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SJC Sets New Standards for Punitive Damages Under Chapter 151B

In *Haddad v. Wal-Mart Stores, Inc.*, the Massachusetts Supreme Judicial Court (SJC) reinstated a $1 million punitive damages award and established new standards for awarding punitive damages in discrimination cases brought under Massachusetts General Laws ch. 151B (Chapter 151B), § 4.

Cynthia Haddad, a pharmacist manager at Wal-Mart, complained that her salary was lower than all of the male pharmacist managers and that her employer denied her the additional hourly pay that her male counterparts received. Soon after Haddad lodged internal complaints, district managers questioned Haddad about two fraudulent prescriptions that a pharmacy technician had filled. Haddad denied having any knowledge about the prescriptions, but acknowledged that one of them may have been filled when she left the pharmacy briefly to use the restroom or to purchase a soda. Wal-Mart terminated Haddad's employment immediately, citing her alleged failure to secure the pharmacy. Haddad brought suit for gender discrimination, and after trial, a jury awarded her compensatory damages, plus $1 million in punitive damages. Wal-Mart filed a post-trial motion to vacate the punitive damages award, which the trial court granted.

On appeal, the SJC concluded that the trial judge erred in vacating the punitive damages award and articulated new requirements for such awards under Chapter 151B, stating: "An award of punitive damages requires a heightened finding beyond mere liability and also beyond a knowing violation of the statute. Punitive damages may be awarded only where the defendant's conduct is outrageous or egregious." In determining whether a defendant's conduct rises to this level, the Court further stated that the fact-finder should consider all of the circumstances surrounding the wrongful conduct, including (1) whether there was a conscious effort to demean; (2) whether the defendant was aware that its conduct would cause harm or recklessly disregarded the likelihood of harm; (3) the actual harm to the plaintiff; (4) the defendant's actions after learning that the conduct would likely cause

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Plaintiff's Personal Behavior May Be Admissible Evidence in Sexual Harassment Case

In *Dahms v. Cognex Corporation*, the SJC affirmed a jury verdict in favor of an employer in a sexual harassment case. Specifically, the SJC held that the trial court appropriately allowed the jury to consider evidence about the plaintiff's "sexual behavior, general sexual predisposition, and wild nature" in evaluating her hostile work environment claim, reasoning that the evidence was relevant in determining whether the conduct about which the plaintiff complained was truly unwelcome.

Kimberly Dahms, a former director of customer satisfaction for Cognex, claimed that an officer of the company subjected her to *quid pro quo* sexual harassment, that she had endured a sexually hostile work environment, and that the company had retaliated against her for filing a claim with the Massachusetts Commission Against Discrimination (MCAD). At trial, the court admitted evidence regarding the plaintiff's dress, speech, and conduct. For example, the trial court allowed testimony that Dahms wore "inappropriately revealing clothing" at work, told "crude jokes," and made statements about her "sexual preferences" to coworkers. After a jury verdict in favor of the employer, Dahms appealed, arguing that the court's admission of details regarding her dress, speech, and conduct was inappropriate and prejudicial character evidence.

The SJC held that the trial court did not abuse its discretion since the evidence related to Dahms's interactions with management and coworkers in the workplace and at work-related events. The Court ruled that the evidence was probative of Dahms's allegation that she found her work environment to be sexually hostile, noting: "Dahms made relevant her own behavior in the workplace and with coworkers." The SJC was clear, however, that evidence regarding a plaintiff's character is not always admissible. Trial judges must be careful to ensure that such evidence is admitted only when its probative value outweighs its potential prejudicial impact on the jury.

This decision affirms that where a plaintiff alleges that he or she has suffered sexually inappropriate actions in the workplace, the plaintiff's

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harm; (5) the duration of the wrongful conduct; and (6) whether the defendant made any attempt to conceal the conduct.

In this case, the Court found sufficient evidence of misconduct to support an award of punitive damages, particularly because the defendant had paid Haddad less than her male counterparts and had provided shifting explanations regarding the reason for Haddad's termination. The Court also found it compelling that the employer terminated Haddad for a single infraction, but did not investigate or discipline her male coworkers for similar or more serious infractions.

This ruling provides employers with clearer guidance about the type of conduct that could warrant punitive damages in a discrimination case. It also serves as a sobering reminder to employers that even in single-plaintiff cases, failure to prevent unlawful discrimination may result in substantial punitive damages awards.

"Admissible Evidence," cont'd from page 1

demeanor at work becomes relevant to the claim. To evaluate whether a plaintiff's work environment is sexually hostile, the fact-finder must consider all relevant facts and circumstances. Establishing that certain workplace incidents were sexually inappropriate does not end a court's inquiry into a hostile work environment claim. The plaintiff must prove that the actions were personally offensive, and determining this subjective element may require consideration of the plaintiff's own behavior.

A Single Racial Epithet Is Sufficient To Establish Discrimination

Affirming a decision by the MCAD, the Massachusetts Appeals Court held that a single racial epithet could support an actionable discrimination claim under Chapter 151B, where the remark was "so powerfully offensive" that it caused injury "by its very utterance."

In *Augis Corporation v. Massachusetts Commission Against Discrimination*, an African-American employee alleged that during an argument, his supervisor used a racial slur, calling him a "f***g n***r." The employee also alleged that his supervisor treated him differently than other employees and terminated his employment because of his race. In support of his discriminatory termination claim, the employee relied solely on the supervisor's slur. He did not allege that he suffered any other harassment and did not base his claim on a racially hostile work environment.

After a hearing, the MCAD determined that the employee's termination was lawful and that he had not been subject to disparate treatment. The MCAD nevertheless concluded that the supervisor's use of this particular racial slur on one occasion constituted racial harassment. Thus, the MCAD awarded damages to the employee, including emotional distress.

Augis appealed the decision, contending that the MCAD had awarded damages against the company for a form of discriminatory conduct—namely, racial harassment—which the employee had never charged. Augis asserted that the employee's MCAD charge was limited to a claim of wrongful termination, and on that claim, it had prevailed. In the absence of any other claims, Augis argued, the single racial slur could not form the basis for liability. The Appeals Court disagreed.

The Court examined the entire record (rather than just the MCAD charge) and found that the employee had sufficiently established that he was singled out for harsh treatment because of his race. Although the employee never made an express claim for harassment or hostile work environment, the Court ruled that the award was proper because the supervisor's slur had always been a "central component" of the overall claim. Rejecting any distinction between "harassment" and "discrimination" claims, the Appeals Court held that one incident—here, the supervisor's use of a racial slur on a single occasion—may be sufficient to constitute liability under Chapter 151B. The Court stated: "'Actionable job discrimination' has no irreducible quantitative requirement that allows supervisors, for example, one free racial slur. Instead, 'the more offensive the comments the fewer incidents of harassment may be required to demonstrate the objective reasonableness of the [discrimination] claim.'" In sum, the Appeals Court held that "a supervisor who calls a black subordinate a f***g n***r has engaged in conduct so powerfully offensive that the MCAD can properly base liability on a single instance."

The *Augis* decision reminds employers that even an isolated incident, such as one repugnant remark, if exceedingly offensive, can result in liability for discrimination.

Claims Under the Massachusetts Wage Act Are Arbitrable

In *Dixon v. Perry & Slesnick, P.C.*, the Appeals Court recently reversed the trial court's order denying the employer's motion to dismiss and compel arbitration. This decision establishes that in certain circumstances claims arising under the Massachusetts Wage Act are subject to arbitration.

Upon commencing employment in 2004, dentist Wendy Dixon signed an employment agreement, which included the provision that "all disagreements and controversies arising with respect to this Agreement, or with respect to its application to circumstances not clearly set forth in this Agreement, shall be settled by binding arbitration." After resigning in August 2007, Dixon filed suit against her employer, alleging violation of Massachusetts General Laws ch. 149, §§ 148 and 150 (the Wage Act). Invoking the terms of Dixon's employment agreement, the employer moved to dismiss the lawsuit and compel arbitration. Dixon opposed the motion, asserting that her nonpayment of wages claim was not subject to arbitration because the Wage Act stipulates that an aggrieved employee has the right to institute a civil "action" and that no employer may enter a "special contract" to exempt it from this regulation. Dixon contended that the term "action" should be interpreted narrowly to mean only a lawsuit in court. Based on this reasoning, she argued that an agreement to arbitrate is effectively a waiver of an "action," and therefore, it constitutes a prohibited "special contract" under the Wage Act.

The Appeals Court rejected this argument and held that the term "action" is not limited to a civil action in court, in part because all of the remedies available under the Wage Act, including multiple damages and attorneys' fees, are available through arbitration. Hence, the Court ruled that each agreement to arbitrate must be analyzed individually to determine its enforceability.

Having determined that Wage Act claims are arbitrable, the Appeals Court next examined whether Dixon had waived her right to a trial in favor of arbitration. Several factors led the Court to conclude that Dixon had indeed waived her right to pursue her claims in court: (1) Dixon negotiated and voluntarily executed the agreement; (2) the claims at issue arose directly from the terms of the agreement regarding her compensation; (3) the arbitration provision was broad enough to encompass claims under the Wage Act; (4) the reservation of rights provision did not exempt claims existing outside of the contract from arbitration; and (5) there is a strong public policy favoring arbitration. Moreover, contrary to Dixon's argument, the Court ruled that arbitrating her claim would not affect the rights of non-parties to the arbitration agreement since Dixon did not bring her claim on behalf of others.

This decision confirms that courts in the Commonwealth will compel arbitration of Wage Act claims in appropriate circumstances. When crafting and implementing arbitration provisions in employment agreements, employers are encouraged to take note of the factors leading to the Court's ruling in this case.

Failure to Accommodate Claim Dismissed Where Need for Accommodation Was Not Obvious

In a failure to accommodate discrimination case, *Kinch v. Quest Diagnostics, Inc.*, the U.S. District Court for the District of Massachusetts recently granted summary judgment in favor of the defendant-employer, finding untenable the plaintiff's claim that his disability was so evident that the defendant was obligated to provide him a reasonable accommodation even though he never asked for one.

Peter Kinch worked for Quest as a specimen processor for twenty-five years. He was diagnosed with Hepatitis C in the early 1990s. In 2002, his job performance began to decline. He failed to meet Quest's productivity requirements, took excessive breaks, and showed little initiative. As a consequence, Kinch received poor performance reviews, as well as oral and written warnings. In March 2005, Kinch told his supervisor that he had started a new medication for the treatment of his Hepatitis C. He gave his supervisor a brochure describing the medication's potential side effects, but did not claim that he suffered from any of them. Kinch's poor performance continued, and Quest placed him on a performance improvement plan in April 2005. Three months later, he received a final warning. Upon receiving this warning, Kinch informed his supervisors for the first time that his medications were having a negative impact on his work performance. Subsequently, Kinch took a leave of absence from July 2005 to October 2005. Upon his return to work, however, Kinch's poor performance continued, and Quest ultimately terminated his employment. Kinch filed a lawsuit alleging that Quest failed to accommodate his disability, and Quest moved for summary judgment.

Kinch argued that although he had not requested an accommodation, Quest should have recognized his need for one. In support of his argument, Kinch relied on a statement in the *MCAD Guidelines: Employment Discrimination on the Basis of Handicap*: "Where an employee has not requested reasonable accommodation, an employer's duty to offer reasonable accommodation may still be triggered if the employer knows or should know that the employee is handicapped and requires reasonable accommodation." The District Court therefore considered whether the evidence supported the notion that

Kinch's alleged handicap was so sufficiently "obvious" that Quest had a duty to provide him a reasonable accommodation.

The District Court concluded that Kinch's need was not obvious. While he gave his supervisor a brochure describing the potential side effects of his medication, he never informed Quest of any specific negative effects that the medication had on his work. Accordingly, Quest could not have perceived Kinch's alleged handicap and had no obligation to provide reasonable accommodation where none was requested.

This opinion takes a narrow view of an employer's obligation to accommodate an employee who has not made a clear and specific request. It also underscores the need for action when an employer learns of an employee who has a handicap which limits his or her ability to perform assigned work adequately. Notwithstanding this decision, employers are well advised to begin interactive communication with an employee immediately to determine if any workplace modification or adjustment is necessary and reasonably available.

MCAD Awards Nearly $1 Million in Age Discrimination Case

In a recent decision, *Massachusetts Commission Against Discrimination v. Willowbend Country Club, Inc.*, the MCAD awarded close to $1 million in damages, which included $200,000 for emotional distress, even though the complainant never sought any treatment for the distress that she alleged she experienced as a result of her layoff.

The MCAD found that age was a motivating factor in complainant Virginia Dilorio's termination from her job as a real estate agent at a country club and real estate community. In particular, the MCAD credited testimony alleging that Willowbend's vice president said that he "need[ed] to bring in some younger blood" and wanted to hire "younger, more attractive people" in order to create "some energy and enthusiasm." The MCAD also found it compelling that ten of the thirteen employees Willowbend laid off were over fifty years of age, and Willowbend's help wanted ads stated: "OUR NEW ERA BEGINS NOW." Further, the MCAD held that the employer retaliated against Dilorio by barring her from visiting the resort after she filed her charge of discrimination.

After a public hearing, the MCAD ordered Willowbend to pay Dilorio back pay, front pay, and emotional distress damages, plus interest, all of which totaled over $922,000. The MCAD determined that an award of front pay for five years was appropriate because Dilorio was "fifty-nine years old at the time of her discriminatory layoff" and evidence established that she had difficulty finding a comparable position. In calculating the front and back pay awards, the MCAD considered Dilorio's annual salary ($62,000) and her real estate commissions, which exceeded $100,000 in every year prior to her termination.

Despite Dilorio's robust income history, the MCAD acknowledged that in the years following 2005, she would likely not have sustained her commissions given the "downward plunge of the real estate market." To account for the new realities of the market, the MCAD awarded front and back pay equal to Dilorio's annual salary, plus *half* the value of her 2005 commissions.

Part of the damages award included $200,000 for emotional distress, although Dilorio never sought medical or psychological treatment following her termination. The MCAD credited her testimony that the termination caused her to become extremely upset and emotionally distraught. In addition to the professional loss associated with her termination, Dilorio claimed that she had also lost an important social network when she was barred from the Willowbend community.

The *Willowbend* decision leaves open the possibility that front and back pay awards may be adjusted downward to reflect current market conditions. It also serves as a reminder that the MCAD can, and sometimes does, award substantial damages for alleged emotional pain and suffering even absent treatment from healthcare providers.

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