

NEWS ALERT**LABOR & EMPLOYMENT****Job Transfer Not Retaliation**

By Barry J. Waters

On December 30, 2016, a Hearing Officer with the Massachusetts Commission Against Discrimination (MCAD) dismissed the Complainant's retaliation case, finding that the Complainant had failed to establish a causal connection between his earlier discrimination complaint and a later adverse action. Most interesting was the Hearing Officer's determination that the Complainant had failed to establish a prima facie case of retaliation as a result of his transfer from one facility to another. There was no evidence that his transfer "caused Complainant to suffer any tangible economic loss or a change in any other job related benefits." MCAD v. Mass. Dept. of Corrections, 11-BEM-02854, 2016 WL 7733656 (MCAD).

UNDERLYING DISCRIMINATION CLAIM

Complainant Rigaubert Aime ("Aime") had been a correction officer with the Massachusetts Department of Correction ("DOC") for over twenty years. In March 2011, he filed a race discrimination claim with the MCAD and soon thereafter filed internal complaints of unfair treatment by his supervisors. While his internal complaints were all dismissed, the Hearing Officer cited established law in holding that Aime only needed to prove that he -- reasonably and in good faith -- believed that the DOC had discriminated against him -- not that it actually had done so -- in order to proceed with his retaliation complaint.

ADVERSE ACTION DEMONSTRATED BUT RETALIATION NOT PROVEN

In the ensuing months, Aime claimed he was subjected to disciplinary treatment of several types, including a two-day suspension for performance reasons, which the Hearing Officer concluded were "adverse employment actions" giving rise to retaliation claims. However, in each instance the Hearing Officer concluded that the DOC's disciplinary actions were justified for legitimate, non-retaliatory reasons.

JOB TRANSFER DID NOT INVOLVE A MATERIAL CHANGE

In late July 2011, the DOC informed Aime that he was being transferred from a Pre-Release Center in Roslindale, MA to the Lemuel Shattuck Hospital Correctional Unit in Boston. The DOC Superintendent in Roslindale, the evidence showed, had requested that Aime be reassigned within a few weeks of the filing of Aime's MCAD discrimination complaint back in March 2011 because of Aime's repeated conflicts with his supervisors. Aime claimed that transfers in the past had often been viewed as negative or punitive and although his transfer did not involve any *material* change in his shift, days off, or any other terms or conditions of his employment, including his commuting time, he asserted that his transfer was in

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retaliation for filing his earlier MCAD complaint. The Hearing Officer did not agree, concluding that the transfer did not “materially disadvantage” him in tangible working conditions. Aime’s subjective feelings of mistreatment, without objective evidence of loss, could not sustain his claim. The Hearing Officer went on to find that, even if the transfer was to constitute an actionable adverse employment action, Aime failed to prove that the reason given for the transfer was a pretext for retaliation.

TAKE-AWAYS

1. Just because an employee has filed a claim of discrimination does not immunize the employee from disciplinary action, including discharge.
2. Just because the employee’s discrimination complaint has been dismissed does not immunize the employer from a retaliation claim.
3. If the employee’s discrimination claim was asserted in bad faith, it cannot support a retaliation claim. But “bad faith” is difficult to prove.
4. The temporal proximity between the discrimination complaint and further disciplinary action is a factor in evaluating whether retaliation has occurred, but it is not dispositive.
5. Employers should not avoid disciplining an employee who has recently filed a discrimination claim. Discipline should be issued as uniformly as possible where the circumstances support it.
6. A persistent employee may claim retaliation, repeatedly, no matter how justified the employer’s actions may seem. This is no reason to give in.
7. All disciplinary action should be reviewed to make sure it is well-supported. This is particularly true if a retaliation claim is likely.
8. Job transfers to a *lesser* position can support a claim of retaliation. In addition, a longer commuting distance may constitute an adverse employment action.
9. This case nonetheless illustrates that not every change relating to a job assignment is an adverse employment action. The employee has the burden of proving the adverse employment action *and* that it was retaliatory.

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