MASSACHUSETTS EMPLOYMENT & LABOR
LAW REPORT
Volume IV, No. 3 September 2003

Superior Court Judge Rules That Retail Establishments Must Pay Both Overtime and Sunday Premium Pay

In the March issue of this newsletter, we discussed whether retail establishments may credit Sunday premium pay toward overtime payments. In that article, we reported that the Massachusetts Department of Occupational Safety (DOS), the Massachusetts administrative agency responsible for interpreting the state's overtime laws, had issued an opinion that declined to read the Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, §1A, to permit employers to credit Sunday premium pay toward their overtime obligation. As such, in accordance with the DOS' opinion letter, when an employer owes both overtime and Sunday premium pay to its hourly retail shop employees, the employer should pay its employees at a premium pay rate of one and one-half times their regular hourly rate for Sunday work time, as required by M.G.L. c. 136, §6(50), and also count the hours the employees worked on Sunday towards the 40-hour work week for purposes of overtime calculation. Under this interpretation of the law, if an employee had worked 40 hours from Monday to Friday and then works an additional eight hours on Sunday, the employer must pay the employee overtime at one-and-one-half times his regular hourly rate for eight hours, and, an additional one half of his regular hourly rate for those eight hours of Sunday work. So, for example, if an employer pays his employee at the regular rate of $10/hour, he must pay his employee $15/hour for each hour of overtime work, and $20/hour if he works those overtime hours on Sunday.

Last month, a Superior Court judge issued the first state court decision interpreting an employer's obligation to pay Sunday premium pay in addition to overtime compensation in the same work week. In *Swift v. Autozone, Inc.*, Judge Van Gestel, who notably did not cite or rely on the DOS' opinion letter, found that retail shop employees are entitled to Sunday premium pay in addition to, and apart from, any compensation the employer owes them for working more than 40 hours in a work week. Judge Van Gestel analyzed the requirements of M.G.L. c. 136, §6(50) (Sunday Premium Pay) and M.G.L. c. 151, §1A (Minimum Wage Law), and found that neither of these Massachusetts statutes, nor any current Massachusetts regulation, contained any language that allowed an employer to credit Sunday premium pay toward the overtime pay the employer owes its employees. The court found that the

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SJC Affirms Deference To MCAD

In *Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination*, the Massachusetts Supreme Judicial Court (SJC) has affirmed the deference it will afford the Massachusetts Commission Against Discrimination (MCAD) in exercising judgment and discretion under M.G.L. c. 151B (Chapter 151B), the Massachusetts Fair Employment Practices Act. This case involved claims by two long-term female employees of the Clerk's office of the Hampden County Superior Court, who were passed over for promotion in favor of two men with no experience in the Clerk's office but who had participated in the Clerk's election campaign. The Clerk's stated reason for bypassing the women was that each had "[j]ob knowledge insufficient for the position." The SJC affirmed the Commission's ability to infer discriminatory animus where the employer's articulated reason for an adverse job action is false, as the MCAD had found.

The two women filed a complaint against the Trial Court and Clerk, alleging gender discrimination. An MCAD Hearing Officer found in favor of the two complainants after a public hearing. The Hearing Officer awarded damages and ordered the Trial Court and Clerk's office to appoint the complainants to the next available assistant clerk positions. The Commission affirmed the Hearing Officer's decision, and the Trial Court and Clerk appealed to the Superior Court. The court ruled that the Commission failed to meet its obligation to make findings regarding each of the nondiscriminatory reasons advanced by the Trial Court and sent the case back to the Commission.

On appeal, the SJC reversed the Superior Court's decision and affirmed the MCAD. In reaching this result, the Court relied on established case law that permits (but does not require) an inference that an employer that articulates a lawful, but false, reason for an adverse employment action is attempting to conceal an unlawful discriminatory animus. The SJC made clear that it is not for the courts to substitute their judgment for that of the MCAD. The Court observed that "the Legislature has given the [C]ommission broad powers to receive, investigate and act on complaints of discrimination. We will not lightly interfere with that mandate by permitting the court's judgment to be substituted for the [C]ommission's on issues that lie within the latter's designated field. To do so would render meaningless the administrative scheme enacted by the Legislature."

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Massachusetts statutes and regulations do not contain language comparable to the FLSA which expressly states that "extra compensation provided by a Premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular days of rest . . . may be treated as an overtime premium for purposes of the [FLSA]." 29 C.F.R. §778.203. In the absence of such comparable language, Judge Van Gestel refused to allow Massachusetts employers to take the offset.

Recognizing the importance and potential impact of his decision, Judge Van Gestel reported the decision to the Massachusetts Appeals Court for immediate review. It is likely that the Supreme Judicial Court will transfer the case to its docket for a definitive ruling within the next few months. Until then, Massachusetts law in this area will remain unclear. Because we cannot be certain how the appellate courts will rule, we advise retail sales employers to review their overtime and Sunday premium policies but not to make changes to those policies until the SJC (or Appeals Court) clarifies the law.

MCAD Hearing Officer's Decision Explores Employer's Duty To Accommodate Employee Religious Practices

A recent decision by a Hearing Officer of the MCAD provides additional guidance to employers regarding their duty to accommodate employees' religious beliefs and practices. In *MCAD v. Massachusetts Department of Correction*, the Hearing Officer held that the employer had failed to accommodate the sincerely held religious beliefs of two Baptist employees. Those beliefs required them to attend church on Sundays.

Correction Officers Rodrigues and Chirigotis had each converted to the Baptist faith. Each attended church on Sundays and one or two evenings during the week. After their conversion, the officers sought to change their schedules to avoid working on Sundays. Their supervisors advised them to use the bidding procedure in the collective bargaining agreement to change shifts. Bidding procedures were governed by seniority, and at the time the employees requested the shift change, no alternate schedules that would accommodate their religious observances were available.

The officers then sought to swap shifts with other officers in order to avoid Sunday work. After each officer successfully switched shifts several times, the Department implemented a policy limiting swaps to once per month for each employee. The Department claimed that the swaps created an administrative burden and problems with the payroll system, and also contended that the officers were, in effect, seeking a "permanent" swap in violation of the collective bargaining agreement's bidding procedure.

The Hearing Officer found that the employer had failed to reasonably accommodate the officers' sincerely held religious beliefs. Because the change in swap policy prevented the officers from practicing their faith, the Department was required to demonstrate that it could not accommodate their needs without undue hardship to its business. Applying the statutory definition of "undue hardship" in the context of religious accommodation, the Hearing Officer declined to find undue hardship because each of the employee's presence was not indispensable to the orderly transaction of business and his work could be performed by another employee of substantially similar qualifications during the period of absence. Specifically, the Hearing Officer determined that permitting the officers to swap their Sunday shifts would not have led to an abuse of the swap system; the swaps did not result in any additional expense or administrative problems for the Department; and the swaps would not violate the collective bargaining agreement. The Hearing Officer further determined that the Department refused to attempt a good faith effort to accommodate the officers or to assist them in obtaining an accommodation. Finally, the Hearing Officer rejected, as unreasonable, the Department's suggestion that the officers bid for another shift to obtain Sundays off, reasoning that the officers should not have to surrender their seniority-earned benefit of bidding for a coveted day shift because of their religious beliefs.

This case alerts employers to the risks of not making good faith efforts to reasonably accommodate employees' sincerely held religious beliefs or practices. While the undue hardship defense in the context of religious accommodation is different from, and less onerous than, its analogue involving handicap accommodation requests, employers that fail to engage in an interactive process with their employees do so at their peril.

Employee Allowed To Proceed On Sex Discrimination Claim Based On Bias Against Mothers With Young Children

In *Sivieri v. Department of Transitional Assistance*, a Superior Court judge ruled that a female employee could state a claim for sex discrimination predicated on a bias against working women with young children. This case is important because the court liberally construed gender discrimination to encompass such a bias even though parental status is not a protected class and the alleged discrimination did not impact women with older or no children.

In this case, a former employee claimed that she had been discriminated against because she was a female with young children. Sivieri was a paralegal in the Massachusetts agency responsible for administering public assistance programs. She alleged that, before having a child, her employer consistently provided her positive performance evaluations, asked her to train new paralegals, and otherwise recognized her as a good employee. According to Sivieri, after her daughter was born, the Department downgraded her performance evaluations and repeatedly passed her over for promotion, which went to less senior employees without small children. She also alleged that employees of the agency frequently made negative comments about working mothers.

The employer moved to dismiss Sivieri's claims on the basis that parental status is not a category protected by M.G.L. c. 151B. The Superior Court denied the employer's motion, reasoning that a plaintiff can establish sex discrimination by showing that she was discriminated against on the basis of a characteristic closely linked to gender. The court held that Sivieri had pleaded sufficient facts in her complaint to survive a motion to dismiss because her allegations, if true, "establish a bias against women with young children predicated on the stereotypical belief that women are incapable of doing an effective job while at the same time caring for their young children."

This is not the first time that a court has held that differential treatment on account of sex-linked characteristics can give rise to sex discrimination. For example, the U.S. District

Court in Massachusetts and the First Circuit have stated that, under federal law, a gay employee can claim sex discrimination if he is harassed for not conforming to masculine stereotypes. *See Ianetta v. Putnam Investments, Inc.*; *Higgins v. New Balance Athletic Shoe, Inc.*

However, in *Sivieri*, unlike those other cases, the plaintiff was not required to show evidence of disparate treatment; *i.e.*, that men with young children were treated more favorably than women similarly situated. By contrast, in *Higgins*, the First Circuit ruled that harassment of a gay employee for non-conformance to gender stereotypes could constitute sex discrimination where evidence demonstrated that female employees with the same trait (*i.e.*, effeminate mannerisms) were treated better than he. Similarly, in *Ianetta*, while the District Court ruled that the plaintiff stated a claim for sex discrimination arising from harassment based on his failure to meet male gender stereotypes, it ultimately dismissed his claim because he failed to produce sufficient evidence that he was treated less favorably than similarly situated women.

Sivieri, like *Ianetta* and *Higgins*, demonstrates that courts may broaden the classes protected by state and federal anti-discrimination statutes where they conclude that employees were treated differently based on characteristics closely linked to their protected class status. Accordingly, employers should be mindful of disparate treatment or harassment that, on its face, may not appear to be based on an employee's protected class status, but may be based on a stereotypical belief or characteristic closely linked to the employee's protected class.

Employer's Destruction Of Compensation Records Leads To Judgment For Employee On Wage Claim

A former employee recently won summary judgment on a claim under the Massachusetts Wage Act, M.G.L. c. 149, §§148, 150, where the employer admitted destroying most of the employee's compensation records and was, as a result, unable to refute her claim that it failed to pay her approximately $37,700 in earned commissions. In *Wiedmann v. The Bradford Group, Inc. d/b/a BBA Technical Services, et al.*, the Superior Court found that without documentary evidence, the defendants had no evidentiary support for their contention that they did not owe the employee any commissions.

The Bradford Group, Inc. employed Wiedmann from February 1999 until her resignation in September 2000. Beginning in April 2000, Bradford compensated Wiedmann on a commission-only basis. Under this compensation plan, Bradford paid Wiedmann a monthly commission and a monthly advance draw against her earned commissions.

After Wiedmann voluntarily resigned, Bradford informed her that it had made an error in the calculation of her commissions and, consequently, that the company did not owe her any additional commissions. Wiedmann contended that Bradford owed her approximately $37,700 in earned commissions.

Wiedmann filed a lawsuit against Bradford and several individuals, alleging, among other claims, violation of the Massachusetts Wage Act. In defense, Bradford claimed that Wiedmann's calculations were incorrect and that the company had overpaid her during her employment. Bradford, however, had no documentary evidence to support its position because the company had destroyed all records concerning Wiedmann's compensation after concluding that Wiedmann did not intend to press her contention that she was owed unpaid commissions.

The court found that Bradford's destruction of these critical documents unfairly prejudiced Wiedmann, and it precluded Bradford from challenging Wiedmann's commissions calculation and from asserting that she was overpaid. As a result, the court granted Wiedmann's motion for summary judgment and awarded her treble damages plus interest, litigation costs, and reasonable attorney's fees.

Under Massachusetts and federal law, employers are obligated to maintain wage records for at least three years and (essentially) one year, respectively, after an employee's termination of employment. Notwithstanding these legal obligations, employers may want to consider extending their wage record retention beyond these minimum periods or understand the potential risks in not so doing.

Six MCAD Cases Before Massachusetts High Court

The SJC will hear six important employment cases involving the MCAD during the current term. Three of these cases involve procedural issues raised by the Court's landmark decision five years ago, *Lavelle v. MCAD*, in which the Court held that respondents (like complainants) have a constitutional right to a jury trial as to claims for money damages (*e.g.*, emotional distress and front pay) under Chapter 151B. Respondents do not have a jury trial right for claims involving only equitable relief under the Massachusetts Fair Employment Practices Act. *Wilfert Bros. Realty Co. v. MCAD* (argument scheduled January 2004); *Keyland Corporation v. MCAD*; and *Stonehill College v. MCAD*. In another case to be reviewed by the SJC, *Ocean Spray Cranberries, Inc. v. MCAD*, the Court will consider issues involving "handicapped" individuals, reasonable accommodation and the statute of limitations defense in a claim alleging failure to provide reasonable accommodation. In *Turgeon v. MCAD* (argued September 2003), the Court heard argument on issues involving the MCAD's review of arbitration decisions. The final case to be heard by the SJC is *MBTA v. MCAD* (argument scheduled October 2003). In addition to these SJC cases, the Appeals Court, in *Kimball, Bennett, Brooslin & Pava v. McGahan*, is scheduled to rule on the admissibility of an MCAD causal determination at trial. Decisions in these cases are expected by late Spring 2004 and will be reported in future issues of this newsletter.

Upcoming Symposium & Breakfast Briefings

Seyfarth Shaw will be presenting its bi-annual Labor & Employment Law Symposium on **October 10, 2003** at the Babson Center for Executive Education in Wellesley, MA. For further information about this program, please contact Denise Welding at 617-946-4800 or dwelding@seyfarth.com.

In addition, Seyfarth Shaw's Labor and Employment Practice Group conducts monthly breakfast and telephone briefings designed to inform our clients and other interested employers about developments in this area of the law. Upcoming Breakfast Briefings include:

November 13: Resolving Issues Between Immigration and Employment Law

December 11: Preparing Your Workplace Against Bioterrorism and Hoaxes

To receive email notification of these briefings, please email Denise Welding at dwelding@seyfarth.com.

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This case follows previous decisions in which the SJC has accorded the MCAD substantial deference. *See Cuddyer v. Stop & Shop Supermarket Co.* (affirming the MCAD's power to develop a continuing violation rule); *Dahill v. Police Dept. of Boston* (granting substantial deference to the MCAD's interpretations in its handicap discrimination guidelines). This case also highlights the importance of employers giving accurate and complete reasons for adverse job actions. If an employer articulates an untrue reason for a job action, even if not a discriminatory reason, the falsity of the stated reason may permit an inference of a discriminatory motive, as demonstrated in this case where the employer stated that insufficient job knowledge (rather than political patronage) was the reason for its promotion decisions.

Table of Cases

Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729 (July 11, 2003)

Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 539 (2001)

Dahill v. Police Department of Boston, 434 Mass. 233 (2001)

Higgins v. New Balance Athletic Shoe, Inc., 109 F.3d 252 (1st Cir. 1999)

Ianetta v. Putnam Investments, Inc., 183 F. Supp.2d 415 (D. Mass. 2002)

Lavelle v. MCAD, 426 Mass. 332 (1997)

MCAD v. Massachusetts Department of Correction, Nos. 98-BEM-2296, 98-BEM-2299, 2003 WL 21802104 (June 27, 2003)

Sivieri v. Department of Transitional Assistance, No. 02-2233H, 2003 WL 21781403 (Mass.Super. June 26, 2003)

Swift v. Autozone, Inc., No. 02-0553 BLS (Mass.Super. Aug. 1, 2003)

Wiedmann v. The Bradford Group, Inc. d/b/a BBA Technical Services, et al., No. 01-3980 (Mass.Super. June 5, 2003)

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