY16 Expenses **(\$ 6,008,976)**
Reversion to General Fund¹ **(\$ 43,101)**

MCAD Budget for FY18

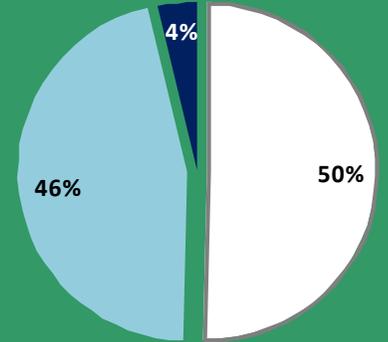
July 1, 2017 – June 30, 2018

State Appropriation (Line Item 0940-0100) \$ 3,207,196
 Retained Revenue (Line Item 0940-0101) \$ 3,500,000
 Training Program (Line Item 0940-0102) \$ 410,000

Total FY18 Budget² **\$ 7,117,196**

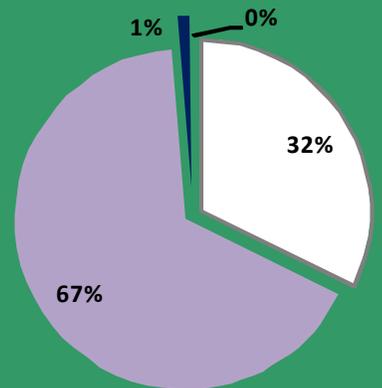
1. Funds earned in excess of the retained revenue caps as well as unspent funds are reverted back to the General Fund.
2. FY18 Budget includes all funds and retained revenue allocated in the FY18 Final Budget and all supplemental appropriations.

FY17 Funding & Revenue



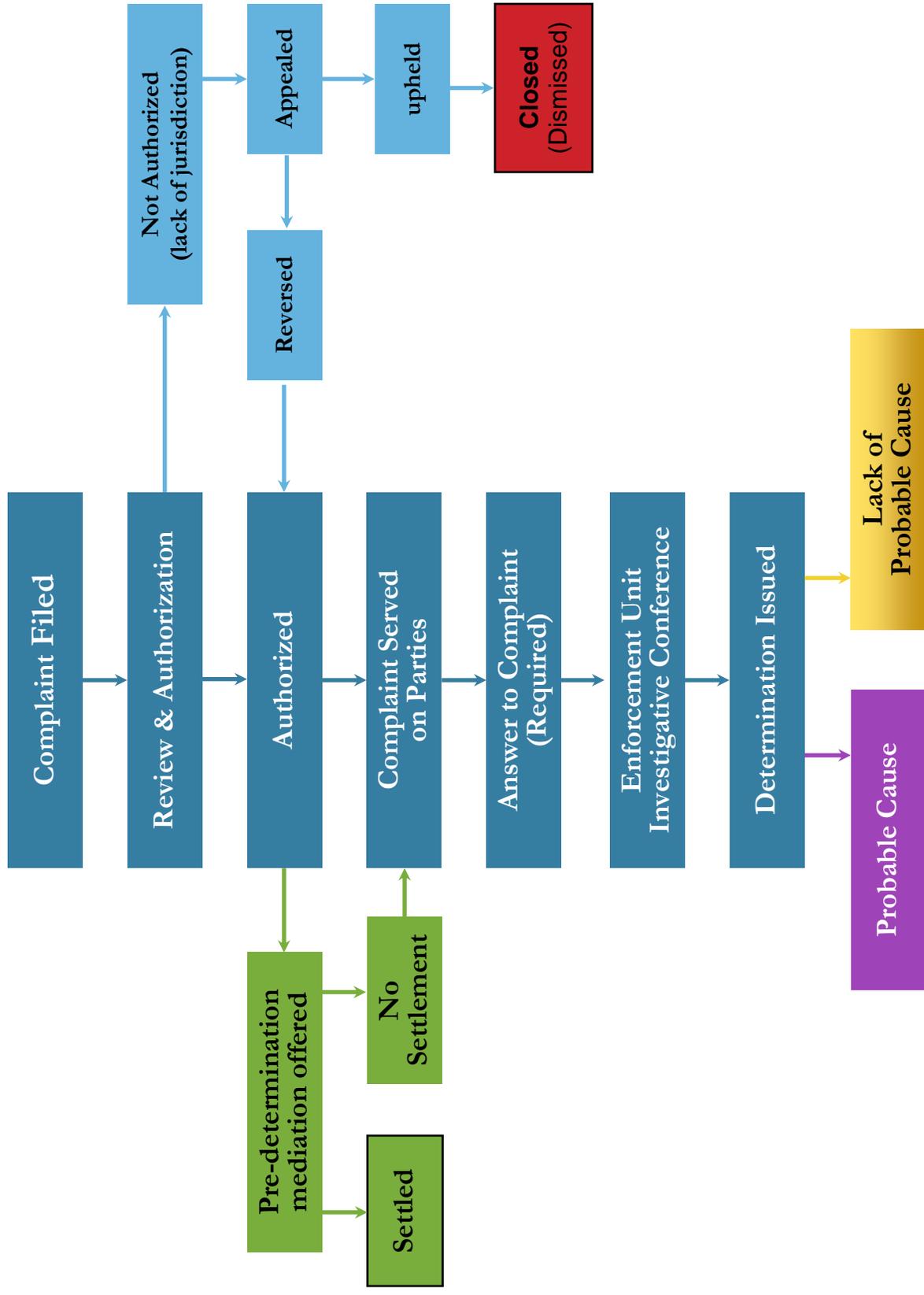
State Appropriation	\$3,048,657
Retained Revenue	\$2,778,115
Training	\$225,305
Total	\$6,052,077

Retained Revenue Sources

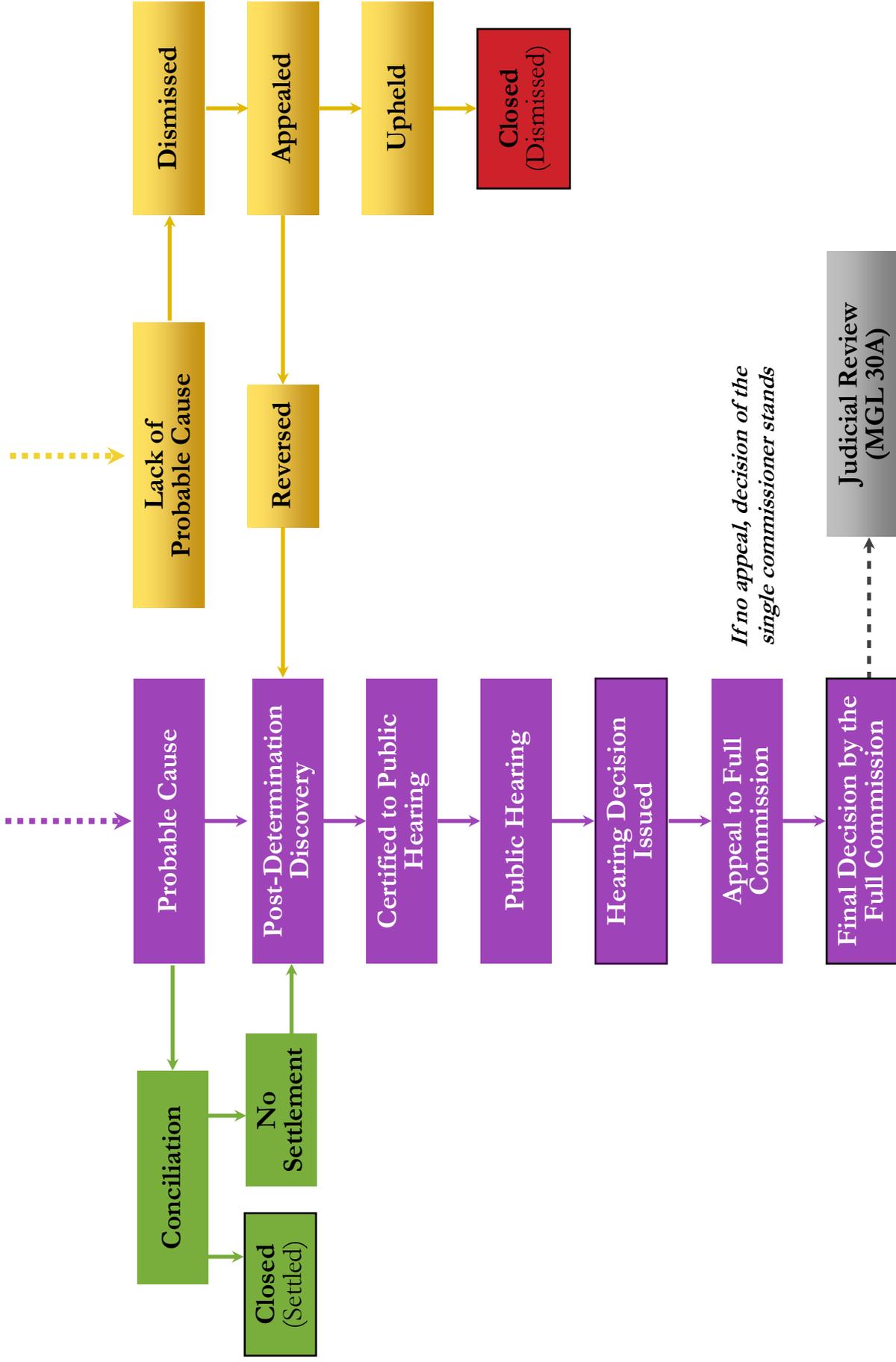


HUD	\$1,846,700
EEOC	\$897,386
Training Fees	\$31,587
Fees	\$2,442
Total	\$2,778,115

Flow Chart of MCAD Investigative Process



Flow Chart of MCAD Process After a Determination Has Been Issued



Division Highlights

Units

- ◆ Investigatory (4)
- ◆ Housing & Testing
- ◆ Alternative Dispute Resolution
- ◆ Training

Staffing

- ◆ Chief of Enforcement
- ◆ Investigators (25)
- ◆ Supervisors (6)
- ◆ Enforcement Advisors (6)
- ◆ Mediator-Conciliators (2)

General Statistics

- ◆ 5,000+ Consultations in 2017
- ◆ 6,000 Info Calls
- ◆ 2,951 New Complaints Filed
- ◆ 3,900 Cases Closed or Resolved
- ◆ 1,726 Backlog Cases Closed
- ◆ 378 Probable Cause Findings
- ◆ 80 Anti-Discrimination Trainings

Complaints Filed Annually



Inventory of Enforcement Cases



Enforcement Division Report

The MCAD Enforcement Division is responsible for investigating **Complaints of Discrimination** filed at the Commission. Enforcement Advisors on Investigators begin by reviewing and authorizing a Complaint for formal investigation by first determining whether the MCAD has statutory authority to investigate the allegations raised in the Complaint. If the MCAD determines it lacks jurisdiction, the Investigator recommends dismissing the complaint, otherwise the Commission proceeds with a formal investigation.

The formal investigation begins with the Respondent party(s) answering the allegations in the Complaint, which the Complainant has an opportunity to address in a Rebuttal

In many of these cases, an investigative conference is scheduled. The purpose of the investigative conference is to gather information from the parties and to discuss the possibility of voluntary resolution. If resolution is not reached, the investigator will continue to gather information by interviewing witnesses, obtaining documents, making site visits, in order to make a recommendation to the Investigating Commissioner regarding their findings.

The investigation concludes when the Investigating Commissioner issues a determination, called the "Investigative Disposition," explaining the legal reasoning of whether there is enough evidence to support a finding of **Probable Cause** (i.e., that it is more likely than not that unlawful discrimination occurred) or a finding of **Lack of Probable Cause**.

Cases Processed

The Division had an outstanding year in 2017, which was aided by an increase in its staff. In 2017, the Enforcement Division received 2,951 new complaint filings, slightly lower than the previous year's 3,082. Over the course of the year, the Division completed 2,717 substantive investigations, 378 of which received a Probable Cause finding.

Investigators successfully reduced the inventory of cases aged over 18-months awaiting a determination (known as the investigative "**backlog**") by 603 cases – a reduction of more than 60% – to just 357 cases. This effort was aided, in part, by the use of Special Investigators, hired on a contract-basis through November 2017, to assist with reducing the backlog inventory. The Division's inventory of complaints under investigation now rests at 2,877 cases, down 989 (25%) since the conclusion of 2016.

Additionally, for the second year in a row, the Division outperformed its annual work-share contract with the U.S. Equal Employment Opportunity Commission (EEOC), resulting in the EEOC increasing its contract with the Commission by 600 cases (20% increase) to be completed in the federal fiscal year.

ADR Unit

The Alternative Dispute Resolution (ADR) Unit, overseen by the Chief of Enforcement, was instrumental in settling complaints prior to the issuance of an Investigative Disposition. The ADR unit conducts early intervention efforts to facilitate settlement between parties before a determination is reached. ADR provides an opportunity for affirmative relief, such as anti-discrimination trainings, policy adjustments, and other victim-specific relief, such as granting of reasonable accommodations, monetary settlements, promotions, reinstatements, and positive letters of references, all of which help the Commission take steps towards eradicating discrimination in the Commonwealth. In 2017, the ADR Unit reported a 60% settlement rate in cases that participated in negotiations. A total of \$5,834,753 was obtained through these settlement efforts over the course of 356 cases.

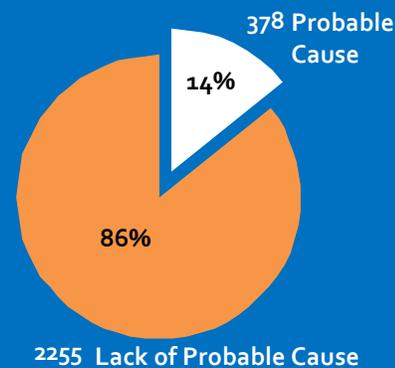
Training and Outreach Unit

Training and Outreach initiatives are a critical means to prevent and address discriminatory practices. The Training Unit, overseen by the Chief of Enforcement beginning in March 2017, provides internal and external discrimination prevention trainings, conducts outreach and recruitment efforts, administers the MCAD's robust internship program, and coordinates professional development opportunities for its staff. Employees attended civil rights conferences, continuing legal education programs, and training seminars.

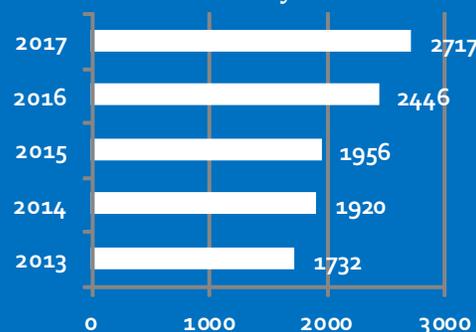
During 2017, the MCAD Training Unit conducted approximately 80 external discrimination prevention training sessions, attended by nearly 1,500 participants, covering the following topics: Workplace Discrimination; Sexual Harassment; Responding to Accommodation Requests; Conducting Internal Discrimination Investigations; Housing; and Public Accommodations. Additionally, the Commission convened its 18th annual curriculum for EEO Professionals, comprising of four half-day prerequisite sessions, two multi-day 'Train-the-Trainer' modules, and two Equal Employment Opportunity (EEO) practitioner modules, 'Responding to Accommodation Requests' and 'Conducting Internal Discrimination Complaint Investigations.'

The MCAD's internship program continued to flourish, with undergraduate, law student, graduate student and attorneys volunteer working at the Commission in 2017. Interns assisted with hundreds of investigations, conducted intake interviews with complainants, and supported the Language Access Program and other initiatives. In the summer of 2017, the Commission held its seasonal Brown Bag Lunch seminar series, for discussions on various relevant topics for interns and employees.

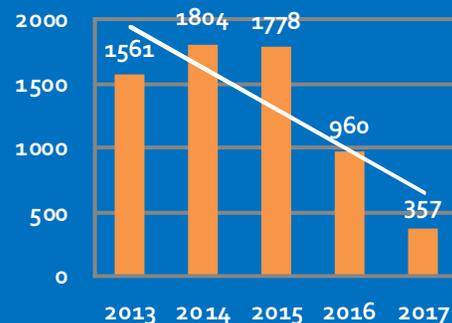
Substantive Determinations



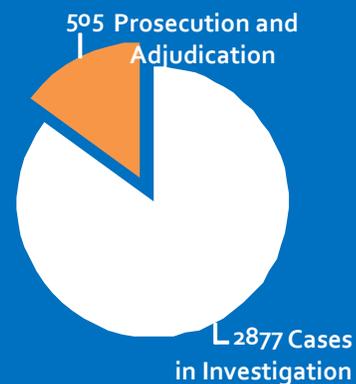
Substantive Determinations Annually



Inventory of Backlog Cases



All Active Cases

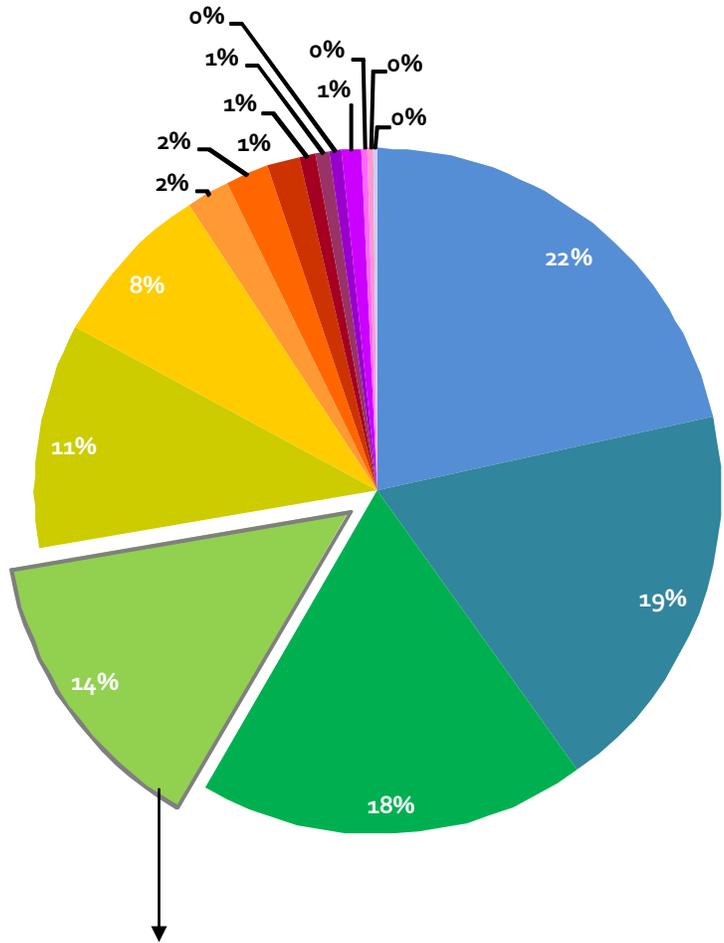


Complaints by Protected Category

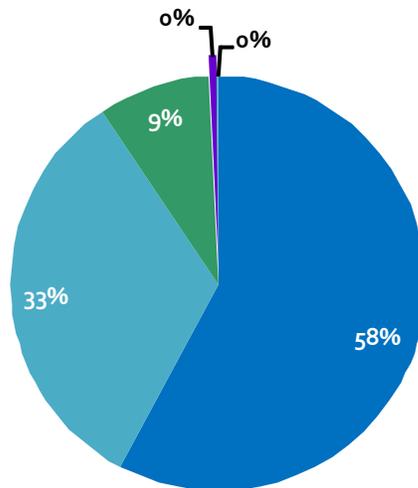
Disability	1,082
Race, Color	934
Retaliation	919
Sex	700
Age	536
National Origin	389
Creed	106
Sexual Orientation	100
Public Assistance	75
Arrest Record	40
No jurisdiction	35
Gender Identity	25
Other*	46
Children	18
Familial	11
Military Status	11

* Includes Lead Paint, Marital status, Veteran, Genetic information

Complaints by Protected Category



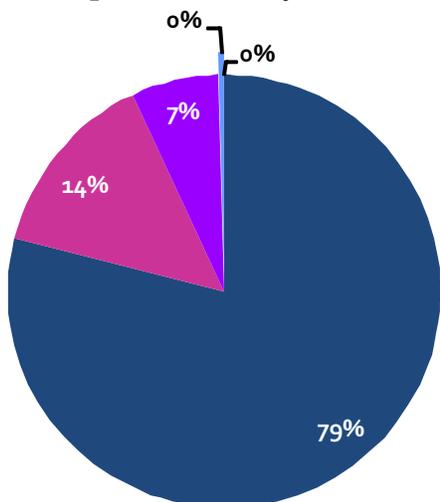
Closer Look: Sex Discrimination



Sex Discrimination Breakdown

Sex Discrimination	476
Sexual Harassment	269
Pregnancy	72
Parental Leave	5
Female Head of Household with Child	1

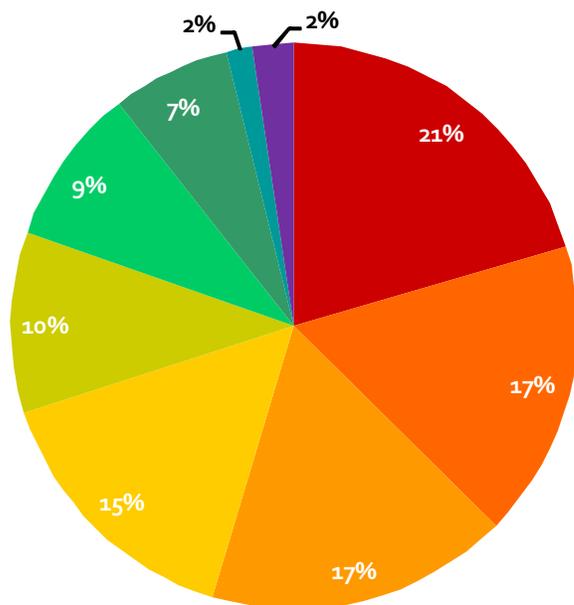
Complaints Filed by Jurisdiction



Complaints Filed by Jurisdiction

Employment	2,329
Housing	416
Public Accommodation	194
Education	10
Credit	2
Total	2,951

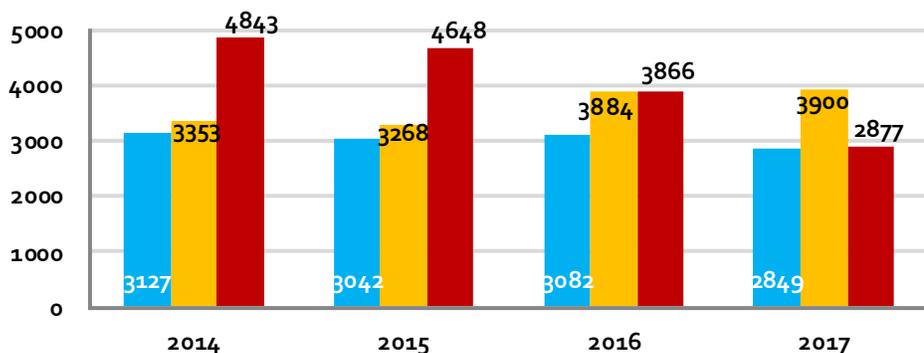
Administrative Closures



Administrative Closures

Chapter 478 (Removed to Court)	319
Pre-Determination Settlement	265
Withdrawn (Settled)	270
Conciliated	239
Withdrawn	162
Dismissed	141
Lack of Jurisdiction	104
Failure to Cooperate	23
Other*	38
Total	1,561

Filings, Closures, and Inventory Compared



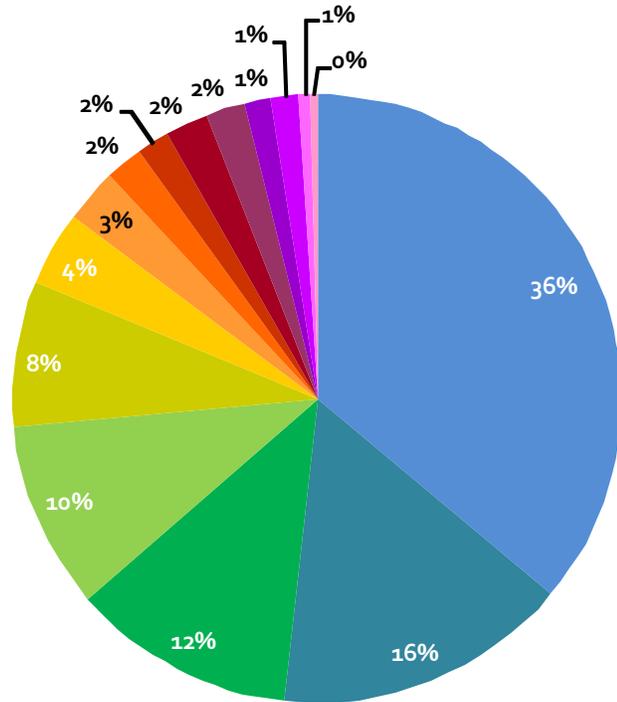
* Cases adjudicated at public hearing, Complainant failed to cooperate, Complainant missing, judicial review, or bankruptcy related proceeding

Filings, Closures and Inventory Compared

New Cases Filed
Closed Cases
Inventory of Enforcement Cases

Housing Investigations

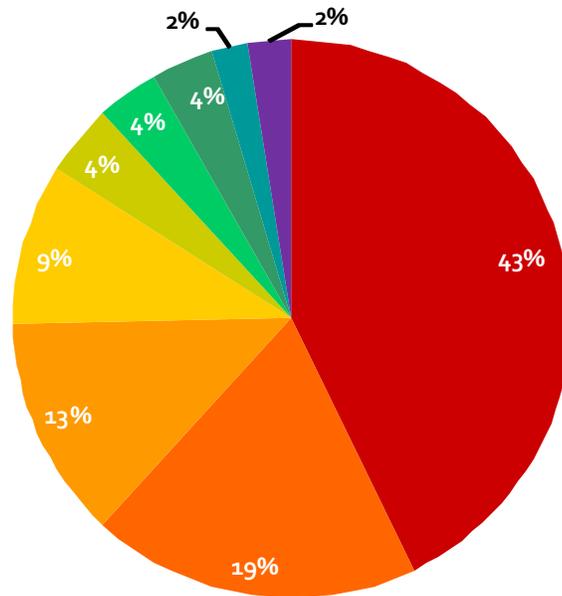
Housing Complaints by Protected Category



Housing Complaints by Protected Category

Disability	225
Race, Color	97
Public Assistance	74
Retaliation	62
National Origin	48
Sex	25
Children	18
Age	12
Familial	11
Sexual Orientation	14
Creed	13
Lead Paint	9
Marital Status	9
Gender Identity	4
Veteran	2

Housing Administrative Resolutions



Housing Administrative Closures

Pre-Determination Settlement	87
Withdrawn	37
Conciliated	25
Dismissed	18
Judicial Review	8
Withdrawn (Settled)	7
Lack of Jurisdiction	7
Chapter 478 (removed to court)	4
Other*	5

Total 194

* Includes Failure to Cooperate, Unable to Locate complainant, No Violation, Investigation not Authorized

Housing Substantive Determinations



Housing Determinations	
LOPC	195
PC	43
Total	238

EEOC Substantial Weight Report

EEOC Substantial Weight Cases are cases where original charges of discrimination are filed and investigated by the EEOC. After EEOC issues a filing, a request to dual file with MCAD may be made by the EEOC whereby after the EEOC investigation is completed, the MCAD reviews it for compliance with State law and may grant substantial weight in accordance with the EEOC's Findings.

EEOC Cases Filed	419
Substantive Completions	35
Active EEOC Inventory	1,088

Breakdown of EEOC Administrative Resolutions

Withdrawn With Settlement	15
Withdrawn	10
Chapter 478 (removed to court)	8
Dismissed	7

Breakdown of EEOC Complaints by Protected Category

Disability	94
Other	88
Sex	85
Age	71
Race, Color	68
National Origin	33
Creed	16
Retaliation	2
Sexual Orientation	2
Arrest Record	1
Genetic Information	1

LEGAL DIVISION REPORT

The Legal Division provides legal services to the Commission to achieve the Commission's mission to eradicate discrimination through enforcement of the Commonwealth's anti-discrimination laws. It supports the Commission's objectives through prosecution of administrative proceedings, litigation and appellate practice in Massachusetts courts. It also provides legal and procedural advice to the Commission, including advice concerning enforcement, investigations, public records requests and proposed legislation. The Legal Division is comprised of the General Counsel, Deputy General Counsel hired in 2017, and six Commission Counsel.

The Legal Division is responsible for defense of all final agency decisions when judicial review is sought in Superior Court and/or the State's appellate courts pursuant to M.G.L. c. 30A, § 14(7). The Legal Division also defends challenges to the Commission's jurisdiction and procedure and files enforcement actions to obtain compliance with the Commission's final orders. It also develops friend of court (*amicus*) briefs on important issues arising under the anti-discrimination laws in cases litigated by private parties in the appellate courts, the Legal Division provides legal support for the Commissioners by considering and developing proposed legislation and regulations. It also develops publications for the Commission and public, providing guidance and responses to frequently asked questions (FAQs), concerning new and evolving areas of the laws enforced by the Commission. Members of the Legal Division also participate in outreach and training efforts to educate staff and the public, including responding to Attorney of the Day inquiries. The General Counsel's Office also oversees the Full Commission review process. The Legal Division also works with the Attorney General's Office when appropriate to defend the agency and its enforcement powers in litigation matters.

Commission Counsel Activity in 2017

Commission Counsel evaluate and prosecute complaints in which the Investigating Commissioner has found Probable Cause, prosecute Commission-initiated complaints, participate in conciliation proceedings, and hear and consider Lack of Probable Cause (LOPC) appeals in order to provide recommendations to the Investigating Commissioners regarding their findings.

The General Counsel assigns Commission Counsel cases to prosecute after an Investigating Commissioner issues a Probable Cause finding. Once assigned to a case, Commission Counsel proceed in the public interest to eradicate discriminatory practices by obtaining affirmative relief and victim-specific relief for Complainants who are not represented by private legal counsel (*pro se* complainants). Of the 378 cases with a Probable Cause determination in 2017, the Legal Division was assigned to prosecute 176 new cases filed by *pro se* complainants. This was an increase from the number of cases assigned in 2016, when 169 were assigned. In 2017, Commission Counsel remained assigned to prosecute the caseload of 193 cases which existed as of December 31, 2016.

176 Cases Assigned to
Commission Counsel (46%)

202 Cases Represented by
Private Counsel (54%)

Noteworthy

In 2017, Commission Counsel resolved a total of 98 discrimination cases through conciliation and negotiation, recovering \$1,591,530 in victim specific relief, affirmative relief in the form of antidiscrimination training and policy reviews. The following is a description of some of the representative matters which were resolved by settlement this year, classified by the type of alleged discrimination.

Housing Cases

In a complaint alleging that Respondent mortgage lender required a pregnant applicant to provide proof from her employer of her intended return to employment after maternity leave, and charged Complainants a higher interest rate than similarly-situated, non-pregnant mortgage applicants, Respondent agreed to pay her \$15,000 and to obtain training for its employees on the fair housing laws of the Commonwealth. [*Middlesex County*]

In a complaint alleging that Respondents evicted Complainants upon learning of Complainant's pregnancy, Respondent agreed to pay Complainants \$16,000, receive training on the fair housing laws of the Commonwealth, and publish nondiscriminatory advertisements for one year. [*Middlesex County*]

In a case alleging failure of Respondents to permit a Complainant with a disability to have a service dog in her home and subjecting it to unlawful breed and weight restrictions, Respondents agreed to pay Complainant \$10,000, receive training on the fair housing laws of the Commonwealth, and to adopt and post a reasonable accommodation policy for its tenants in a common area. [*Middlesex County*]

Employment Cases

An employee alleged that she was terminated by a school district based on her disability. The employer resolved the case for \$30,000 and disability discrimination training for supervisory staff. [*Berkshire County*]

An employee alleged that her employer discriminated against her on the basis of her national origin, and retaliated against her for internally raising allegations of discrimination. The employer agreed to resolve the case with a settlement of \$45,750. [*Berkshire County*]

In a complaint alleging that Complainant was sexually harassed and that Respondent failed to adequately address her complaints, Respondent agreed to pay Complainant \$20,000, to send its Human Resources Director to MCAD training, have the Director train its managers and employees on sexual harassment, and to subject its EEO policy to MCAD review. [*Brewster County*]

A fraternal organization, whose officers allegedly harassed a female bartender, agreed to pay \$5,000 and have its elected and appointed officials participate in annual anti-sexual harassment training through 2019. [*Bristol County*]

Respondent agreed to pay \$60,000 in settlement of a complaint in which an employee, suffering from pregnancy related complications, was terminated from employment at the end of a 12 week FMLA medical leave. The termination occurred with no consideration of the job restoration rights provided under Massachusetts Parental Leave Act which were triggered by the subsequent birth of the employee's child. [*Essex County*]

Complainant requested a leave of absence from work due to her disabilities. Respondent terminated Complainant, alleging that the duration of the requested leave was unreasonable. The matter settled for \$20,000 and Respondent agreed to obtain anti-discrimination training for all managers of the location at which Complainant was employed and to implement a Commission-reviewed employee manual. [*Hampden County*]

Complainant alleged that the owner of the companies that employed Complainant routinely made offensive and sexually explicit comments and gestures related to the time Complainant spent in prison and his perceived homosexuality. Complainant's employer admitted much of the alleged conduct, but asserted that this was "locker room" humor and that Complainant was a willing participant. The matter settled for \$14,000. The owner of the Respondent Companies agreed to attend anti-discrimination training and to implement a Commission-reviewed sexual harassment policy. [*Hampden County*]

An employee alleged that her employer subjected her to sexual harassment and sex discrimination in the workplace in the form of sexual comments, propositions, and sex-based disparagement and treatment. Respondent agreed to pay \$30,000, obtain anti-discrimination and harassment training for the business owner, submit its anti-discrimination/harassment policies for Commission review and revision, and to report all claims or knowledge of alleged discrimination or harassment to the Commission for a period of three years. [*Hampden County*]

An employee alleged that after being injured on the job and taking leave, she returned to work with a request for temporary work restrictions as an accommodation, but the employer failed to allow the requested accommodation and failed to engage in an interactive process with the employee; instead terminating her employment upon receipt of the request, unilaterally determining it to be unreasonable. The parties reached a settlement for payment by Respondent of \$85,000, completion of anti-discrimination training for a human resources manager, and submission of Respondent's anti-discrimination policies to the Commission for review and revision. [*Middlesex County*]

A restaurant agreed to pay \$8,000 and to send all of the employees at the subject location to anti-discrimination training after a server was allegedly sexually harassed by the restaurant's chef and management failed to address her complaints. [*Middlesex County*]

Respondent agreed to pay \$15,000 to an HVAC technician who alleged that his employment was terminated in retaliation for his complaints about a co-worker's anti-Semitic comments. [*Norfolk County*]

In a complaint alleging that a large employer discriminated on the basis of disability when it laid off Complainant shortly after taking a medical leave for a workplace injury, Respondent agreed to pay Complainant \$50,000, and to provide fair employment training for department managers. [*Norfolk County*]

A restaurant and server agreed to settle a disability discrimination complaint for \$25,000. Server alleged that restaurant failed to provide a reasonable accommodation despite the restaurant's acknowledgment that adjustments to the work environment were necessary in order for the employee to perform the essential functions of the job. [*Suffolk County*]

Two employees of a security company brought separate claims that included allegations of sexual harassment, age discrimination and retaliation. Respondent

resolved these cases with a combined settlement of \$80,000, one-on-one training for a manager and sent a human resources official to a three day training on conducting internal investigations. [*Suffolk County / Middlesex County*]

An employee alleged that her employer discriminated against her by failing to accommodate her religion. The employer resolved the matter with a settlement of \$25,000 and religious accommodation training for its human resources representatives. [*Suffolk County*]

A contract employee for an international healthcare company alleged that his employer failed to extend his employment based on his race (African American). Respondent agreed to pay Complainant \$33,500, in settlement of the claim. [*Suffolk County*]

A long-term employee alleged that after taking leave for cancer treatment which resulted in a permanent mobility disability, she returned to work requesting certain accommodations to permit safer and equal access to her workplace, but the employer failed to discuss or evaluate the requested accommodations and shortly thereafter laid her off. It was alleged that subsequently the employer paid another employee to perform Complainant's former job duties and eventually hired a replacement, without offering her the available hours or considering her for re-hire. The parties reached a settlement for payment by Respondent of \$35,000, completion of anti-discrimination training for all supervisory and management employees, and submission of Respondent's anti-discrimination policies to the Commission for review and revision. [*Worcester County*]

Public Accommodation Cases

Complainant, a disabled veteran, utilizes a service dog. Complainant alleged that he was refused service and instructed to leave the premises by the employee working the counter of a convenience store due to being accompanied by his service dog. Respondent paid \$5,000 to complainant, obtained anti-discrimination training for all location employees, implemented a policy prohibiting discrimination against customers and posted a Customer Notice of Nondiscrimination at its business entrance. [*Essex County*]

Complainant, who identifies as a transgender woman, attended a bridal show with her male partner where Respondent Company was showcasing its products and services. The representative of Respondent Company would not allow Complainant or her partner to book a party with the company, to participate in a raffle, or to spin the prize wheel. The Respondent Company business cards stated that parties and services were "EXCLUSIVELY for women 18 and over!" Although Respondent Company was no longer actively engaged in the business at the time of settlement. The company agreed that if its owners re-engage in the same or similar business in Massachusetts, then the new company will provide equal access to services and products to individuals regardless of sex and all representatives working in Massachusetts will attend MCAD-approved discrimination training. Respondent Company provided a total of \$13,000 to Complainant and her partner in settlement. [*Hampden County*]

A restaurant customer alleged that she and her family received unequal service based on their race/color and that the restaurant failed to properly investigate her formal complaint concerning the incident. Respondent, a national restaurant chain, agreed to pay \$8,000, obtain anti-discrimination training for all location employees, and implement a national policy prohibiting discrimination against customers. [*Worcester County*]

Public Hearings

Commission Counsel prepare and prosecute cases at public hearings through discovery, motion practice, argument, witness preparation and examination. The attorneys at public hearing, including Commission Counsel, also prepare proposed findings and conclusions of law following the public hearing.

MCAD and Peter Joyce v. CSX Transportation, 11BEM00505 (May 31, 2017)

In 2017, the Hearing Officer issued a favorable decision on the public hearing held in September 2016. Mr. Joyce had a successful career in the railroad industry spanning thirty-two years, multiple railroads, and several different jobs. In 2010, Mr. Joyce became a freight conductor with railroad CSX. Due to certain disabilities, Mr. Joyce had difficulty with computerized tasks, and required additional training and time to learn them. When Mr. Joyce told CSX of his disabilities and repeatedly requested training on a computerized device used in his work, CSX allegedly denied him the training needed. It sometimes took Mr. Joyce significant time, requiring overtime, to complete his administrative duties. CSX cited him for violating its overtime policies and removed him from service. Mr. Joyce never returned to employment at CSX. The Hearing Officer issued a decision finding that CSX discriminated against Mr. Joyce on the basis of his disabilities by failing to provide him necessary training and for disciplining him for taking extra time to complete his administrative work. The Hearing Officer awarded Mr. Joyce lost wages of over \$224,000, and \$100,000 for emotional distress damages. The Hearing Officer's decision is more fully described later in this Annual Report (Hearing Division Report). CSX filed an appeal to the Full Commission.

Robar v. International Longshoremen's Union 1413-1465 and Joseph Fortes

MCAD Docket Nos. 09-NEM-03054 and 11-NEM-02713

Commission Counsel prosecuted a three day sex discrimination matter in 2017 against the International Longshoremen's Union 1413-1465 ("ILA") and the former president of the ILA, Joseph Fortes. The ILA is a labor union with membership consisting of longshoremen working at the Maritime Terminal and Bridge Terminal in New Bedford and State Pier in Fall River. The ILA selects workers for dock jobs and from its inception; the ILA has had exclusively male membership. For several years, the Complainant, who is female, worked on the fish boats at the New Bedford docks as a non-union fish wrapper/stamper, an assignment made primarily to females. As the number of fish boats entering the New Bedford docks began to decline, boats carrying fruit cargo began to increase. Fruit boats do not have wrapper/stamper assignments, and instead, primarily require forklift operators. Complainant had forklift experience and had obtained a forklift certificate from Maritime Terminal. When Complainant sought placement on the fruit boats as a forklift operator, she was bypassed for non-union males, some of whom had not obtained a forklift certificate. The Hearing Officer's decision is anticipated to be issued in early 2018.

Mass. Superior Court Activity

The Legal Division defends the Commission's decisions and procedures in the Massachusetts courts. These cases include M.G.L. 30A administrative appeals and challenges to the Commission's investigative and enforcement authority. During 2017, Commission Counsel were assigned eleven new Superior Court cases to defend. The following report describes some of the activity in cases against the Commission being defended in the Massachusetts Superior Courts.

Defense of Full Commission Decisions (M.G.L. c.30A cases)

C-Worcester v. MCAD & Tatum/Harris, Worcester, Superior Court; No. 1585CV01263.

Following the Full Commission decision of June of 2015 addressing the Complainants' disparate impact claims, the Respondent filed this M.G.L. c. 30A petition for review. This matter was subsequently consolidated with two other cases, seeking judicial review of the prior Full Commission decision addressing Complainants' claims of disparate treatment (1185CV02497, 1185CM02500). In November 2016, the parties each filed Motions for Judgment on the Pleadings. The matter was argued in March 2017. The court's decision is anticipated to be issued in 2018.

Mitch's Marina v. MCAD & another, Hampshire County Superior Court No. 1680CV00122

The Superior Court (Rupp, J.) affirmed the Full Commission decision holding that Mitch's Marina had engaged in disability discrimination in a place of public accommodation by failing to accommodate a long-term patron with a parking space near her seasonal campsite. While an appeal initiated by Mitch's Marina was pending, the parties resolved the victim-specific award and attorneys' fees. Mitch's Marina also agreed to pay a civil penalty of \$3,500. The parties subsequently stipulated to the dismissal of the matter.

Stefani v. MCAD, et al., Suffolk Superior Court; No. 1784CV00662

The plaintiff, Kathleen Stefani, filed an action pursuant to M.G.L. c. 30A arguing that the MCAD's Full Commission decision affirming the Hearing Officer's dismissal of her complaint was not supported by the substantial evidence. Major Stefani alleged in a sex discrimination case before the MCAD that her former employer, the State Police, discriminatorily removed her from the rank of Major and subjected her to different terms and conditions based on gender. The MCAD's final decision and order dismissed the case, concluding that the Colonel's decision to remove Major Stefani from the rank of Major was not motivated by gender bias, but instead, due to the Colonel's concern that Major Stefani was actively seeking to replace him in the position of Colonel. Commission Counsel defended the MCAD's decision in Superior Court on the grounds that the decision was supported by the substantial evidence. After oral argument, the matter is under advisement.

Challenges to Lack of Probable Cause Determinations and Preliminary Hearings

Although M.G.L. c.151B provides that the outcome of Investigative Dispositions (e.g. LOPC determinations) and preliminary hearings challenging these dispositions are not subject to judicial review, disappointed Complainants persist in filing Superior Court complaints against the commission seeking review. In two 2017 cases filed against the Commission in Massachusetts Superior Court, Commission Counsel successfully explained (with supporting case law) to plaintiff's attorney that there is no legal right to judicial review of an investigative disposition or its affirmation at a preliminary hearing. In both cases, the plaintiffs voluntarily withdrew their complaints. In other cases, attorneys or pro se plaintiffs have been unwilling to withdraw their complaints. The following describes some of such cases defended by Commission Counsel. The Superior Court has allowed the Commission's motion to dismiss in every decided case.

Emmanuel J. Eustache v. MCAD, Tufts University, Tufts University School of Dental Medicine, Robert L. Aronson, and Stephen L. Nasson,

Suffolk County Superior Court, Civil Action No. 1784CV01448

The Commission issued an Investigative Disposition with a Split decision in this matter. Complainant appealed claims that were issued a Lack of Probable Cause determination (LOPC) to a preliminary hearing before the MCAD. The MCAD affirmed the LOPC and the Complainant sought relief in Superior Court. The Complainant initially argued that he was entitled to relief pursuant to M.G.L. c. 30A and a writ of certiorari, but Complainant's counsel eventually acknowledged that there was no cause of action pursuant to c. 30A and amended the complaint to remove the claim. The Complainant continued to pursue judicial review under a theory of writ of certiorari. The MCAD moved to dismiss, arguing that judicial review was also unavailable under a writ of certiorari. The court (Leighton, J.) granted the MCAD's motion to dismiss on October 24, 2017. The court recognized that there was no standing to proceed with certiorari. Complainant filed a Notice of Appeal to the Massachusetts Appeals Court.

Stephen Gill v. MCAD, Suffolk County Superior Court, Civil Action No. 1684CV03205

The Commission issued a LOPC determination in this matter. Complainant appealed the LOPC in a preliminary hearing before the MCAD. The MCAD affirmed the LOPC and the Complainant sought relief in Superior Court. The Complainant argued that he was entitled to relief pursuant to M.G.L. c. 30A. The court (Wilkins, J.) granted the MCAD's motion to dismiss on May 3, 2017, recognizing that there is no c.30A relief available to the denial of a LOPC appeal.

Gerard D. Grandoit v. MCAD, et al.

An individual filed three separate Complaints with the Commission: two alleging unlawful discrimination by housing providers, and another alleging unlawful discrimination in a place of public accommodation. All three were dismissed by the Commission for a lack of probable cause. Complainant appealed the findings and, after preliminary hearings before the Commission, the findings were affirmed. Complainant then filed three separate actions in Superior Court seeking judicial review under M.G.L. c. 30A. In each the Commission sought dismissal based on a lack of jurisdiction and the failure to state a claim for relief due to the unavailability of judicial review for an investigatory dismissal by the Commission.

In Suffolk County Superior Court Case No. 1784CV03173, the Commission's motion to dismiss was allowed by the Court (Giles, J.) on November 22, 2017. Complainant appealed and the matter is pending before the Massachusetts Appeals Court.

In Suffolk County Superior Court Case No. 1784CV03181, the Commission filed a motion to dismiss, but at present the Commission's motion has not been ruled upon.

In Suffolk County Superior Court Case No. 1784CV03061, the Commission has served a motion to dismiss, which will be filed in the near future in accordance with the procedural rules.

Sherma M. Simpson v. MCAD, City of Boston, and Dion Irish, Suffolk County Superior Court, Civil Action No. 1784CV03119

The Commission issued a LOPC determination in this matter. Complainant appealed the LOPC in a preliminary hearing before the MCAD. The MCAD affirmed the LOPC and the Complainant sought relief in Superior Court. The Complainant argued that she was entitled to relief pursuant to M.G.L. c. 30A. The court (Kazanjian, J.) granted the MCAD's motion to dismiss on November 8, 2017, agreeing that there is no c.30A relief available to the LOPC determination

Rosalinda Zaragoza v. MCAD, Plymouth County Superior Court, No. 1783CV00462

An individual filed a Complaint with the Commission alleging unlawful discrimination in her place of employment. After an investigation, the Commission issued a LOPC determination. Complainant appealed the finding and, after a preliminary hearing before the Commission, the finding was affirmed. Complainant filed an action in Superior Court seeking judicial review under M.G.L. c. 30A and c. 151B, § 6. The Commission's motion to dismiss based on the lack of jurisdiction due to the unavailability of judicial review of an investigatory determination by the Commission was allowed by the Superior Court (Cosgrove, J.) on June 20, 2017.

Enforcement of Commission Orders

The Legal Division provides support for enforcement of the Commission's decisions and orders. In 2017, two new cases relating to enforcement were litigated.

Middlesex Sheriff's Office v. MCAD, Middlesex County Superior Court No. 1781

MSO sought declaratory and certiorari relief challenging a Hearing Officer's discovery order ordering the deposition of the Middlesex Sheriff in the administrative hearing pending at the MCAD. After MCAD filed a Motion to Dismiss and a Counterclaim for Enforcement of the Hearing Officer's Order, the Superior Court dismissed the Complaint on grounds of mootness on October 2, 2017. Oral argument was held on the Counterclaim on October 5, 2017, during which the Court allowed intervention by the Complainant in the MCAD administrative action, and ordered additional briefing. After further argument, on November 10, 2017, the court (Karp, J.) granted the Commission's motion for judgment on the pleadings and ordered that Sheriff Koutoujian obey the Commission's Order that he be deposed. The court concluded that the MCAD Hearing Officer did not abuse her discretion in permitting the Sheriff's deposition, recognizing her familiarity with the issues and specialized knowledge of MCAD proceedings.

MCAD v. X-treme Silkscreen & Design, Inc., et al., Essex County Superior Court; No. 17-361D

Complainant Carlos Santos and the MCAD prevailed in a disability discrimination case prosecuted by Commission Counsel. In September, 2016, the Hearing Officer issued a Decision and Order finding liability and awarding \$10,000 in emotional distress damages plus statutory interest. Respondents did not appeal the decision to the Full Commission, and Commission Counsel was awarded attorneys' fees and costs payable to the Commonwealth. On March 17, 2017, Commission Counsel filed an enforcement action to enforce the final decision and orders of the MCAD. In July 2017, the Superior Court (Wall, J.) issued two judgments against Respondents, the first for \$16,246 plus post-judgment interest, owed to the Complainant; and the second for \$20,669.37 plus post-judgment interest, owed to the Commonwealth.

Defense of Commission Procedures

J. Whitfield Larrabee v. MCAD, Suffolk Superior Court No. 1584CV02725. In this action alleging breach of contract and violation of the Massachusetts Public Records Act, M.G.L. c. 66, §10, Plaintiff sought damages, a preliminary and permanent injunction, a writ of mandamus, and other legal and equitable relief. The court (Connolly, J.) granted MCAD's Motion for Summary Judgment on August 18, 2017,

recognizing that MCAD's practice to release complaints and related information only after the close of its investigation is consistent with the public records act, common law and the constitution. Plaintiff filed a Notice of Appeal on August 31, 2017. The case is being handled by the Attorney General's Office with the assistance of General Counsel and Commission Counsel.

Alexandre McCarroll v. MCAD, Hampden County Superior Court, No. 1779CV00429

An individual resolved his underlying MCAD charge of discrimination against his landlord for unlawful eviction at a pre-determination mediation. He then brought an action in Superior Court alleging that the Commission committed fraud in its handling of the charge of discrimination. Plaintiff sought equitable and compensatory relief. A motion to dismiss based upon procedural failures as well as the claim being barred by the doctrine of sovereign immunity, M.G.L. c. 258, § 10(c), was allowed by the Superior Court on September 22, 2017. The case was handled by the Attorney General's Office with the assistance of Commission Counsel.

U.S. District Court

The Massachusetts Attorney General's Office defended the Commission in litigation in the federal courts in 2017 challenging the Commission's procedures and determinations.

Henton v. MCAD, et al., U.S. District Court No. 17CV40003-T5H

The plaintiff filed an employment discrimination charge at the MCAD against the City of Worcester and others in 2013. The Commission issued an investigative determination finding Lack of Probable Cause, which was affirmed after a preliminary hearing. The plaintiff, in this 2017 federal lawsuit, claimed that this determination was arbitrary and a violation of his civil rights. The Commission's motion to dismiss based upon sovereign immunity and lack of jurisdiction was allowed by the U.S. District Court on May 26, 2017 (Hillman, D.J.). The case was handled by the Attorney General's Office with the assistance of General Counsel.

MA Appeals Court

Adrien v. MCAD, Appeals Court No. 2016-P-1127

In 2017, the MCAD continued to defend a case in which the appellant argued that he was entitled to a writ of certiorari or declaratory judgment. The appellant was an MCAD complainant who sought judicial review of an LOPC that the MCAD had affirmed in a preliminary hearing. The lower court granted the MCAD's motion to dismiss. On appeal, the MCAD argued that a writ of certiorari is not available to review an LOPC determination because extraordinary relief in the nature of certiorari is not available where complainant had an adequate remedy in the private right of action available pursuant to M.G.L. c. 151B, 9. The MCAD also argued that the superior court properly dismissed the declaratory judgment on the grounds that the complainant's disagreement with the MCAD's entry of an LOPC does not create a justiciable controversy required for relief under by M.G.L. c. 231A, § 1. The MCAD briefed and argued this case before the Appeals Court. At oral argument, the appellant withdrew the matter, and the appeal was dismissed.

Massasoit Industrial Corp., v. MCAD & another, 91 Mass.App.Ct. 208 (March 23, 2017)

The Massachusetts Appeals Court upheld an MCAD final decision and order finding that a part-time custodian, with a “spotless” 20 year employment history, suffered age and disability discrimination when he was terminated from employment. The court determined that “Notably, the hearing officer found that while Massasoit employed older individuals, it drew the line at someone in his mid-seventies who was confronting sequential health issues. [The Hearing Officer] also found, based on her credibility determinations of the conflicting testimony presented, that the reason given by Massasoit for the termination -- no call/no show -- was a pretext.” The court also gave consideration to the haste in firing the employee and the lack of any interactive dialog.

In this decision, the Appeals Court further recognized the MCAD’s liberal interpretation regarding illegal disability discrimination when an employer **regards** an employee as disabled, whether or not the employee actually has a substantial impairment of a major life activity. The court further rejected Massasoit’s argument that the employee waived a perceived disability claim based upon a hyper technical reading of the MCAD complaint - instead finding that the MCAD complaint was sufficient to place Massasoit on notice of the employee’s claims.

MA Supreme Judicial Court – Amicus Briefs

The Massachusetts Supreme Judicial Court invites amicus (friend of court) briefs from the Massachusetts Commission Against Discrimination and other interested entities concerning Massachusetts anti-discrimination law. In response to such inquiries, the Legal Division considers the request, provides recommendations to the Commissioners and when appropriate, prepares and files amicus briefs to provide the Commission’s opinion regarding the issue.

Sean Gannon v. City of Boston, 476 Mass. 786 (2017)

The MCAD submitted an amicus brief in this matter in 2016. In 2017, the Supreme Judicial Court (SJC) reversed the lower court and agreed with the Commission’s amicus position that the burden shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) should not apply in cases where an employer explicitly relies on the employee’s impairment in making an adverse employment decision. The SJC concluded that even if the police department relied on its belief that the officer could no longer safely patrol the streets because of his perceived handicap, summary judgment is not appropriate where there are facts in dispute as to whether the officer is a qualified handicapped person capable of performing the full duties of a patrol officer without posing an unacceptably significant risk of serious injury to himself or others. The SJC concluded that summary judgment was not proper and remanded the case for a trial.

The SJC held that at trial, the employer must offer evidence showing an increased risk of serious injury that is so significant that it cannot reasonably be deemed acceptable by an employer. Where the employer has satisfied this burden of production, the employee must prove by a preponderance of the evidence that he or she is capable of performing the essential functions of the job without posing an unacceptably significant risk of serious injury to the employee or others.

Cristina Barbuto v. Advantage Sales & Marketing, LLC, et al., 477 Mass. 456 (2017)

The Commission submitted an amicus brief on March 7, 2017, in response to a solicitation by the SJC on the question “[w]hether the termination of an employee’s employment based on her lawful use of medical marijuana outside the workplace violates G. L. c. 151B, § 4.” In this case, an employee was terminated after failing a pre-employment drug test based on her off-site use of marijuana to treat a disability, for which use she requested an accommodation in the form of an exception to the employer’s drug testing policy. Her claims for disability discrimination under M.G.L. c. 151B, as well as other claims, were dismissed by the lower court, and the dismissal was appealed directly to the SJC. The Commission’s amicus brief recognized that the termination of an individual’s employment based on the lawful use of medical marijuana outside the workplace to treat a disability, or the failure of an employer to permit or consider the off-site use of medical marijuana as an accommodation may violate M.G.L. c. 151B, § 4. The Commission explained that c. 151B requires an individualized analysis of the facts to evaluate whether the elements of a claim are met in each particular case, and there are no lawful medical treatments that are per se unreasonable and never require accommodation. Under Massachusetts’ anti-discrimination law, an employer is obligated to permit an accommodation which allows qualified disabled individuals equal access to employment that is reasonable and does not pose an undue hardship to its business, including modification of misconduct or drug policies.

On July 17, 2017, the SJC issued an opinion largely in agreement with the position of the Commission. Giving “substantial deference” to the Commission’s disability guidelines interpreting c. 151B and appropriately construing that law “liberally for the accomplishment of its purposes,” the Court held that an employee using medical marijuana to treat a disability may proceed with a discrimination claim after being terminated based on her off-site use. It determined that, under Massachusetts law, marijuana use by a qualifying patient is as lawful as any other prescribed medication, and an employer’s exception to its drug policy to permit its off-site use is a facially reasonable accommodation. The Court acknowledged that in certain circumstances an employer may be able to show that such use would pose an undue hardship to its business (including the possibility that permitting such use may bring the employer into violation of federal law or contracts), and noted that an interactive process to determine whether there was an available reasonable alternative is required, the failure

of which alone is sufficient to support a claim of disability discrimination if the employee proves that a reasonable accommodation existed that would have enabled her to perform the essential functions of her job.

HEARINGS DIVISION REPORT

The Hearings Unit is comprised of three Hearing Officers and the three Commissioners. In addition to holding public hearings, the Hearings Unit also conducts pre-hearing conferences, mediations and conciliations, certification conferences, and rules on discovery matters and motions. In 2017 the Hearings Unit scheduled 52 public hearings. Of the 52 cases scheduled, hearings were held in 11 cases and 21 cases settled prior to the hearing. The remaining 20 cases were continued or dismissed. The Hearings Unit scheduled 101 pre-hearing conferences. Of that number, 46 pre-hearing conferences were held, and 12 cases settled prior to the conference. The remaining 41 cases were continued or dismissed and 3 were withdrawn. The Hearings Unit conducted some 20 mediations or conciliations, the vast majority of which resulted in significant settlements for Complainants. In 2017 the Hearings Unit issued 15 hearing decisions, all involving claims of employment discrimination. Five out of the 15 cases decided involved claims of sexual harassment. The remaining cases involved 3 claims of race discrimination, 3 of disability discrimination, 3 of national origin, and one of retaliation. Of the 15 cases decided, 9 were in favor of Complainants and 6 were in favor of Respondents. The Full Commission issued 9 decisions affirming the Hearing Officers' decisions. The following is a summary of some of the significant decisions issued. The decisions and awards are published in on MCAD's website.

Significant Hearing Officer Decisions

MCAD and LaPete v. Country Bank for Savings, 39 MDLR 24 (2017) Pregnancy/Disability

This case involved an employee who sought a further leave of absence beyond her FMLA/maternity leave for mental health disabilities related to post-partum depression. Complainant had worked for Respondent as a loan coordinator for seven years. In March of 2009, Complainant became pregnant and in August she scheduled a C-Section for September 30, 2009. Respondent approved Complainant for a 12-week leave pursuant to the FMLA, with an end date of November 30, 2009. In early September 2009 Complainant was transported to the hospital by ambulance and delivered a baby by emergency C-Section. Thereafter, Complainant suffered symptoms of post-partum depression which included: difficulty concentrating, inability to perform her usual household tasks, insomnia, binge eating and fasting, inattention to her person hygiene, and crying for long periods of time.

By late October 2009, Complainant's primary care physician diagnosed her with post-partum depression, prescribed an anti-depressant and referred her to a therapist, whom she saw weekly from November 24, 2009 to January 20, 2010. Complainant notified Respondent in October that she would be unable to return to her job on November 30, 2009, the date her leave was scheduled to end. Respondent advised Complainant to forward the appropriate paperwork from her physician and therapist.

On December 1, 2009, Complainant's therapist diagnosed her as suffering from major post-partum depression and anxiety, stated the prognosis was good, but as of December 10, 2009, he could not predict an end date for resolution of Complainant's depression and anxiety. Respondent notified Complainant by letter received December 11, 2009, that because her most recent doctor's note could not state a definite date for her return to work, if she did not return by December 21, 2009, her employment would be terminated effective that date. Thereafter, Complainant phoned Respondent to state that she was improving and anticipated returning to work

by mid-January, 2010. Respondent's manager responded equivocally to this information.

On December 17, 2009, Complainant's attorney wrote Respondent seeking an extension of Complainant's leave of absence as an accommodation to her post-partum depression. The letter stated in part that he recommended Complainant continue her weekly therapy appointments and consult with her primary care physician in January to determine a return to work date and advise Respondent accordingly. The letter also stated that if a return to work date could not be determined, Complainant would report that information to Respondent within two weeks.

On December 22, 2009, Respondent's counsel notified Complainant's attorney that Complainant's employment was terminated because she had not returned to work on December 21st and had failed to provide Respondent with a definite date for her return. On December 31, 2009, Complainant received a letter from Respondent stating that her employment had been terminated. Complainant felt hurt and traumatized by her termination and her symptoms of depression were exacerbated.

The Hearing Officer determined that Complainant established she was disabled and that she requested an extension of her leave of absence as an accommodation to her disability. She further ruled that having received Complainant's request, it was incumbent upon Respondent to engage in an interactive dialogue with Complainant to determine if the accommodation sought was reasonable. The Hearing Officer rejected Respondent's argument that Complainant was seeking an open-ended, indeterminate leave of absence. Rather, the evidence supported Complainant's assertion that she sought merely a few more weeks to reach the determination of a return to work date. Moreover, Respondent presented no evidence of undue hardship or burden to its operations resulting from Complainant's leave of absence, or that such undue burden would result from a further brief extension of her leave. Given the dearth of evidence on the issue of undue burden, the Hearing Officer concluded that Respondent failed to establish that a brief extension of Complainant's leave during the end of the year holiday period was unreasonable and that the refusal to grant such extension was a denial of a reasonable accommodation to Complainant's disability.

The Hearing Officer found that Complainant's post-partum depression was exacerbated by Respondent terminating her employment and awarded her damages for emotional distress in the amount of \$50,000. Complainant was also awarded damages for lost wages of \$12,000 for the period of the time from when she was able to return to work until such time as she became employed at a higher salary than she received at Respondent.

MCAD and Phillips v. Electro-Term Hollingsworth, 39 MDLR 72 (2017) Sexual harassment/Constructive discharge

This case involves a claim of hostile work environment sexual harassment and a failure to investigate the charges, resulting in constructive discharge of the Complainant.

For several months in 2010, Complainant worked as a wire harness assembler for Respondent, an employee-owned manufacturer and distributor of electronic wiring, terminals, and related items. During a portion of the time, Complainant and a co-worker shared a work table, and she was able to overhear the conversations of two young male employees at an adjoining work table. Complainant overheard these two young male employees speaking in graphic terms about their sexual relations with their girlfriends.

Complainant complained to her immediate supervisor about the offensive language. His first reaction was to laugh at her complaint, but she observed him taking the two men aside and advising them in a joking manner to cease such conversations, because Complainant had lodged a complaint. Later that day, the two male employees told Complainant that she should not have complained about them. Complainant became fearful of these two employees because they were physically intimidating to her and they used language she perceived as threatening. She subsequently met with the manager regarding her co-workers' offensive language, and he advised her to follow the chain of command by reporting such matters to her supervisor, but stated he would look into the matter. He responded by advising the supervisor to resolve the matter.

Around the same time Complainant told a female co-worker about the offensive conversations and the co-worker advised Complainant of a vacancy in her department, and suggested she ask the manager for a transfer. Another female worker informed Complainant that she had heard occasional use of offensive language referring to women's breasts in the workplace by other male employees. Complainant again advised her manager that the offensive language was getting worse and he responded that such behavior was unacceptable and that he would address it. That same day the manager called the supervisor and one of the male offenders to his office and told them that foul language would not be tolerated and he would terminate anyone who continued to use it.

When Complainant left work early a few days later for a medical appointment, a manager and her supervisor met with her the following day to discuss her attendance. Complainant subsequently told Respondent's HR manager that her complaints about co-workers' offensive language were met with retaliation and she was leaving to see the doctor. A manager and supervisor met again with one of the male perpetrators to reiterate that termination would be a consequence if such behavior continued. Subsequently, one of the perpetrators threatened Complainant. She became so frightened by the incident that she was transported to the emergency room where she was treated and discharged. Complainant thereafter told the HR manager she could not return to work because of the ongoing harassment and retaliation. On two occasions thereafter, Respondent interviewed several co-workers who could not corroborate Complainant's allegations. Notwithstanding, strict warnings with the threat of termination were relayed to all employees of the wiring department.

The Hearing Officer found that the two male employees subjected Complainant to repeated and pervasive sexual comments that were lewd and offensive and engaged in actions that were threatening and intimidating to Complainant after she reported their conduct. The Hearing Officer concluded that she was legitimately offended, frightened and intimidated by coworkers' comments that she perceived as threats and established that she was subjected to hostile work environment sexual harassment. The Hearing Officer determined that once Complainant had registered several internal complaints about sexually offensive conduct, Respondent was obligated to conduct a prompt, neutral investigation into the allegations and take steps to remedy the situation. While the evidence suggests Respondent admonished the perpetrators, it failed to remedy the offensive conduct. Respondent did not consider measures such as disciplining the perpetrators or reassigning Complainant to a vacancy in another department, at least temporarily, until the matter was resolved. That the offensive behavior continued despite Respondent's assurances that it would cease, led the Hearing Officer to the conclusion that Respondent failed

to undertake adequate and effective remedial action.

Complainant claimed that Respondent engaged in retaliation for her protected activity of making internal complaints of sexual harassment. She claimed she was assigned less desirable work, counseled about attendance issues and threatened with termination. While the Hearing Officer did not credit Complainant's testimony regarding changes in work assignments, she concluded that Respondent's counseling and threats of discipline for attendance infractions were motivated primarily by retaliatory animus. The Hearing Officer also found that Complainant was constructively discharged because her working conditions became so intolerable that a reasonable employee would have been compelled to resign, given her numerous complaints and Respondent's failure to adequately remedy the situation. Complainant felt intimidated by and frightened of the perpetrators' threats to her after she complained of a hostile work environment.

The Hearing Officer concluded that Complainant suffered emotional distress from having been subjected to a sexually hostile work environment and retaliation, resulting in her constructive discharge. Complainant suffered from insomnia and anxiety, became withdrawn for a period of time, worried about not being able to support her family, and feared being subjected to similar conduct at subsequent jobs. Notwithstanding, the evidence suggested that Complainant's anxiety and insomnia were of short duration and, more importantly, were not caused solely by Respondent's discriminatory treatment. Finding that Complainant suffered from other numerous pre-existing stressors in her life and pre-existing anxiety and depression, the Hearing Officer concluded that only a minor portion of Complainant's emotional distress was the direct result of Respondent's unlawful actions, and awarded a modest sum of \$5,000 for emotional distress. Complainant was also awarded the sum of \$2,880 for lost wages from the time of her constructive discharge until she obtained a new job. Respondent was ordered to participate in sexual harassment training of its supervisors and managers.

MCAD and Codinha v. Bear Hill Nursing Home, 39 MDLR 53 (2017) Disability/Age

This case involves a Complainant who suffered an off-the-job injury resulting in a disability and Respondent's refusal to allow Complainant to return to light duty and termination of her employment under circumstances that suggested a pretext for age and disability discrimination.

Complainant was a 72 year-old nursing assistant at Respondent, a rehabilitation hospital providing long and short term care. Complainant was the one of the oldest working nursing assistants at Respondent and was the oldest on her unit. Complainant had been employed at Respondent since 1996, began working part-time at age 65 and, at age 67, reduced her schedule to three day-shifts per week. Her duties were to provide personal care to patients and assistance with bathing, dressing, toileting, meals, personal grooming and ambulation. Complainant received favorable annual evaluations in the many years preceding her injury.

In the fall of 2013, Complainant tripped and fell at home, breaking her wrist. She sought and was granted a medical leave of absence from Respondent until March of 2014, when she sought to return to work with a temporary five pound lifting restriction. Respondent denied her request for an accommodation, despite evidence that there were numerous tasks she could have performed with the restriction and that Respondent had allowed such lifting restrictions in the past. Complainant's leave was extended until May of 2014, when she was able to return with no restrictions. Two days prior to her anticipated return, she received notice from Respondent that it had determined she would not be returned to work. Complainant was given no explanation

for the decision and her termination was characterized in internal documents as a “lay off.”

Respondent asserted that Complainant was not returned to work because of complaints from a number of co-workers about her bad attitude, despite the fact that none of these co-workers had complained to management prior to or during Complainant’s medical leave. The evidence instead, was that Respondent solicited complaints from co-workers. Co-workers’ statements were prepared by a third party and were undated. At Hearing, Complainant’s co-workers testified about problems with Complainant’s frequent complaints, attitude toward the job and her co-workers, including that she sought to swap heavier patients for lighter ones, and complained about co-workers of a particular national origin being lazy and refusing to help her even though they helped each other. All of them testified that they did not want Complainant to lose her job. The Hearing Officer did not credit all of this testimony. Complainant had not been disciplined for any performance issues from 2009 to 2013, and there was no evidence of any serious concerns about Complainant’s performance prior to her leave.

Complainant testified that she loved her job and loved interacting with the patients and her abrupt termination with no explanation left her feeling stressed and depressed and at loose ends after so many years. She testified that she felt as though she was thrown out like a piece of trash.

The Hearing Officer concluded that Complainant was disabled within the meaning of the law and that her request for a reasonable accommodation in the form of a five pound lifting restriction was denied for reasons related to her age and concerns about her disability. She also concluded that the reasons Respondent stated for refusing to return Complainant to work were a pretext for age and disability discrimination. She found that concerns about Complainant’s attitude and poor performance were not the real reasons for the termination. She concluded Respondent’s assertion that co-worker complaints drove the termination was suspect because of conflicting testimony and vagueness surrounding the initiation of Respondent’s inquiry and the timing of the inquiry. She found that solicitation of complaints from co-workers was an after-the-fact attempt by Respondent to drum up negative information about Complainant to justify a termination decision that had already been made based on unlawful considerations of age and disability. Complainant’s evaluations were positive and Complainant was not asked about or given the opportunity to rebut any of the allegations made against her.

The Hearing Officer awarded Complainant \$35,000 in damages for emotional distress and ordered the Respondent’s HR personnel, managers and supervisors to undergo training on issues related to disability discrimination and reasonable accommodation and age discrimination.

MCAD and Canton v. Biga Wholesale, Inc. et al., 39 MDLR 63 (2017)

Sexual Harassment/Retaliation

This case involves claims of quid pro quo and hostile work environment sexual harassment and retaliation. Complainant worked at Respondent Biga Breads, primarily in the bread production department, from May 2008 until April 2011. A husband and wife team served as corporate officers, owners and operators of Biga Breads, LTD and three other related corporations. Complainant alleged that her supervisor began making advances to her in 2009 upon becoming her supervisor. His conduct included romantic and sexual overtures in words and gestures. Complainant repeatedly informed her supervisor that she was not interested in a relationship with

him and would not date him. In 2010 the supervisor's sexual advances intensified with telephone calls and texts and attempts to persuade Complainant to accept rides home with him. Complainant did not lodge a complaint with the owners because her English was very limited and she did not have confidence or trust in the owners who instructed workers to address complaints to their supervisors.

Complainant accepted rides home a few times from her supervisor when it was too cold for her to ride her bike to work. On one of those occasions, the supervisor propositioned her and asked that she come home with him. Complainant declined, tried to call her boyfriend numerous times, and got out of the car demanding he take her home. Complainant testified that her supervisor reduced her hours and days of work after she declined his advances and told her that to work more hours she would have to accept his proposition. Complainant's hours fluctuated and for several months thereafter the supervisor continued to make sexual overtures to her, suggesting that increased hours were dependent upon accepting his overtures. He was relentless and called her cell phone as many as 62 times in an eight month period. On one occasion the supervisor cornered Complainant in an elevator and hugged and kissed her and on another occasion in a stairwell, he propositioned her and placed her hand on his erect genitals. Thereafter, Complainant refused to be alone with him and he attempted to move Complainant to an evening shift in the packing department.

Complainant secured a legal services attorney who informed Respondent of the harassment and manipulation of her schedule and her claim that this was in retaliation for rejecting her supervisor's advances. Upon being informed of the claim, Respondent sought information about Complainant's cell phone use, including her texts to the supervisor and did not discipline the supervisor. Respondent asserted that Complainant and the supervisor had been in a consensual relationship and that Complainant flirted with Respondent's owner, Mr. Martin. The supervisor continued to supervise Complainant and control her schedule. Complainant testified that the experience left her fearful and untrusting of men, changed how she lived her life, and that she had frequent and lingering nightmares about her supervisor chasing her, accosting her and locking her in dark room.

Respondent hired a private investigator with little experience in discrimination matters to look into Complainant's allegations. Complainant was laid off several months later along with a number of other employees. Respondent claimed that Complainant's lay off was caused by a lack of business due to the cancellation of a contract with a large customer.

The Hearing Officer found that Complainant was the victim of both quid pro quo and hostile work environment sexual harassment and that she was subjected to an unsafe and frightening work environment. She determined that Complainant was also subject to retaliation for refusing her supervisor's advances, in that her hours were cut, she was threatened with a move to the night shift, and she was terminated in advance of Respondent receiving notice of the loss of a major contract, suggesting that the reason was unlawful retaliation. The Hearing Officer also found that Respondent sought to blame the victim and did not conduct an adequate investigation into her charges. Complainant was awarded \$47,992 in back pay damages and \$125,000 in damages for emotional distress.

MCAD and Joyce v. CSX Transportation, 39 MDLR 85 (2017) Disability

Complainant was a long time employee of the railroad industry, working some thirty-two years for Respondent and its predecessors in a number of different positions, including brakeman, trackman, flagman, switch tender, utility man and conductor. Complainant has suffered from a number of cognitive disabilities since childhood, including ADD/ADHD and depression. He struggled with learning disabilities, learning comprehension and distraction all of which affect his ability to think, process information, and problem solve. He has particular difficulty with computer related tasks.

Complainant belonged to a union and the terms of his employment were governed by a collective bargaining agreement. In 2004 Complainant was disciplined for misuse of overtime after his position as a brakeman was abolished and he bid on a conductor position. On one occasion, Complainant sought additional paid overtime for time needed at the end of his shift to complete administrative tasks related to the use of a computerized On Board device that he had difficulty learning and operating. Complainant was removed from service for misuse of overtime and appealed the discipline. At a hearing, he presented medical evidence of his disabilities and how they inhibited his ability to work with the computer, claiming he needed additional time to complete certain administrative tasks. Nonetheless, Respondent terminated his employment.

Complainant was reinstated several months later as part of a settlement of his union grievance. He returned to the position of switchman and met with Respondent's Terminal Supervisor who oversaw all the terminals in the area supervised the Trainmasters in each area. The Terminal Supervisor commented on Complainant's disabilities in a manner that Complainant described as incredulous and mocking and told Complainant he need not worry about using the On Board computer device in the future since he would not be in a conductor position. Complainant testified that the Terminal Supervisor was intent upon his not working again as a conductor.

After several labor positions Complainant held were abolished, Complainant was forced to bid on a conductor position in Middleboro, MA. He was required to use the On Board Computer device for this position and he informed the Trainmaster that he needed additional training in use of the device. He also claimed that he informed the Trainmaster that because of his ADD/ADHD he needed additional time to perform administrative duties. Complainant continued to have difficulty using the device and was criticized by the Trainmaster for not using it. The Trainmaster denied that Complainant discussed his disabilities, but there was evidence that the Trainmaster spoke frequently to the Terminal Supervisor and that they likely discussed this issue and that the Terminal Supervisor had warned the Trainmaster that Complainant might be seeking a lot of overtime. The Trainmaster was also aware of Complainant's prior discipline for abusing overtime.

After Complainant used overtime to complete his duties with the On Board device at the end of his shift, using the assistance of a company help-line, he was removed from service for misusing overtime. Complainant did not attend a disciplinary hearing because he was medically unable to attend due to severe depression and anxiety at having been terminated again for what he viewed as trumped-up charges. Complainant subsequently sought outpatient treatment and counseling and received disability leave benefits and an occupational disability annuity from the Railroad Retirement Board. He is eligible for full railroad retirement benefits.

The Hearing Officer found that Complainant was disabled as a result of his cognitive impairments and sought a reasonable accommodation to his disability when he sought additional assistance, training, and time to successfully use the On Board device. She also found that based on Complainant's personnel record and past discipline, Respondent had knowledge of his disabilities and failed to engage in an interactive process to determine how to best assist him with his computer related administrative duties. The Hearing Officer also concluded that Complainant was removed from service for reasons related to his cognitive disabilities, i.e. that he was too slow to complete his administrative tasks. She also determined that the "cat's paw" theory of discrimination was at play where the Trainmaster's actions were tainted by, and mirrored the bias of the Terminal Supervisor, and that reliance on the Terminal Supervisor's biased view tainted the Trainmaster's decisions. She found that the Terminal Supervisor who harbored discriminatory bias influenced the adverse employment decision and that the unlawful motives of this employee ultimately caused the adverse employment decision.

Complainant was awarded \$224,070 in damages for lost wages and \$100,000 in damages for emotional distress. Respondent was also ordered to conduct training of its Human Resources personnel, managers and other employees authorized to negotiate and provide reasonable accommodations for employees.

MCAD and Babu v. Aspen Dental Management, Inc., 39 MDLR 111 (2017) National Origin/Retaliation

This case involves a woman of Romanian national origin who claimed she was subjected to disparate treatment while working as a dental assistant at Respondent. Complainant claimed she was subjected to reduction in pay, demotion, harsher working conditions, denial of vacation preferences and ultimately discharged due in substantial part to her national origin and in retaliation for filing a complaint of discrimination.

Complainant was born in Romania and came to the U.S when she was 23 years old. She commenced employment with Respondent as a dental assistant in 2001. From 2001 to 2008 Complainant received very favorable performance evaluations while working at a number of different facilities of Respondent.

In 2009, a new officer manager commenced employment at Respondent's Leominster office and Complainant confronted the office manager about her inappropriate flirting with a male patient and making sexual comments about him in the office. Thereafter, the office manager denigrated Complainant for her accent, saying she could not understand Complainant and that Complainant's accent was driving her crazy. The office manager also claimed that patients had difficulty understanding Complainant and considered her rude as a result of her accent. She also accused Complainant of coming from a third world country and picking her husband out of mail-order magazine.

Complainant was also blamed for inventory overages at the facility and according to Respondent was subject to discipline for over-stocking gloves. In January of 2010 Complainant received a document entitled "second warning," informing her that she was demoted from lead dental assistant to dental assistant for unacceptable customer service, based on complainants that she was rude or disrespectful to customers, unsatisfactory performance in over-ordering dental supplies, and safety/health compliance violation (failure to complete a weekly spore testing). The demotion was accompanied by a reduction in pay. Complainant protested her demotion

and reduction in pay to Respondent's HR Department. Complainant's hourly rate was not reinstated. There was disputed testimony about the adequacy of the spore testing and whose responsibility it was. The Hearing Officer resolved this dispute in Complainant's favor. Complainant claimed that after her demotion, the office manager directed her to clean dental chairs with bleach and to clean office bathrooms, and the office floor, tasks which were not in the job specifications of dental assistant. Complainant was also required to submit doctor's notes for absences, given a hard time about vacation requests and denied bereavement leave.

Complainant originally filed a complaint of discrimination against Respondent in 2010 alleging that she was subjected to harassment because of her Romanian accent and for objecting to the "sexualized behavior" of her office manager toward male patients. A new dentist who commenced employment with Respondent in January of 2011 found Complainant's work to be excellent. On July 25, 2011, Complainant was terminated for alleged misuse of drill in the mouth of patient during a procedure. Complainant asserted that she had followed all proper procedures in working on a patient's crown.

The Hearing Officer found that there was direct evidence that Complainant was subjected to a demeaning attitude based on her national origin and that this directly impacted the decisions to demote and terminate her employment. She found that the office manager's statements created a highly probable inference of forbidden bias which played a motivating part in the challenged employment actions. She also concluded that Respondent's asserted reasons for demoting Complainant were found to be not credible and a pretext for discrimination. The Hearing Officer credited Complainant's version of the events and noted that her evaluations prior to 2009 had been very favorable. The Hearing Office also concluded that Complainant's demotion and termination were in retaliation for her having lodged complaints about the office manager. Her termination was imposed in haste without proper investigation and demonstrated that Respondent jumped at the opportunity to rid itself of an employee that engaged in protected activity.

Complainant was found to have suffered depression, anxiety, weight gain, insomnia and withdrawal from her family and social activities as a result of Respondent's unlawful treatment. She was awarded \$78,868 in back pay damages and \$150,000 in damages for emotional distress.

MCAD and Hernandez v. Beautiful Rose Corp. d/b/a Strega Waterfront Restaurant, et. al, 39 MDLR 127 (2017) Sexual Harassment

This case involves a claim of hostile work environment and quid pro quo sexual harassment by a restaurant worker, as well as claims of retaliation for Complainant's refusing the sexual advances of her restaurant manager. Complainant alleged that her hours were reduced and that her employment was terminated after she declined to participate in sexual banter and to answer personal questions about her private life.

Complainant was hired to be a dessert line worker at Strega Waterfront Restaurant upon the recommendation of her brother-in-law. Complainant spoke Spanish as her first language and knew very little English. Her brother-in-law frequently served as an interpreter between her and her manager. Complainant resided with her sister and brother-in-law after coming to the US from El Salvador to care for their child, and their relationship suffered after Complainant sought outside employment, stopped caring for her sister's child, and moved in with her new boyfriend.

Complainant alleged that at the outset of her employment at Strega, the restaurant manager made intrusive inquiries of a personal and sexual nature, asking questions about her private life, such as how old she was, if she were married or had a boyfriend, if she were a virgin, and if she had children. Complainant alleged that the manager also made comments about her breasts, asked her to give him a massage, and invited her to go to a casino with him. He also stated Salvadoran women were good for child bearing.

At some point Complainant began to work fewer hours and she alleged she was assigned fewer hours because of her rejecting the manager's advances. Respondent asserted that Complainant called in sick frequently and that her hours fluctuated depending upon how busy the restaurant was. There was evidence that Complainant became pregnant around the time her hours diminished and that she suffered from significant bouts of vomiting and nausea that affected her ability to eat. Complainant admitted that she called in sick a lot.

Several months into her employment, Complainant was terminated after a female bartender complained that Complainant and her friend, the restroom attendant, had stolen a personal item from the bartender's purse. At the same time, Complainant's brother-in-law complained to the manager that she was causing him problems at home by telling her sister (his wife) that he was involved sexually with a female employee of the restaurant. Respondent also asserted that Complainant was not attentive to her duties and frequently was not at her station and would be found chatting in the restroom with her friend. The manager claimed that for these reasons he suspended Complainant for four days and ordered her and the restroom attendant to go home. Complainant asserted that the manager called her a thief and terminated her employment.

The Hearing Officer found that Complainant was subjected to hostile work environment sexual harassment as a result of the unwanted sexual comments and overtures of her manager. However, she did not prove quid pro quo harassment since the Hearing Officer did not credit her testimony about calling in sick and did not credit the allegation that her hours were reduced for rejecting the manager's advances. Her initial complaint did not allege that her hours were cut due to sexual harassment and there was insufficient evidence that the terms and conditions of her employment were dependent upon her acceptance of, or positive response to, the manager's behavior. Finally, the Hearing Officer did not credit the assertion that Complainant was terminated for rejecting sexual advances and found Respondent's asserted reasons for the suspension believable. She drew the inference that complaints originating with Complainant's brother-in-law and another co-worker demonstrated that Complainant was causing disruption in the workplace and that this was entirely unrelated to her charges of sexual harassment. The Hearing Officer was persuaded that that the difficulties with co-workers, in addition to spotty attendance and performance, were the real reasons Complainant was suspended. The Hearing Officer also concluded that Complainant was not constructively discharged because her work environment at the time of her separation was not intolerable.

Complainant was awarded \$20,000 in damages for emotional distress she suffered resulting from the hostile work environment, including embarrassment, humiliation and confusion at the manager's intimate questions and overtures. Respondent was ordered to conduct a training of its managers and supervisors and to implement a formal sexual harassment policy which included the designation of a sexual harassment officer.

MCAD and Jean Brune v. The Martin Group, Inc., 39 MDLR 137 (2107) (National origin/religion)

This case involved a claim by Complainant that Respondent rescinded a job offer to him after discovering that he had changed his name from an Arab/Muslim sounding name to his current name thirteen years earlier. He asserted a claim of discrimination based on national origin and religion. Respondent asserted that the offer to Complainant was rescinded because he had not disclosed his prior name on the job application.

Complainant was born in Syria to a Syrian father and a Lebanese mother. He was raised in Lebanon by his mother. Complainant immigrated to the United States in 1996 to join his mother and brothers and attended college and worked in California. He changed his name after the 9/11 terrorist attack for fear of hostility toward individuals with Arab or Muslim sounding names. He did not disclose his former name on the job application he submitted to Respondent's because his understanding was that he was not legally required to do after seven years and because all his former jobs and school records for the last 10 years were under his new name. Complainant had successfully interviewed with Respondents, received a verbal and written job offer and had a start date for his employment.

After very favorable interviews, Respondent extended an offer of employment to Complainant and then embarked on a Google search of him and discovered that he had a former name of Abdunnasser Mustafa Mazjoub. Upon discovering this, Respondent immediately rescinded the job offer to him stating that his failure to disclose his former name was the reason. Respondent refused to consider that Complainant had changed his name for legitimate reasons, nor did it accept Complainant's position that he no longer had a legal duty to disclose his former name. The Hearing Officer determined that Respondent's actions were motivated by discriminatory animus arising out of fear and suspicion of Complainant's background and identity as an Arab/Muslim. The Hearing Officer found that based primarily upon the information about Complainant's name change, Respondent determined that Complainant was untrustworthy and not the person he claimed to be.

Complainant had already given notice to his former employer prior to Respondent's rescission of the job offer and was without work for several months. He made significant efforts to mitigate his damages and found a full time job working for the DEA after passing an extensive background check. He was awarded \$3000 in back pay damages and \$35,000 in damages for emotional distress, based on his testimony that he was devastated by the incident and suffered panic attacks.

Significant Full Commission Decisions

MCAD and John Garrison v. Lahey Clinic Medical Center, 39 MDLR 12 (2017)

The Full Commission affirmed the Hearing Officer's dismissal of a complaint for disability discrimination by a former Lahey Clinic staff psychologist. Complainant claimed that Respondent was liable for discrimination based upon its alleged refusal to excuse him from overnight on-call duty, resulting in his resignation/constructive discharge in 2006. In 1999, Complainant had received an exemption from on-call duty due to his age. Complainant suffered a minor heart attack in 2000. In 2006, the exemption policy was reversed for operational reasons and Complainant was to be scheduled for on-call duty. The Hearing Officer concluded that there was no credible evidence that Complainant requested an accommodation due to his heart condition, and instead, simply submitted a resignation letter. The Hearing Officer's determinations that Complaint did not establish that he was disabled within the meaning of Chapter 151B in 2006, and that he failed to enter into an interactive dialogue to request an accommodation for his purported disability, were found to be supported by substantial evidence.

MCAD and Kamau Weaver v. Windy City Pizza, 39 MDLR 16 (2017)

The Full Commission affirmed a decision of the Hearing Officer in favor of Respondent Windy City Pizza. Complainant was a cashier for Respondent, a fast food restaurant. He alleged that his supervisor and co-workers at Respondent subjected him to a racially-hostile work environment by uttering offensive racial epithets. The Hearing Officer found that instead it was Complainant who used racial epithets, both in the workplace and in music which he distributed to other employees. The Hearing Officer determined that Complainant's employment was terminated after a confrontation with his supervisor in front of customers, not for discriminatory reasons, and dismissed the complaint.

MCAD and Kathleen Stefani v. MA State Police, 39 MDLR 19 (2017)

Complainant Kathleen Stefani's complaint of gender discrimination in the workplace, including her demotion to Captain from the rank of Major, was dismissed by the Hearing Officer. The Full Commission determined that the Hearing Officer's determination that the decision-maker, Colonel Foley, was motivated in his demotion decision by a sense of betrayal and Complainant's lack of loyalty to him, rather than gender discrimination, was supported by substantial evidence. The Full Commission recognized that there was substantial evidence to support the fact-finder's conclusion that Complainant failed to sustain her burden of proving that the Respondent's adverse actions were the result of discriminatory animus based on her gender.

MCAD and Tiffany Schillace v. Enos Home Oxygen Therapy, Inc., et al., 39 MDLR 59 (2017)

This Full Commission decision arose after a finding in favor of Complainant for retaliation arising from Complainant's discipline and termination. Complainant appealed the Hearing Officer's deduction of welfare benefits from the award of back pay. The Full Commission held that absent countervailing circumstances, that in the discretion of the fact-finder would render application of the collateral source rule unjust, the rule should be applied. The collateral source rule is based on the rationale that if there is a "windfall" as a result of benefits from a collateral source, the benefit should accrue to the injured party rather than to the wrongdoer (e.g. employer). The Full Commission determined that there was nothing in the record that merited disregarding the collateral source rule, and modified the award of back pay to Complainant without deduction of the amount in welfare benefits she received following termination of her employment.

MCAD and Oscar Brookins v. Northeastern University, 39 MDLR 99 (2017)

The Full Commission affirmed Hearing Officer (former Chairman) Medley's decision dismissing a race discrimination complaint brought by a Professor of Economics based upon salary disparities between him and other faculty members. Chairman Medley found that Complainant did not meet his burden to show that the University's position-- that the pay disparity resulted from cumulative salary decisions reflecting the Professor's performance relative to other faculty members-- was a pretext for discrimination. The Full Commission affirmed Chairman Medley's determination that the Complainant did not meet his burden of proving that the pay disparity was the result of racial animus. The Full Commission also rejected Complainant's argument that the Chairman's past acquaintance with one of Respondent's witnesses created an inability to preside over the hearing with neutrality, recognizing that Complainant had no objection to the relationship when it was disclosed by the Chairman during the public hearing. Instead the potential conflict was raised for the first time following receipt of the adverse decision.

MCAD and April Brown v. Feel Well Rehab, et al., 39 MDLR 123 (2017)

Complainant April Brown performed clerical work for the Respondent, a therapeutic massage business with various locations. The Hearing Officer determined that Complainant did not meet her burden of proof to show that Respondents sexually harassed and constructively discharged her from employment. The Hearing Officer did not find the Complainant to be credible in key points of her testimony, such as the reason why Complainant left her employment. The Hearing Officer's determination-- that possible inappropriate banter or conduct by the individual Respondent was not sufficiently severe or pervasive to alter the conditions of Complainant's employment or to create an abusive work environment-- was found to be supported by substantial evidence. Similarly, the Full Commission held that the determination that Complainant was not constructively discharged and that she stopped going to work due to reduced hours, which made her ineligible for subsidized child care, and not because her work environment was intolerable, was based, in part, upon the Hearing Officer's credibility assessments, which should not be disturbed by the Full Commission.

MCAD, Englehart, Bassett, and Duphily v. Town of Carver, et al., 39 MDLR 125 (2017)

The Full Commission affirmed the decision of the Hearing Officer involving four police officers in the Town of Carver. Complainants appealed the Hearing Officer's decision dismissing hostile environment and disparate treatment claims based upon gender discrimination. The Hearing Officer's determination that Respondents were liable for retaliation against two of the police officers when it denied them promotions for having filed or assisted with the MCAD complaints was not appealed. The Full Commission affirmed the Hearing Officer's decision that isolated remarks by the Carver Police Chief were not sufficiently severe or persuasive as to sustain a claim for hostile work environment sexual harassment.

MCAD and Patricia Scanlon v. Dept. of Correction, 39 MDLR 133 (2017)

The Complainant is a Corrections Officer at the Concord Farm. The Hearing Officer found that following Complainant's internal discrimination complaint concerning a Shift Commander, she was subsequently primarily assigned to "outside" posts, although most of her previous assignments had been to internal posts. Complainant was also ordered to pat-search male inmates prior to their leaving the institution, although this was contrary to the prior practice that only male Corrections Officers pat-search male inmates when at the institution. After Complainant questioned this order, the Department of Corrections suspended her for five days without pay. This

was the first discipline Complainant had received in fourteen years of employment, and it was later overturned by the Civil Service Commission. The Hearing Officer determined that Complainant was subjected to prohibited retaliatory conduct. The Full Commission affirmed the Hearing Officer's decision, determining that her conclusions were supported by substantial evidence and that there was no legal error.

MCAD and Joseph Santagate v. FGS, LLC, 39 MDLR 135 (2017)

The Full Commission affirmed a Hearing Officer's decision finding that Respondent engaged in unlawful employment discrimination based upon Complainant's disability. Complainant was wrongfully terminated while on approved leave following an accident at work which required extensive treatment due in part to his disability. Rather than providing a reasonable accommodation for Complainant's disability, and without engaging in any interactive dialogue, the Respondent terminated Complainant once he completed the twelve weeks of leave it provided under the federal Family Medical Leave Act. The Full Commission held that there was sufficient evidence to support the Hearing Officer's findings that the Complainant could have returned to his job without restrictions in a matter of weeks after his termination, provided notice to Respondent prior to the termination of his intention to return to work and that a leave of absence was a reasonable accommodation in this case.

Glossary of Terms

Administrative Resolution A complaint that is resolved at the MCAD other than through completion of the investigative process or final adjudication. Such cases may be resolved through the actions of the parties or action by the Commission.

Alternative Dispute Resolution: The process in which a third-party assists the disputants in reaching an amicable resolution through the use of various techniques. ADR describes a variety of approaches to resolve conflict which may avoid the cost, delay, and unpredictability of an adjudicatory process.

Americans with Disabilities Act (ADA): The Americans with Disabilities Act is a law that was enacted by the U.S. Congress in 1990. The ADA is a wide-ranging civil rights law that is intended to protect against discrimination based on disability.

Chapter 30A Appeals: State Administrative Procedures Act governing judicial review of a final agency decision of the Full Commission.

Chapter 478: Case closure where the complaint has been withdrawn from MCAD to remove the case to Court.

Conciliation: Mandatory post-probable cause resolution process in which the Commission attempts “to achieve a just resolution of the complaint and to obtain assurances that the Respondent will satisfactorily remedy any violations of the rights of the aggrieved person, and take such action as will assure the elimination of discriminatory practices, or the prevention of their occurrence, in the future.”

Disposition: The official document issued stating the determination by the Investigating Commissioner as Probable Cause or Lack of Probable Cause.

EEOC: U.S. Equal Employment Opportunity Commission is the agency of the United States government that enforces the federal employment discrimination laws.

HUD: The U.S. Department of Housing and Urban Development. Within the Department of Housing and Urban Development, the Office of Fair Housing and Equal Opportunity (FHEO) administers and enforces federal laws to ensure equal access to housing.

Jurisdiction: the official power to make legal decisions and judgments.

Lack of Jurisdiction: A determination that the MCAD lacks the statutory authority to investigate, adjudicate, or otherwise address the allegations charged.

Lack of Probable Cause: A determination by the Investigating Commissioner of insufficient evidence upon which a fact-finder could form a reasonable belief that it is more probable than not that the Respondent committed an unlawful practice.

Mediation: Voluntary pre-disposition process in which the parties in the dispute attempt to resolve the outstanding issues and arrive at a settlement with the assistance of MCAD trained personnel.

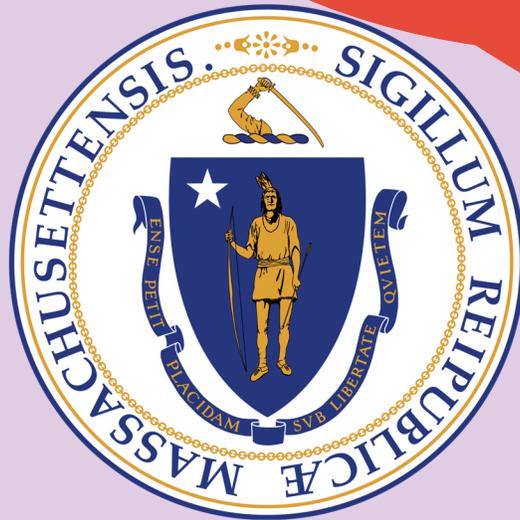
Pre-Determination Settlement: A settlement arrived at by the parties prior to the issuance of a disposition.

Probable Cause: A determination of the Investigating Commissioner that there is sufficient evidence upon which a fact-finder could form a reasonable belief that it is more probable than not that the Respondent committed an unlawful practice.

Protected Category: a characteristic of a person which cannot be targeted for discrimination. Protected categories differ based on the type of alleged discrimination. Common protected categories include race, gender, gender-identity, ethnicity, age, national origin, sexual orientation, military stator and disability.

Regulations: The whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it.

Substantive Disposition: The disposition of a complaint upon conclusion of the investigation resulting in a finding of either “Probable Cause” or a “Lack of Probable Cause.”



**MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION**