Employment Bulletin - October 19, 2009

October 19, 2009

MASSACHUSETTS APPEALS COURT FINDS SINGLE COMMENT ACTIONABLE AS DISCRIMINATION

written by Jamie L. Matthews

Recently, in affirming a decision by the Massachusetts Commission Against Discrimination ("MCAD"), the Massachusetts Appeals Court held that a racial epithet can constitute discrimination in terms and conditions of employment. In *Augis Corp. v. Massachusetts Commission Against Discrimination*, an African-American employee alleged that a supervisor had directed a profane and offensive racial slur towards him. The employee was subsequently terminated for violating a work rule, and he filed a charge with the MCAD alleging that he had been treated differently and terminated due to his race. While the employee relied on the supervisor's statement in support of his claim, he did not allege that he was subjected to harassment or a hostile work environment. After a hearing, the MCAD found that the employer lawfully terminated the employee and rejected the employee's claim of disparate treatment. Nonetheless, the MCAD determined that the supervisor's slur constituted "racial harassment" and produced an "abusive working environment." It thus found the employer liable for discrimination under Chapter 151B. In addition, based only on the employee's testimony that he was stunned, upset and hurt by the racial epithet, the MCAD awarded the employee $10,000 in emotional distress damages.

On appeal, Augis argued that the MCAD's decision should be overturned because it had never been charged with harassment or a hostile work environment and that it, in fact, had prevailed on the actual theory of the charge. The Appeals Court rejected this argument. Although the employee had never alleged that he had been subjected to a hostile work environment, the Court noted that the supervisor's offensive statement had been a central component of the employee's claim from the outset. Rejecting any distinction between harassment and discrimination, the Appeals Court found the slur to be so offensive that the MCAD could properly base liability solely on that one comment, regardless of how the charge was styled. Further, although the Supreme Judicial Court has instructed that emotional distress damages must rest on more than just the employee's testimony that he was upset, the Appeals Court upheld the emotional distress award in *Augis* as supported by substantial evidence.

The supervisor's profane and offensive slur should not be tolerated in any workplace, and Massachusetts law has long recognized that a single, extreme incident may establish a hostile work environment. However, the decision in *Augis* is troubling because the employee never claimed to have been subjected to a hostile work environment. He attempted to use the slur as evidence that his termination and treatment were because of his

race, a theory rejected by the MCAD. Thus, the decision blurs the line between harassment and discrimination in terms and conditions of employment and suggests employers may be held liable for "discrimination" even in the absence of any disparate treatment or adverse employment action. While we suspect the decision was driven by the outrageous nature of the supervisor's comment, *Augis* arguably permits the MCAD to find a violation of Chapter 151B premised on a theory that is different from what was alleged in the original charge. Finally, although the amount of the award for emotional distress was not substantial, the Court's acceptance of that award based solely on the employee's testimony may signal that Massachusetts courts are willing to give the MCAD more leeway in awarding such damages.