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LABOR AND EMPLOYMENT GROUP NEWS

September 2016

MCAD HEARING OFFICER AWARDS \$50,000 PLUS 12% INTEREST FOR GENDER IDENTITY HARASSMENT

By Barry J. Waters

A recent MCAD case illustrates the exposure companies doing business in Massachusetts face for:

1. Strict liability for discriminatory and retaliatory acts committed by supervisors;
2. Emotional distress damage awards based on Complainant's own testimony of "garden variety" distress; and
3. Twelve percent interest on Awards, dating back to the time of the filing of the MCAD complaint which can be substantial since the time from filing to the Award averages four to six years.

Hostility from Supervisor

On July 17, 2013, Complainant Alyx Tinker, f/k/a Rebecca Tinker, filed a complaint of discrimination against his then-employer, Respondent Securitas Services, and his supervisor, Respondent Najeeb Hussain. Mr. Tinker alleged that he was discriminated against on the basis of his sex/gender, his gender identity, and his sexual orientation in that he was subjected to a hostile work environment by Hussain.

Complainant began working for Securitas as a part-time security officer in October 2009. At the time, Complainant was a woman who self-identified as female and as lesbian. Complainant's name at that time was Rebecca Michele Tinker. Complainant testified that he is transgender, but had not yet begun the gender reassignment process to become male. Complainant did not publically identify as transgender until late 2010 and he changed his name to Alyx Jaden Tinker on July 20, 2011. Complainant informed Securitas and Hussain that he was transgender, was transitioning to a man, and asked to be called by his new name and by the pronoun "he."

During Complainant's employment, Securitas provided security services for various buildings and departments at Harvard University, including Harvard University School of Law, where Complainant worked.

After Complainant legally changed his name, he filed paper work with Securitas to register his name change on or about August 1, 2011. In the summer of 2011, Complainant also revealed to Securitas' co-workers and management that he was transgender and in the midst of the gender reassignment process to change from the female to male gender. At this time, Complainant asked his co-workers and supervisor Hussain to begin referring to him by the name Alyx, or A.J., and to refer to him by male terms and pronouns. Complainant testified that Hussain refused to comply with his request and regularly referred to or addressed Complainant as "she" or "Becky." Complainant testified that despite his repeated requests that Hussain stop using female terms to refer to him, Hussain persisted in using female terminology to describe him. According to Complainant, Hussain often referred to him and a female employee as "you girls" or "those girls," and berated them for causing problems at the site. Complainant believed that Hussain's persistent use of female terms was not unintentional, but a deliberate attempt to degrade him.

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Complainant testified that when he was employed as a floater, before he identified himself transgender, and when Hussain was not yet his supervisor, Hussain would make derogatory statements about women and lesbians. He testified that Hussain made the following derogatory comments about Complainant's gender, gender identity, and sexual orientation: Hussain told Complainant that according to the Quran, homosexuality is wrong, but that being a lesbian was not as bad as being a gay male and f—king a male. Hussain stated it was “wrong” and “unclean” for one woman to love another woman and that Complainant was going to hell; that Complainant's lifestyle was an abomination and that females are biologically not as intelligent as males. Hussain said that women should not have certain positions at HLS and did not need weekends off because they “just go out and whore around.” Complainant told Hussain that these comments were inappropriate and made Complainant feel uncomfortable. Complainant also testified that he witnessed Hussain approach the female security officer, McCracken, and rub her stomach and tell her she was gaining weight and needed to lose weight. He did not witness Hussain act or speak in a similar manner to male security officers.

Disputed testimony about reporting of harassment

Complainant did not register a formal complaint of harassment or discrimination regarding Hussain's conduct through Securitas' hotline, a mechanism available to employees to register complaints. He testified that he did, however, report Hussain's inappropriate gender-based comments and his use of the female pronoun to refer to Complainant, to a number of supervisory level employees as early as late 2011. Complainant testified that he also complained about Hussain's conduct to the Training Manager around the end of 2012 or the start of 2013. Securitas' witnesses all denied hearing from Complainant about Hussain making harassing or discriminatory comments.

Complainant testified that he became very frustrated because the situation with Hussain did not improve, especially after he complained to one supervisor at least three times and that supervisor said he would speak to the Director of Security for Securitas.

In June 2013, Hussain encountered Complainant doing paperwork in the office and proceeded to berate Complainant in a profane manner in the presence of another employee for not being fully trained on certain procedures. Complainant testified that Hussain cornered him behind a desk while cursing at him, accusing him of not doing his “f—king job,” yelling that “you girls are always causing problems,” and asking him why “you girls won't do your job.” He advised Complainant to “go back to the f—king office” and sent him on his way to deal with another matter. Complainant testified that this incident made him “extremely anxious” and “nervous,” “very fearful,” and left him “very shaky,” and that he went to the bathroom and “vomited.”

Supervisor denies harassment

Hussain categorically denied making many of the inflammatory and offensive statements alleged by Complainant. He stated that his referring to Complainant as “she,” was unintentional and occurred at most only three times. He denied intentionally using female pronouns to refer to Complainant and stated that within months he ceased doing so and became accustomed to referring to Complainant as a man.

Complainant transfers after filing his Complaint and resigns fifteen months later

Complainant filed the charge of discrimination in July 2013. He was transferred shortly after filing his complaint of discrimination and no longer reported to Hussain after that. More than a year later, in the fall of 2014, Complainant resigned from his employment with Securitas. He did not allege any further harassment by Hussain during the 15-month period between his transfer in July 2013 and his resignation of employment in October 2014.

MCAD Award

The case proceeded to formal hearing at the MCAD fourteen months after Complainant left Securitas. Complainant testified that he was anxious about the way Hussain spoke to him “and felt stressed from being persistently degraded and ridiculed by Hussain.” After the June 2013 incident, he “had trouble sleeping and was having nightmares about the incident and was jittery all the time.” Based on this testimony – and no evidence of medical treatment – the Hearing Officer concluded that Complainant had suffered significant distress as a direct result of Hussain's unlawful actions related to his gender and gender identity and that he is entitled to damages in the amount of \$50,000 for the emotional distress resulting therefrom. Interest at the statutory rate of 12% for just over six years was added to the Award.

TAKE-AWAYS:

1. Under Massachusetts law, notice to management of harassment by a supervisor is not required for liability to attach to the Company, as it is vicariously liable for the unlawful harassment committed by a supervisor upon whom it confers authority.
2. MCAD Hearing Officer's fairly routinely award emotional distress damages based on the Complainant's own testimony of sleepless nights and feelings of anxiety.
3. Statutory interest from the date of the complaint until the amount is paid accrues at 12% per annum.

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