

Labor & Employment Alert

An informational newsletter from Goodwin Procter's Labor & Employment Practice

Employer Violated Anti-Discrimination Statute By Failing to Investigate Possible Accommodations of Prospective Employee's Religious Beliefs

In its recent decision in *Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination*, the Supreme Judicial Court clarified the obligations of Massachusetts employers faced with requests for a religious accommodation, holding that they must actively identify and investigate all potentially feasible accommodations except those that they can conclusively prove, without investigation, would impose an undue burden on them.

The plaintiff in this case, David Marquez, applied for a job as a part-time bus operator for the Massachusetts Bay Transportation Authority (the "MBTA"). Part-time bus operators are required to work the morning and afternoon rush hour shifts, Monday through Friday. As a practicing Seventh-Day Adventist Marquez observes the Sabbath, precluding him from working from sundown on Friday until sundown on Saturday, thus interfering with his ability to work the Friday afternoon rush hour shift. Marquez informed the MBTA of his religious-based restriction and was told that the MBTA would be unable to grant his request to not work on Friday evenings and that his job offer was being withdrawn. The MBTA did not discuss any possible accommodations with him.

Issues and Holdings

Marquez filed a charge with the Massachusetts Commission Against Discrimination ("MCAD") claiming religious discrimination in violation of M.G.L. ch. 151B, the Commonwealth's anti-discrimination statute. The MCAD determined that a number of possible accommodations of Marquez's Sabbath observance existed; the MBTA could maintain a list of relief drivers who could cover his shift, it could facilitate shift trades among drivers, it could leave the vacant shift open or it could pay another driver overtime to cover the shift. While the MBTA did not have to provide any of these accommodations if it could prove that each one would cause it "undue hardship," its failure to even explore these options precluded it from meeting this burden. Moreover, the MCAD held that the MBTA's failure to engage in an interactive process with Marquez to identify and explore possible accommodations was itself a violation of the statute, separate from its failure to provide a reasonable accommodation. A Superior Court judge agreed.

On appeal, the Supreme Judicial Court affirmed, holding that "[a]n employer's mere contention that it could not reasonably accommodate an employee is insufficient" to

carry its burden of proving undue hardship; it must provide evidence supporting this conclusion. In reviewing whether the possible accommodations identified by the MCAD would in fact cause the MBTA undue hardship, the Court determined that the MBTA could not be required to leave the shift unattended, to pay someone overtime to cover the shift or to require other employees to swap shifts involuntarily because each of these options carried more than a de minimis cost to the employer. However, the possibility of voluntary shift swaps as a means of accommodation remained. While the MBTA argued that it had a policy which prohibited full-time drivers from trading shifts with part-time drivers, the evidence demonstrated that this was not an official policy and that shift trades of this nature were frequently allowed. “An employer cannot meet its burden . . . by casting a selectively enforced swap policy as a roadblock to accommodation.” Moreover, while a voluntary shift trade might cause undue hardship because it could still leave some shifts uncovered, the MBTA’s failure to even explore this option left its claim of undue hardship “unpersuasively, in a factual vacuum,” and exposed the MBTA to liability.

Finally, the Court held that the MBTA’s argument that it was relieved of the obligation to explore possible accommodations because even that process would cause it undue hardship would “eviscerate religious protection in the workplace. If merely looking into an accommodation, or consulting with an employee about his requested accommodation, were to be considered too great an interference with an employer’s business conduct, then employers would effectively be relieved of all obligation” under the statute. The Court nevertheless held that an employer’s failure to engage in the interactive process is not a stand-alone violation of the statute but, rather, can, as here, fatally undermine the employer’s argument that the accommodation at issue imposes an undue burden. The Court did, however, recognize that employers need not investigate accommodations that they could conclusively demonstrate would impose an undue hardship. For example, if the employer had previously determined that a given accommodation would cause it undue hardship, it need not re-investigate that accommodation each time it is sought. Similarly, if a collective bargaining agreement precludes a certain accommodation, that accommodation need not be investigated.

Implications

The Court’s decision makes explicit the need for employers to engage in an interactive process with employees requesting religious accommodations unless it is clear that all conceivable accommodations would impose an undue hardship. The Court’s decision also illustrates what that interactive process should look like. When faced with a request for religious accommodation, employers would be wise to determine the scope of the religious belief or observance at issue, identify all possible accommodations and actively investigate the viability of each option.

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