

The SJC, in another decision pertaining to “mixed motive” cases, held that the nondiscriminatory reasons standing alone would have produced the same decision. A “mixed motive” case is one in which the employee has shown some evidence of discriminatory animus infecting the employment decision, and the employer has shown a legitimate business reason for terminating the employee. (In cases other than “mixed motive” cases, once the employer articulates a legitimate, non-discriminatory decision, the employee must then prove that this reason is a pretext and that there was discriminatory intent in the mind of the employer.)

In Wynn & Wynn v. Massachusetts Commission Against Discrimination, the SJC stated that in a “mixed motive” case, once a plaintiff has shown that a discriminatory motive played a part in the employment decision, the employer faces an increased burden to show that its legitimate reason, standing alone, would have produced the same decision.

In Wynn & Wynn, one of the key decision-makers made a discriminatory remark during a meeting when the hiring of the plaintiff, who was pregnant, was discussed. According to the SJC, once the plaintiff showed that the discriminatory remarks were made and were a motivating factor, the employer was required to present evidence that it would have made the decision not to hire her despite its discriminatory animus.

Lessons to Be Learned

The first lesson for employers is to be honest and truthful. Embellishing minor incidents or contriving problems in an attempt to create a pattern of grave incidents is highly risky. Employees should keep written notes if they perceive themselves in such a situation since specific incidents and benign explanations go a long way to convincing juries that employers’ reasons are false. Employers must clearly articulate and document the reasons for making employment decisions and provide these reasons to the affected employees. Sometimes, this requires having a difficult and uncomfortable conversation. Although telling an employee that she/he did not perform well may not be easy, giving a reason other than

the real reason can be costly. Employees should be given an opportunity to respond so that employers can determine if there are reasons for perceived under-performance.

The second lesson is to be even-handed. Putting some, but not all, employees under microscopic scrutiny to record each and every misstep provides fodder for allegations of unequal and perhaps unlawful conduct.

The third lesson is to be careful about comments in the workplace. Discriminatory comments may provide the juries the perceived insight they need to conclude whether or not intentional discrimination took place. In the end, the jury will assess the credibility of the witnesses. If one side is perceived as dishonest then the jury is permitted to conclude that dishonesty is a pretext for unlawful discrimination.

Some Jobs May Require More Flexibility

In Ward v. Massachusetts Health Research Institute, the First Circuit opened the door to greater scrutiny of the “essential elements” of a job in disability discrimination cases filed under the Americans with Disabilities Act (ADA) and Massachusetts Chapter 151B, § 4 (16). The employer in Ward had a flexible schedule for its employees, allowing them to arrive at work between 7 a.m. and 9 a.m. and leave any time after working for seven and a half hours. However, the plaintiff required an even more flexible schedule due to a severe arthritic condition which was worse in the morning and often prevented him from arriving even by 9 a.m. When the plaintiff arrived after 9 a.m., he worked for the required seven and a half hours. The Court ruled that regular and timely attendance is not necessarily an essential element of a job and that investigation into the particular circumstances of the employee and the employment environment is necessary to determine whether accommodation is reasonable or imposes an undue hardship on the employer.

Thus, even the most accommodating of

employer faced an increased burden to show that policies will not necessarily shield employers from litigation. As demonstrated by Ward, even some basic elements of a job, like attendance, can be scrutinized by a judge or jury to determine how essential they are to a position. The specific circumstances of each employee’s situation must be carefully examined to determine if a reasonable accommodation can be made before terminating an employee. Blanket policies for flexible time will not necessarily translate into a reasonable accommodation. Employees and employers should work together to resolve issues of accommodation, rather than employers attempting to “pigeonhole” employees to fit general policies, even under circumstances like Ward, in which the policy was relatively generous.

Employees should clearly address and document complaints they make to their employers. This can create a record that will show the employee took appropriate steps and the employer had notice of the problem. It will also help the employer to address the employee’s situation and perhaps avoid the need for litigation. Employees should pay careful attention to exactly what they are being told and ask probing questions. If the employees do not understand the answer to a question, they should ask for clarification. Employees should also ask, where appropriate, for their employers to document the answers to their questions.

The concepts described in this newsletter are general in nature. One must seek competent counsel before implementing any of the ideas described in this newsletter. This newsletter may be deemed advertising under the rules governing lawyers’ conduct in Massachusetts.