

## RECENT CASES DEMONSTRATE EVOLVING NATURE OF MASSACHUSETTS EMPLOYMENT LAW

By: Mark Broth, Esq.  
Email: [mbroth@devinemillimet.com](mailto:mbroth@devinemillimet.com)  
Phone: 603.695.8558

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In two recent decisions, the Massachusetts courts have demonstrated that employment law concepts concerning both liability and damages continue to evolve.

In Augis Corporation v. Massachusetts Commission Against Discrimination, which was decided on October 14, 2009, the Massachusetts Appeals Court held that the Massachusetts Commission Against Discrimination (MCAD) could properly find an employer liable for race discrimination based on a single instance of a supervisor uttering an offensive racial epithet. In this case, the MCAD found that a supervisor had, on one occasion, called a black male employee a "nigger." The Court held that

we think that a supervisor who calls a black subordinate a 'f \_ \_ \_ \_ \_ nigger' has engaged in conduct so powerfully offensive that the MCAD can properly liability on a single instance. That term inflicts cruel injury by its very utterance. It is degrading, it is humiliating, and it is freighted with a long and shameful history of humiliation, the ugly effects of which continue to haunt us all. The words have no legitimate place in the working environment - - indeed, they have no legitimate place - - and there is no conceivable justification for their use by a workplace supervisor.

In reaching this decision, the Massachusetts court deviated from a long-established federal law precedent. In its 1986 decision in Meritor Savings Bank v. Vincent, the U.S. Supreme Court held, for the purposes of Title VII, that "mere utterance of an ethnic or racial epithet which engenders offensive feelings" cannot be the basis of a discrimination or harassment claim. The Augis Corp. decision should cause Massachusetts employers to adopt "zero tolerance" policies with regard to the use of slurs based on race, religion, ethnicity, sex and sex preference. Massachusetts employers should also consider emphasizing in workplace training that a single instance of offensive conduct can result in liability.

### Labor, Employment & Employee Benefits

**Mark Broth, Chair**  
603.695.8558  
[mbroth@devinemillimet.com](mailto:mbroth@devinemillimet.com)

**Newton Kershaw**  
603.695.8571  
[nkershaw@devinemillimet.com](mailto:nkershaw@devinemillimet.com)

**Karen Levchuk**  
603.695.8618  
[klevchuk@devinemillimet.com](mailto:klevchuk@devinemillimet.com)

**Patricia McGrath**  
603.695.8537  
[pmcgrath@devinemillimet.com](mailto:pmcgrath@devinemillimet.com)

**Anthony Augeri**  
978.475.9100  
[aaugeri@devinemillimet.com](mailto:aaugeri@devinemillimet.com)

**Margaret O'Brien**  
603.695.8631  
[mobrien@devinemillimet.com](mailto:mobrien@devinemillimet.com)

**Anne Scheer**  
603.410.1708  
[ascheer@devinemillimet.com](mailto:ascheer@devinemillimet.com)

**Laurel Van Buskirk**  
603.695.8565  
[lvanbuskirk@devinemillimet.com](mailto:lvanbuskirk@devinemillimet.com)

**Anne Trevethick**  
603.695.8725  
[atrevethick@devinemillimet.com](mailto:atrevethick@devinemillimet.com)

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

In Haddad v. Wal-Mart Stores, Inc., a case decided by the Massachusetts Supreme Judicial Court on October 5, 2009, the Court enunciated a new standard for the award of punitive damages in a sex discrimination case. In this case, the plaintiff claims that the employer's decision to terminate her employment was based on gender. A jury awarded the plaintiff front pay, together with \$1 million in punitive damages. The punitive damage award was set aside by the trial court judge and the plaintiff appealed that decision. On appeal, the Court held that to justify an award of punitive damages, the jury must find that the employer's actions evidenced intentional discrimination. Further, the Court held that punitive damage may only be awarded where the employer's conduct is outrageous or egregious. The Court enunciated a five part test for determining whether conduct meets this "outrageous or egregious" standard:

1. Where there was a conscious or purposeful effort to demean or diminish the class of which the plaintiff is a part;
2. Whether the defendant was aware that the discriminatory conduct would likely cause serious harm, or recklessly disregard the likelihood that serious harm would arise;
3. The actual harm of the plaintiff;
4. The defendant's conduct after learning that the initial conduct would likely cause harm;
5. The duration of the wrongful conduct and any concealment of that conduct by the defendant.

The Court's ruling strongly suggests that employers take great care to avoiding making decisions that they know to be discriminatory. Moreover, the ruling strongly suggests that employers, upon learning of discriminatory acts, take prompt action to correct the wrongdoing and to minimize the harm to the plaintiff.

As these cases demonstrate, employment law continues to evolve. Employers are cautioned to assure that their policies and procedures and workplace training programs are continually updated to assure that they are keeping pace with the developing law.

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#### 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

