MCAD LEGAL UPDATE
2008

COURT CASES

Supreme Judicial Court

Massachusetts Bay Transit Authority v. MCAD 450 Mass. 327 (2008)

Religious Accommodation

The case involved a decision by the Commission that the MBTA had failed to offer religious accommodation to a prospective employee who was a Seventh Day Adventist and to whom it had made a conditional offer of employment as a part-time bus driver. When Complainant informed the Authority that his religious beliefs did not allow him to work from sundown Friday to sundown Saturday, he was informed that the Authority could not accommodate his request to have this time off because of seniority provisions in the collective bargaining agreement with the Union. The Commission held that the MBTA had refused to attempt any good faith effort to accommodate Complainant and did not meet its burden of proving undue hardship pursuant to G.L. c. 151B s. 4(1A). The Authority asserted that since no accommodation was feasible, any interactive process would have been futile. The SJC disagreed with the Commission that the employer's failure to engage in the interactive process is, in and of itself, a violation of G.L. c. 151B, s. 4(1A), irrespective of whether a reasonable accommodation is feasible. The Court held that an employer in under no obligation to undertake an interactive process if the employer can conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business. However, the SJC agreed with the Commission that in this case, because the MBTA failed to explore or investigate possible options for accommodation raised by the Complainant, the mere blanket assertion that his request for accommodation was unreasonable was insufficient to prove undue hardship.

Amicus Filings

Brown v. F.L. Roberts & Co. Inc. No. SJC-10155

Religious Accommodation

The plaintiff worked for a Jiffy Lube, whose parent company instituted an across-the-board grooming policy which required male employees to be clean-shaven. The plaintiff's sincerely held religious beliefs mandated that he not shave his facial hair. The employer offered all of its employees the same alternatives –work in the lower bay, shave, or face termination. The plaintiff sought as a religious accommodation to remain working in his current job without having to forego his religious beliefs. His request for accommodation was denied and he filed a claim charging his employer with failure to accommodate his religious beliefs, claiming working conditions in the lower bay were significantly worse. The lower court granted summary judgment to the employer stating that the employer had articulated undue hardship by its mere assertion that non-adherence to the grooming policy would injure its public image. In its amicus brief to the SJC, the Commission takes the position that summary judgment was inappropriate where there is a genuine issue of material fact as to whether accommodating the plaintiff's religious beliefs by allowing him to retain his current job without adhering to the grooming policy would have caused injury to the employer's corporate image or otherwise significantly impacted its business or operations. The Commission takes the position that the mere articulation of undue hardship is insufficient and argues that the lower court erred when it based its decision on articulated, but unproven and speculative, injury to the employer's corporate image.

Appeals Court

Thomas O'Connor Constructors Inc. v. MCAD 72 Mass App. Ct. 549 (2008)

Employer Liability to Non-employees

The Appeals Court upheld a decision of the Commission finding a general contractor (O'Connor) liable for acts of racial harassment by one of its employees toward a non-employee pursuant to G.L. c. 151B s. 4(4A). The Court based its ruling on the fact that O'Connor (general contractor) had knowledge of the harassment of Aldridge, an employee of a sub-contractor, because its project manager was notified of the conduct. O'Connor conducted an investigation without speaking to the victim again, did not discipline the alleged harasser and never notified the complainant of the results of its investigation nor did it inform him that the harasser would be returned to the work site. The Court agreed with

the Commission that O'Connor was liable to Aldridge for failing to remedy a racially hostile work environment of which it had notice. However, the Court ruled that it need not reach the issue of whether O'Connor could be liable under section 4(4A) solely on account of its employee's remarks without regard to its awareness of those remarks. The Court voiced concern that application of principles of vicarious liability for a claim under section 4(1) to a claim under section (4A), would render an employer strictly and immediately liable for discrimination directed at non-employees that it had no opportunity to control. The Court affirmed the Commission's award of emotional distress damages of $50,000 as supported by the record.

Collin Allen v. MCAD & another 2007-P-1439
(decision pending)

Emotional Distress Damages

The Superior Court upheld the Commission's award of emotional distress damages in the amount of $100,000 to Complainant Allen, who was found to be the victim of race discrimination when he was terminated from his employment as a campus police officer at UMass Boston. The Court held that the Hearing Officer's specific findings of fact supported the award of damages, including her crediting of testimony from complainant and other family members that as a result of his termination, complainant lost his identity, was never the same person again, never stopped being upset about the termination, was too depressed to look for other work, and felt he had let everyone down. The evidence also included credible testimony that complainant's family disarmed his firearm so he wouldn't harm himself and that his marriage was adversely impacted by the termination. Both UMass and Complainant Allen appealed. UMass has challenged the finding of liability and the damage awards. The complainant has challenged the Commission's downward modification of his request for attorney's fees. Oral argument was held on September 16, 2008.

Gargano & Associates v. MCAD & another 2008-P-1155
(decision pending)

Emotional Distress Damages

The Superior Court (Murphy, J.) upheld the Commission's finding of liability against Respondent law firm, for handicap discrimination where it refused to grant a reasonable accommodation to complainant by allowing her to return to work part-time for a short period, after she underwent back surgery and instead terminated her employment. The Superior Court upheld the Commission's ruling on liability but vacated a $10,000 civil penalty assessed against the employer and reduced the Commission's award of emotional distress damages to the Complainant from $50,000 to $10,000. The Superior Court stated that the amount of the damage award for emotional distress was not supported by substantial evidence. The employer has appealed the finding of liability and the determination that complainant mitigated her lost wages. It has also sought a further reduction of the emotional distress award. The MCAD has filed a cross-appeal of the downward modification of its emotional distress award. Appellate briefs have been filed.

Kimball, Bennett, Brooslin & Pava v. McGahan & MCAD, 72 Mass. App. Ct. 1105, *rev. denied* 452 Mass. 1104 (2008)

Application of *Stonehill College v. MCAD*

The Court, in this case, addressed the question of whether the ruling in *Stonehill College v. MCAD* denying respondents the right to a *de novo* jury trial after a finding by a Commission fact-finder should be applied retroactively. Prior to the issuance of *Stonehill*, the complainant, McGahan, litigated her claim at the MCAD and prevailed. The employer then filed a complaint in Superior Court seeking a jury trial pursuant to the ruling in *Lavelle v. MCAD,* or, in the alternative, review by the Superior Court pursuant to G.L. c. 30A. The employer was granted a jury trial and prevailed. Complainant filed a notice of appeal, and while her appeal was pending, the SJC issued its ruling in *Stonehill* rescinding the right of respondents to claim a *de novo* jury trial. The MCAD and Complaninant McGahan filed motions for relief from judgment based on the ruling in *Stonehill,* and the trial judge vacated the jury verdict and reinstated the MCAD's decision against the employer. The employer appealed arguing that the ruling in *Stonehill* should not be applied retroactively in this case. The Appeals Court concluded that at the time the S*tonehill* decision issued, Complainant McGahan had a live claim pending and was therefore entitled to a retroactive application of *Stonehill.* It also concluded that the emotional distress award was not excessive and legal fees were appropriate. The employer sought review by the SJC, which was denied on September 8, 2008.

Town of Hull v. MCAD & another , 72 Mass.App. Ct. 525 (2008)

Age and Handicap Discrimination

The Appeals Court upheld a judgment of the Superior Court largely affirming a decision of the MCAD. The Commission found that the Town of Hull discriminated against Donald Gillis on the basis of age and handicap when it failed to reinstate him as a firefighter upon his return from disability retirement and awarded, among other damages, $50,000 for emotional distress. The Commission also awarded lost wages and ordered the Town to reimburse the Retirement Board for disability income benefits it paid to Gillis. The Appeals Court upheld the finding of liability and the damage awards for emotional distress and lost wages, but concluded the Commission erred in ordering reimbursement of disability income benefits paid by the Retirement Board, since the Board was no longer a party to the action and the Commission could not make an award in favor of a non-party. The Appeals Court also held that the Commission lawfully delegated to its administrative hearing officers the power to conduct public hearings and to render decisions. The Town's request for Further Appellate Review was denied by the SJC.

Superior Court

City of Boston v. MCAD Suffolk Superior Ct. C.A. No. 2006-02650 2/8/08

The Superior Court upheld a finding of disability discrimination and failure to accommodate against the Boston Schools. The Commission had ruled in favor of a teacher who sought part-time job sharing positions as an accommodation to her disabilities. However, the Court reduced the Commission's award of emotional distress damages from $195,000 to $50,000. The Court referenced Complainant's long and complicated psychological history, and found that circumstances other than the actions of her employer contributed to Complainant's emotional distress, and that her distress was not solely attributable to the discrimination by respondent City of Boston. The Court also compared the award to other awards by the Commission for emotional distress and found it to be excessive relative to those cases. The MCAD has appealed.

Federal District Court

ERISA Preemption

1. Colonial Life & Accident Insurance Company et al. v. Malcolm S. Medley, et al,
08-CV-40010-FDS

Colonial Life filed a Complaint for Declaratory Judgment and Injunctive Relief based on ERISA preemption against the MCAD in Federal Court. The suit seeks to enjoin the MCAD from proceeding with the investigation of a claim of disability discrimination by the Complainant. The underlying MCAD charge of discrimination alleges that Colonial Life's policy, which refuses to provide short-term disability benefits to individuals with mental disabilities, while providing coverage for physical disabilities, is unlawful. The MCAD filed a motion to dismiss arguing that pre-emption should not apply based on the Younger Abstention Doctrine and based on the MCAD's concurrent jurisdiction with the EEOC to investigate claims for violation of the ADA where c. 151B is substantially similar to the ADA. The District Court denied the Motion to Dismiss and issued a preliminary injunction on the basis of ERISA pre-emption, enjoining the Commission from further investigating or adjudicating complainant's claims of disability discrimination. The MCAD has filed an appeal with the First Circuit.

Commission Decisions

Full Commission

Eboni Harrison v. Roller World, Inc. 30 MDLR 66 (2008)

The Full Commission upheld a Hearing Officer's ruling in a case of first impression that G.L. c. 272 requires reasonable accommodation to a person's religious beliefs by places of public accommodation, and that the Respondent in this case, a roller skating rink, had failed to grant the Complainant a reasonable accommodation. Respondent insisted that Complainant, a young Muslim woman, remove her hijab for safety reasons and denied her access to the rink when she indicated that her firmly held religious beliefs prevented her from doing so. The Commission also affirmed that the Complainant did not have to prove that wearing a hijab was a mandate of Islam, but only that her religious

beliefs were sincere. The Full Commission upheld an award of $3,500 for emotional distress damages as reasonable.

Ford & Hurley v. City of Melrose 30 MDLR___(2008)

The Full Commission recently upheld a Hearing Officer's finding of age discrimination against the City of Melrose for its failure to promote two police officers to sergeant, when their names were at the top of an active civil service list. The Chief of Police deliberately refused to appoint from that list, stating that he chose to await the announcement of a new Civil Service exam and a new eligibility list so that younger officers would have a chance at promotion. The Full Commission affirmed the finding of liability but modified the award of the Hearing Officer to include retroactive promotion of the two officers with back pay to the time they would have been promoted, but for the discrimination.

Bridges v. ABCC 30 MDLR___(2008)

The Full Commission upheld a finding of race discrimination in hiring against the Alcoholic Beverages Control Commission, where complainant was put through a tortuous hiring process, was given untruthful information about the availability of positions, and was not hired during the same time period that non-minorities were hired. The Full Commission affirmed the finding of liability, but modified the Hearing Officer's award of damages for emotional distress by a reduction of 50% from $50,000 to $25,000 where the Hearing Officer relied on evidence that was not in the record to support her award and where there was substantial evidence in the record to suggest that the Complainant suffered from other sources of distress unrelated to the discrimination in hiring. The Commission also reduced the award of attorney's fees granted by the Hearing Officer by 35% on the grounds that Complainant did not prevail on one of his claims and upon a determination that some of the work for which compensation was sought by two separate attorneys was duplicative and excessive.

Attorney General & Sten-Clanton v. Fung Wah Bus Co. 30 MDLR___(2008)

In a public accommodations case brought by the Attorney General on behalf of a couple who were both legally blind, the Full Commission upheld a finding by the Hearing Officer that the Fung Wah Bus Company had unlawfully denied the couple access to a place of public accommodation by refusing them the purchase of bus tickets for travel from Boston to New York City because the husband

required the use of a guide dog. The Full Commission upheld the award of emotional distress damages to the couple in the amounts of $35,000 and $25,000 and upheld the assessment of a Civil Penalty against the bus company in the amount of $10,000.

Hearing Officer Decisions

St. Marie v. ISO New England, Inc., 30 MDLR 19 (2008)

In 2001 Respondent, which manages the bulk electrical power system in New England, entered into a settlement agreement of a previously filed age discrimination suit with all the litigants except for Complainant. In 2003, Complainant resolved his own claims against Respondent and entered into a settlement providing that "all differences, disputes, claims and disagreements" were settled. Four months later, Complainant was discharged from his position as a control room shift supervisor after a power outage on Cape Cod for which Complainant was held responsible. Complainant alleged that he was terminated in retaliation for his prior age discrimination claim.

The Hearing Officer found that Complainant had engaged in protected activity by filing and settling an age discrimination claim and that the protected activity was causally related to his subsequent termination four months later. Although Respondent articulated a legitimate, nondiscriminatory reason for Complainant's termination, i.e., Complainant's role as shift supervisor during the power outage, the Hearing Officer concluded that the proffered reason was a pretext. The conclusion of pretext is supported by evidence that others involved in the outage received little or no discipline, by Respondent's revisions to its operating guides following the blackout, by the unconvincing claim of Respondent's Chief Operating Officer that he was unaware of the payment of settlement funds to Complainant four months earlier, and by Respondent's consideration of Complainant's pre-settlement job performance despite language in the settlement agreement resolving all "differences, disputes, claims and disagreements" between the parties.

Daniel Stephan v. SPS New England, Inc., 30 MDLR 61 (2008)

This handicap discrimination case involving termination of an employee was remanded to the MCAD for a re-computation of back pay damages. The Hearing

Officer had awarded Complainant back pay damages in the amount of $371,220.00, where the Respondent had failed to introduce evidence at the public hearing of subsequent employment and mitigation of back pay damages. Respondent filed a post-hearing motion for leave to introduce new evidence of Complainant's interim earnings, which was denied by the Full Commission. Upon review, however, the Superior Court remanded the case for the taking of additional evidence pertaining to mitigation in order to avoid "a substantial, undeserved windfall."

On remand, Respondent introduced evidence that the actual amount of lost wages for the period between discharge and the date of public hearing was $88, 080.00. The Hearing Officer noted the evidence, but declined to modify the previous award of $371,220.00 because Respondent had not fulfilled its burden of proffering evidence of mitigation at public hearing or providing a good reason for its failure to do so.

Abel v. Kiessling Transit, Inc., 30 MDLR 43 (2008)

The Hearing Officer found Respondent, Kiessling Transit, Inc., liable for the sexual harassment of one of its employees, a teenager who worked in its "RIDE" program by a fifty-year old employee who held himself out as her manager. The sexual harasser distributed work assignments to Complainant, answered her questions, gave her permission to leave the worksite, showed her a business card describing himself as "Operations Manager" and attended managerial meetings. He sexually harassed Complainant by making inappropriate sexual comments to her and digitally raping her on two occasions at the worksite. Although the Respondent claimed that the sexual harasser was not a supervisory employee, the Hearing Officer concluded that the company was vicariously liable for his conduct under a theory of apparent authority because the Respondent allowed the harasser to behave and hold himself out as an authority figure in the office. Complainant was awarded $200,000.00 in emotional distress damages on the basis of medical records and testimony diagnosing her with PTSD and depression. The evidence demonstrated that the harassment had turned Complainant from a confident, ambitious, energetic and well-adjusted high school graduate into an alcohol and drug-abusing individual who had trouble sleeping, suicidal ideations, and an irritable and nervous manner.

Millett v. Lutco, Inc. 30 MDLR 77 (2008)

Complainant, a transgendered female, claimed that she was discriminated against based on sex and sexual orientation in her employment as a quality control engineer. In ruling on Respondent's motion to dismiss, the Full Commission determined in 2001 that discrimination against an individual based on transsexual status violates the prohibition against sex discrimination in G.L.c.151B.

After a public hearing on the merits of the claim, the Hearing Officer found that Complainant, who was hired as a male employee in 1996 in order to guide Respondent through two quality control audits, was treated in a friendly manner by co-workers and supervisors at the start of his employment and received a favorable review in his first performance appraisal. In 1997, Complainant began to attend nursing school, work nights for Respondent, and transition to a female identity. Around this period, Respondent's president and other supervisors became frustrated with Complainant's lack of progress on the job, absenteeism, lack of availability to co-workers, and over-reliance on emails.

Complainant asserted that following her sexual transition, her immediate supervisor stopped socializing with her, played music with homophobic lyrics at work, and called her by her former male name rather than her female name. However, the evidence also established that during this period Respondent allowed Complainant to take leave for sexual reassignment surgery, arranged for Complainant to use a private bathroom, and chastised employees who made inappropriate comments. Following the company's low score on its quality assurance audit, Respondent demoted Complainant and eventually eliminated her position. The Hearing Officer concluded that Respondent's actions were not based on sex discrimination or retaliation, but, rather, on Complainant's neglect of her job responsibilities, her criticism of co-workers, and her focus on her nursing studies at the expense of her job. Accordingly, Complainant's claim of sex discrimination was dismissed.

Kacavich v. Halcyon Hill Condominium, 30 MDLR (2008)

In a case of housing discrimination based on disability, the Hearing Officer found that Respondent failed to extend a reasonable accommodation to Complainants. Complainants are two sisters who live at the condominium complex managed by Respondents. Complainant Linda Kacavich serves as legal guardian for her sister, Sandra Kacavich, who has Down syndrome. After Sandra sustained a fall on the ice by the entrance to her building, she became

unable to walk up and down the exterior stairs of her building without a walker. Complainant Linda Kacavich requested that Respondents install a ramp and was informed that she could do so at her own expense. Respondent's property manager provided a price quote from a contractor whom Linda Kacavich hired. The ramp was installed in a defective manner.

Under G.L.c.151B, section 4(7A), discrimination on the basis of handicap includes the refusal to allow reasonable modifications to premises if such modifications are necessary to afford a resident the full enjoyment of the premises. The Hearing Officer concluded that under section 4(7A), the Respondent Board of Trustees is the owner of the common areas of the condominium complex, including the entrance to the building where the Kacavichs reside. The Hearing Officer found that Sandra Kacavich was a handicapped individual who must use a walker to climb stairs for the rest of her life and that her requested accommodation -- the construction of a ramp to her building -- is reasonably necessary to afford her equal opportunity to use and enjoy the premises. The Hearing Officer found that the Board of Trustees, as the owner of the common areas of the condominium complex, violated C.L.c.151B, section 4(7A) by discriminating on the basis of handicap when it refused to make and pay for the requested accommodation. In addition to awarding damages in the amount of $26,700, the Hearing Officer ordered the Respondents to rebuild and pay for the requested accommodation.

Griffin & Leftwitch v. Eastern Contractors & S & R Construction Co. 30 MDLR___ (2008)

In a case brought by two African-American men who worked for two different employers at a construction site and who alleged racial harassment and termination, the evidence demonstrated that Complainants were racially harassed by a supervisor of the general contractor, Eastern, and were terminated after complaining to supervisory employees and filing complaints with the MCAD. The Hearing Officer found Eastern liable for discrimination and retaliation against its employee Leftwitch. In addition the Hearing Officer found Eastern liable for discrimination and retaliation against Griffin who was employed by subcontractor S & R, but was working under the direction of Eastern at the time of the most egregious incident of racial harassment. The Hearing Officer also concluded that the harasser engineered Griffin's termination after he complained. The Hearing Officer found S & R liable for discrimination and retaliation against Griffin, because S & R failed to stop the harassment and

terminated his employment. This case is significant because it supports the principle that an employer may be held liable for the discriminatory acts of its supervisors directed against non-employees working at its direction at a site that it controls. The Hearing Officer found that the Complainants were entitled to back pay and found that each Complainant suffered from emotional distress resulting from Respondents' discriminatory conduct, such as loudly referring to Complainants with offensive racial epithets in the presence of their co-workers in a particularly humiliating manner and terminating their employment after they complained and filed charges at the MCAD. The Hearing Officer awarded Complainants back pay for the wages they would have earned had they remained on the project until its termination. She also awarded each Complainant the sum of $100,000.00 in damages for emotional distress.

Archer v. Paxson Communications Corp. 30 MDLR 89 (2008)

The Hearing Officer found that Complainant, who had filed prior claims of race and national origin discrimination against his employer, was retaliated against when his job was eliminated and he was not offered another position. Complainant, who worked the overnight shift at Respondent's Boston radio station, had made prior complaints of race and national origin discrimination against his employer, all of which were dismissed. Nonetheless, the evidence demonstrated that Complainant was considered a good employee and when Respondent eliminated the overnight shift due to planned automation, it terminated Complainant's employment and offered a newly-created shift to a co-worker who had less seniority than Complainant. The Hearing Officer found Respondent's reasons for not offering the shift to Complainant -- that he had previously turned down a similar shift nearly a year earlier-- to be a pretext for unlawful retaliation. The Hearing Officer awarded Complainant lost wages for one year and damages for emotional distress. In awarding back pay damages, the Hearing Officer noted that Complainant did not seek work in the broadcasting field after his termination and instead became a self-employed music producer. The Hearing Officer concluded that Complainant's failure to earn any income working in the music business for a period of time beyond one year should have prompted him to seek alternative employment and that the failure to do so constituted a failure to mitigate his damages. The Hearing Officer further concluded that Complainant's assertion that he worked up to 80 hours a week in the music business was incompatible with his claim of severe emotional distress. Nonetheless, there was evidence that Complainant was adversely affected by his termination and that his emotional well-being, daily

activities, social life, and close relationships suffered as a result of the discrimination. He was awarded damages for emotional distress in the amount of $30,000.00.

Moran v. David's Gym et. al., 30 MDLR 1 (2008)

In this case, the Hearing Officer found that the employer engaged in disability discrimination when it abruptly terminated its employee, Mitzi Moran. Complainant Moran was employed as a day care provider. She used a wheelchair due to Post-Polio Syndrome, and as a result, had some difficulty being at work on extremely cold days. Throughout the two and one-half years that Complainant was employed by Respondents, Complainant occasionally missed work in the winter due to cold or snowy weather. Her employer had accommodated her disability for several years, utilizing coverage from other day care providers on those days. The employer admitted that it regularly hired replacements or fill-ins for Ms. Moran when she was unable to come to work. The employer also admitted that there were other employees whose attendance was not always reliable but who were not terminated for this reason. The employer abruptly terminated the Complainant's employment without warning and did not offer a legitimate, non-discriminatory reason. The Hearing Officer concluded that the employer violated its continuing obligation to engage in an interactive process with disabled employees who request or require accommodations.