

THE MCAD HOLDS THAT TERMINATING AN EMPLOYEE ON MATERNITY LEAVE DOES NOT VIOLATE THE MA MATERNITY LEAVE ACT

By: Anthony Augeri, Esq.
Email: aaugeri@devinemillimet.com
Phone: 978.475.9100

MAY 21, 2010

The Massachusetts Commission Against Discrimination (MCAD) was established to investigate all allegations of discrimination and harassment brought under the Massachusetts employment discrimination law, M.G.L.A. Section 151-B. By agreement with the federal EEOC, the MCAD also investigates certain charges of alleged violations of federal laws, including Title VII, the ADEA and ADA. Under Massachusetts law, all discrimination cases must be initiated through a charge of discrimination filed with the MCAD within 300 days of the last alleged discriminatory act. An aggrieved party may later choose to file a private lawsuit, but filing a charge with the MCAD is a necessary prerequisite. Because of this exclusive initial jurisdiction, MCAD decisions are important barometers in assessing potential liability and defenses.

The MCAD's recent decision in *MCAD, et al. v. Gervais Companies, et al.* (*Lawyers Weekly No. 22-010-10*) (10 pages) gives clear and important guidance regarding how the agency intends to interpret the Massachusetts Maternity Leave law. In *Gervais*, the employer, a car dealership, moved to dismiss a sex discrimination charge filed by an employee who was terminated while on maternity leave. After a hearing, the MCAD granted the employer's motion, determining that the employee was terminated for a legitimate, nonpretextual reason; specifically, that it was the result of cost-cutting measures implemented in the face of declining business.

In support of its finding, the MCAD noted that two months before the complainant was laid off, the respondent had also laid off Dorothy Gauthier, another long-term administrative employee, and earlier in the same year the respondent laid off three other clerical employees, none of whom were known to be pregnant. The MCAD stated that the: "...reductions in force, together with the layoffs of employees handling cars, reduced the workforce from an average of fifty-nine employees in 2005 to fifty-one employees in 2006." The MCAD found credible the testimony of the employer's General Manager that even after the 2005 reductions in staff, he anticipated the need to take

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Anthony Augeri
978.475.9100
aaugeri@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvanbuskirk@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

additional cost-cutting measures in 2006, despite telling the complainant and another employee “not to worry about [the complainant’s] job status because he wasn’t sure what he was going to do and didn’t want to cause premature worry.”

MCAD Judge Waxman wrote:

While [the employer’s general manager] was uncertain about how to trim costs prior to complainant’s maternity leave, following her departure it became clear that [another employee] could perform complainant’s job while continuing to perform her own. [The General Manager] determined that a consolidation of the two positions would promote the dealership’s goal of reducing expenses. By laying off Complainant during her maternity leave, [the General Manager] sought to make her eligible for unemployment benefits following the birth of her baby as opposed to being on an unpaid eight-week maternity leave. I credit this rationale.

Complainant focuses on the existence of other options aside from her own layoff as justifying an inference of discrimination. She notes that she was laid off despite having more seniority than [another employee] who was retained [by the employer]. However, [the employer’s General Manager testified that he retained [the other employee] in lieu of Complainant because Complainant would have required re-training in order to perform [other employee’s] job and because [the other employee] was better at working with people. I accept this testimony as credible.

The complainant argued that she had demonstrated an inference of discrimination by showing the respondent had hired eighteen employees in 2006 despite claiming financial troubles; that complainant was the sole clerical employee laid off in 2006; and that complainant’s layoff was followed by the hiring of three clerical employees in 2006. Judge Waxman found this evidence, un-refuted by respondents, non-discriminatory, stating it:

simply reflects the reality that a car dealership has more mechanics, salespeople, and car washers than clerks, that such employees come and go, and that the dealership has clerical needs unrelated to the cashier’s position. There is no evidence that the cashier’s position was revived and re-filled after complainant’s departure”....[i]nstead, complainant’s duties were folded into the job of [other employee] who was already on the payroll as the dealership’s warranty administrator.

Judge Waxman also found that although: “There were...three clerical employees hired after complainant was laid off...they were hired on a part-time basis at a significantly lower hourly rate than that paid to complainant. By the time they were hired, [the General Manager] was aware that Complainant had already secured permanent, full-time employment

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

elsewhere, earning \$15.00 an hour. [The employer's General Manager's] assumption that complainant would not be interested in a part-time job with the respondent at \$8.00 an hour does not support an inference of sex discrimination."

The MCAD then addressed the complainant's claims of discrimination under the Massachusetts Maternity Leave Act, which requires employers to grant non-probationary female employees eight weeks of unpaid maternity leave, if employee gives the employer at least two weeks notice of the anticipated date of departure and of the intention to return to employment. Judge Waxman held that in this case, the eight weeks of unpaid maternity leave was cut short by the elimination of complainant's position for non-discriminatory reasons; therefore there was no violation of the Massachusetts Maternity Leave Act.

While this decision provides insight into how the MCAD will treat charges of discrimination involving pregnancy, it also highlights the importance of proceeding with caution when considering the termination of an employee on a statutory leave of absence. In order to be able to defend potential claims, an employer must be able to evidence a non-discriminatory rationale for the action preferably by showing that similarly situated employees were treated in a substantially similar manner.

The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at employment@devinemillimet.com.

"This is not a legal document nor is it intended to serve as legal advice or a legal opinion. Devine, Millimet & Branch, P.A. makes no representations that this is a complete or final description or procedure that would ensure legal compliance and does not intend that any reader should rely on it as such."