

## The MCAD's Fiscal Year 2023 Report: Everything Employers Need to Know

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The Massachusetts Commission Against Discrimination ("MCAD" or "Commission") has released its Fiscal Year 2023 ("FY23") Annual Report, which highlights the strides the Commission has made over the last fiscal year toward recovering from pandemic-related setbacks. Importantly, the report also provides several data points regarding the filing and disposition of employment related claims over the last fiscal year that every Massachusetts employer should know.

### Complaints Filed in FY23

FY23 marked another increase in the number of complaints filed with the Commission: 3,086 in total – a 9% increase from Fiscal Year 2022 ("FY22"), 78% of which (2,407 total) were employment matters. By category, the majority of claims continue to be retaliation (22%) and disability (21%). Sex and race/color also comprised a substantial number of the claims, at 17% each. The remaining categories comprising more than one percent of the claims included age (8%), national origin (5%), religion and creed (3%), and sexual orientation (2%).

### The FY23 Backlog

In FY23, the number of backlogged cases that have been pending over 18 months rose significantly from 1,460 cases in FY22 to 1,800 in FY23. According to the report, the backlog rose primarily due to staffing challenges. In FY23, the Commission hired 20 employees for its Investigative Division and hopes to hire 16 new employees in Fiscal Year 2024 and is trying to actively reduce the number of backlogged cases.

### Determinations at the MCAD in FY23

In FY23, 1,202 determinations were reached by the MCAD. These determinations consisted of 236 probable cause determinations (20%); and 966 lack of probable cause determinations (80%). In FY23, there were 4,538 open cases pending in the investigations stage, and 208 pending in the post-probable cause stage.

The majority of cases are still closed administratively, with the majority reasons being that they were settled (30%) (or conciliated, 12%), or removed to court (24%).

### In-Person v. Remote Proceedings

The Commission began offering more in person proceedings in FY23. Importantly, the Commission began holding hybrid adjudicatory hearings, transitioning from the fully remote practice instituted during the pandemic. This model requires the parties and presiding officer to appear in-person for the hearing, while providing public access via live stream. The presiding Hearing Officer also has the discretion to allow virtual witness testimony. Mediations and conciliations continue to be held entirely remotely absent special circumstances.

### ADR in the MCAD

In FY23, there were fewer mediations and conciliations at the Commission, down to 407, from 484 in FY22. The MCAD continued to offer late mediation, including post-discovery and post-certification mediation.

### FY23 Hearings Unit Decisions

The Hearing Unit issued five decisions after public hearing in FY23, four of which were employment matters. They are summarized below.

#### *MCAD and Silva v. Acushnet Co., et al.*, 44 MDLR 33 (2022)

Employee filed complaint alleging gender and age discrimination based hostile work environment and disparate treatment and retaliation after employer selected her for termination. The Hearing Officer found that employee failed to prove that employer's stated reason for termination—poor job performance—was pretextual and, therefore, employee failed to prove discriminatory animus and causation.

#### *MCAD and Joseph v. Mass. Dep't of Children and Families*, 45 MDLR 5 (2023)

Social worker employee filed complaint against Massachusetts Department of Children and Families ("DCF") alleging disability discrimination, failure to accommodate, retaliation and constructive discharge after she requested accommodations of no driving and a reduced caseload. The Hearing Commissioner rejected DCF's arguments that (1) the employee was not a qualified disabled person on the grounds that driving was a requirement of the position; and (2) accommodating a reduced caseload would create an undue hardship for DCF. Further, the Hearing Commissioner found that DCF took adverse retaliatory action by creating a hostile work environment that was so unusually aggravated that it resulted in the employee's wrongful constructive discharge. The Hearing Commissioner awarded the employee lost wages and \$35,000 for emotional distress and assessed a \$10,000 civil penalty against DCF.

#### *MCAD and Gurnett v. Organogenesis, Inc.*, 45 MDLR 17 (2023)

Employee filed complaint against wound care company employer alleging disability discrimination, failure to accommodate and wrongful constructive discharge after employer denied her request to work from home twice per week to alleviate pain she suffered during her commute due to a disability. The Hearing Officer concluded that the employer was liable for disability discrimination and failure to accommodate because the employee could perform the essential functions of her job while working from home two days per week and it would not have caused undue hardship to employer. The Hearing Officer further decided that accommodations related to commuting to and from work may constitute reasonable accommodations. However, the Hearing Officer decided that without more, the mere failure to accommodate did not result in a hostile work environment such that complainant was constructively discharged. The employee was awarded \$75,000 in emotional distress damages.

#### *MCAD and Santiago v. Caregivers of Mass., Inc.*, 44 MDLR 61 (2023)

Employee filed complaint against caregiver service employer alleging sexual harassment, retaliation, violation of the Massachusetts Parental Leave Act (M.G.L. c. 149, § 105D), disability discrimination, failure to provide a reasonable accommodation, sex discrimination and pregnancy discrimination. Importantly, the Hearing Officer found that the employee's transfer after her complaint of sexual harassment was retaliatory because it included a longer commute and she could not access the tools she needed for her job in the location to which she was transferred. The Hearing Officer also found that the employer failed to accommodate the employee because

the employer terminated her rather than discuss potentially extending her leave as she requested, and the Hearing Officer concluded the extension would not have been an undue burden. The Hearing Officer awarded lost wages, \$10,000 for the emotional distress caused by the retaliatory transfer, and \$20,000 in emotional distress damages resulting from the discriminatory termination.

### FY23 Full Commission Decisions

The Full Commission issued four decisions in FY23, of which three were employment cases:

#### *MCAD & Iris Quinones v. Faridoon Zamani, DMD & Faridoon Zamani, DMD, PC, 44 MDLR 25 (2022)*

The Full Commission affirmed the Hearing Officer's determination that the dental practice employer was liable for sexual harassment, sex discrimination, and constructive discharge, and affirmed the Hearing Officer's award of \$135,000 in emotional distress damages, finding it was supported by substantial evidence. The Full Commission also awarded \$15,330 attorney's fees and costs to the employee.

#### *MCAD & Yvrose Cesar v. Danvers Mgmt Sys, Inc. d/b/a Hunt Nursing and Rehab. Ctr, 44 MDLR 29 (2022)*

The Full Commission affirmed the Hearing Officer's decision dismissing Certified Nursing Assistant employee's claims of race and national origin discrimination but finding nursing home employer liable for retaliatory termination. Commission found that employee reported to the Human Resource Manager that her coworkers were calling her racial slurs. The Full Commission agreed with the Hearing Officer that the employee rebutted employer's stated reason for termination (poor performance), and that there was substantial evidence of retaliation, including that employer's policies provided for lesser discipline in lieu of termination, that other employees were not disciplined for other instances of the same conduct for which the employee was terminated, that the employee had prior favorable performance reviews, and that the employer failed to meaningfully investigate. The Commission affirmed the Hearing Officer's award of \$12,000 in damages for backpay and \$15,000 for emotional distress. The employee also received \$53,334.91 in attorney's fees and costs.

#### *MCAD & Somaira Osorio v. Standhard Physical Therapy et al., 45 MDLR 1 (2023)*

The Full Commission upheld the Hearing Officer's decision finding two managers and a physical therapy practice employer liable to a former female managerial employee for sexual harassment and retaliation. The Commission found that the employee's testimony established the conduct at issue was sexual in nature, unwanted, and objectively offensive. The Full Commission agreed with the Hearing Officer's finding that the timing of the employee's termination and the employer's inadequate investigation were substantial evidence of retaliation. The Full Commission affirmed awards of \$3,200 in lost wages, \$50,000 in emotional distress damages, and \$15,319.32 in attorney's fees and costs.

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