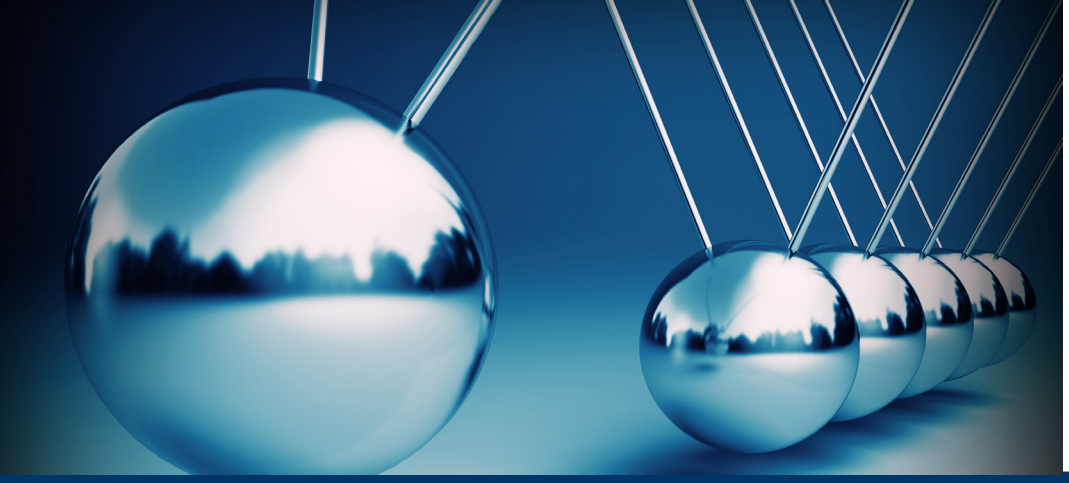

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RARE EMPLOYER WIN AFTER PUBLIC HEARING AT THE MCAD: BUT "WHAT IS THE PRICE OF VICTORY?"

Having cases before the Massachusetts Commission Against Discrimination (MCAD) can be a very frustrating experience for employers. After a complaint is filed, the employer must file a position statement and then attend an administrative conference where the merits of the case are discussed, briefly. This phase of the process happens relatively quickly (typically within six months of the filing). The Investigator is charged with making a determination as to whether "probable cause" exists that the claimed discrimination and/or retaliation has occurred.

The relatively prompt scheduling of the administrative conference was intended to move cases to determination more efficiently and more quickly. However, that has not been the case. Due to the limited number of Investigators in comparison to the overall caseload at the MCAD, the Investigator's follow-up often does not occur until several years after the administrative conference. We now regularly receive requests for information three years or more after the filing of the MCAD complaint.

If the Investigator finds "probable cause," the case is assigned to an MCAD staff lawyer to take the case to public hearing. Taxpayers, and not the complaining party, pay for the staff lawyer's representation. Formal discovery does not start until the staff lawyer is involved. If the case does not settle, a trial-like public hearing will be held after the close of discovery and a final determination rendered. Where "probable cause" is found, several practical considerations place pressure on employers to settle the case in advance of discovery and public hearing, including: 1) the length of the process going forward; 2) the free representation for the Complainant by the MCAD staff lawyer; 3) the perception that Hearing Officers may be more sympathetic to an employee's claim where the MCAD has already found "probable cause," and 4) the exposure to damages, civil penalties, interest, attorney's fees, and a possible "training" order to educate managers on the applicable law. The attorney's fees award can be made on the basis of work performed by the complaining party's private lawyer and/or the MCAD staff lawyer. Interest of twelve percent from the time the complaint was filed may be awarded.

MBTA Case

In a recent race and disability/handicap discrimination case (decided Nov. 11, 2015), the MBTA withstood all of those pressures and won. That's the good news. The bad news is that it took one month short of five full years to achieve that result. The Complainant had only been employed,

If you have any questions about the issues addressed here, or any other matters involving Labor and Employment issues, please feel free to contact:

Susan J. Baronoff

Michael Colgan Harrington

Lauren M. Hopwood

Lissa J. Paris

Rachel Faye Smith

Barry J. Waters

Jennifer A. Corvo

Monica P. Snyder

Kristen L. Zaehringer

part-time, by the MBTA for a few days when she received a breast cancer diagnosis. She had been an employee for only nine days and was still in her training period when she left work to begin chemotherapy, surgery and radiation treatment. While the Complainant did not qualify for FMLA leave, as the Hearing Officer noted, "a medical leave under the ADA [or Massachusetts law] has no prior work requirement." In ruling in the MBTA's favor, the hearing officer determined:

1. Under these circumstances, the MBTA was not required to grant the employee a leave of absence for the more than one-year duration of her treatment for and recovery from breast cancer. The MBTA had a written attendance policy which required employees to return to work within one year of the initial leave of absence "or within a short period of time thereafter."

2. The Authority was not required to transfer the employee to another job during this treatment and recovery period.

The Hearing Officer acknowledged that accommodations may take many forms, including changes in work schedules and assigned tasks, modifications of job requirements, and provision of adaptive equipment, among other possible accommodations. "Accommodations are not deemed reasonable, however, if they require a fundamental alteration of a job such as the waiver of an essential job function, a transfer into another position, or the fashioning of a new position."

Leave of Absence as Accommodation

Even where FMLA leave has been exhausted, or as here, where the employee does not qualify for FMLA, a leave of absence may be considered a "reasonable accommodation" of a handicap or disability under state or federal law. Written policies requiring all employees on leave to return to work within a specified period are effective in justifying a termination for failure to return to work. However, these policies must be applied even-handedly. In addition, the employer should still consider a limited extension of that period should it have evidence that the employee could return to work within a short period of time after that. Here, the MBTA testified that it was willing to give the employee six to eight weeks of additional leave had her doctor provided a definite return to work date.

Transfer to Another Position

As the Hearing Officer held, Massachusetts law does not require a transfer, fundamental alteration of the current job or fashioning a new job as an accommodation. Federal law is somewhat different. Under federal law, the employer is not required to create a new job or "bump" another employee in order to reassign the disabled employee. Nor is reassignment required if the disabled employee can perform the essential functions of her job with or without reasonable accommodation. However, if the employee cannot perform the essential functions of her job with or without reasonable accommodation, and there is a vacancy at the time of the request for accommodation, or if a position will soon become vacant, then federal law may require reassignment – but not contravention of a collective bargaining agreement or well-established seniority system.

TAKE-AWAYS:

1. It is nice to "win," but winning isn't everything at the MCAD. Here, nine days of part-time work followed by a leave of absence of more than one year, followed by five years of litigation at the MCAD, seems like a hollow "victory." Even after the "cause" finding, it was two and one-half years before the public hearing took place. The Hearing Officer issued her decision eleven months after that. Therefore, consider your options for early claim resolution, even if you do not believe the case has much merit, taking into account the time and cost of "winning."

2. Have consistently-applied policies regarding job transfers and leaves of absences. Even then, consider whether some modification of those policies might be prudent in a given circumstance, as a "reasonable accommodation."

3. Engage in the interactive process in a manner sympathetic to the employee's medical condition while applying policies in an even-handed manner.

For more information, please contact: Barry J. Waters - 203.772.7719 - bwaters@murthalaw.com