



## Episode 48: “Dealing With MA Commission Against Discrimination Claims”

Speakers: Ari Kwiatkowski and Carolyn Marcotte Crowley,  
Barclay Damon

**[Ari Kwiatkowski]:** Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

**[Ari]:** Hey, guys, welcome to episode 48. This week we are off to Massachusetts, and we are getting some tips from Carolyn Crowley, who is a partner in our Boston office, on handling claims before the MCAD [Note: Massachusetts Commission Against Discrimination]. Carolyn, welcome.

**[Carolyn]:** Thanks for having me. Appreciate it.

**[Ari]:** Absolutely. Thanks so much for joining. And to our listeners and I just mentioned Carolyn is a Barclay Damon partner who works in Boston. And Carolyn brings to the table years of experience representing employers in various capacities in litigation and in representing and defending employers before the MCAD. So, Carolyn, I know you’re the perfect person to talk to us today.

**[Carolyn]:** I hope so.

**[Ari]:** So before we dig in, Carolyn, I know you may know this from listening to other episodes or from our conversations, but I do always ask our guests to share something fun or interesting about themselves or their personal or professional life. So I’m going to ask you to do the same, if you don’t mind, and you will indulge me.

**[Carolyn]:** Sure. So, yeah. So I’ve got to reach back in time to when I had a lot of time. But I have gone around the world on a ship. I did Semester at Sea when I was in college and was able to stop at some very interesting countries and places that I would never have thought I would have ever been able to go to, like Cuba and Vietnam and Singapore. So I think that’s fun.

**[Ari]:** Yeah, I agree. So, Carolyn, I’ll just ask one follow-up. What was your favorite spot or your favorite place that you visited?

**[Carolyn]:** Sure. So the Seychelles, this little island in the middle of the Indian Ocean, it was unbelievable.

**[Ari]:** Love it. So a lot of guests who come on talk about their travels as a fun or interesting fact. And I just feel like I would love to have a sidebar travel podcast. But unfortunately for us and our listeners, this is not a travel podcast. So let’s dig in and get right to it. So, Carolyn, can you tell us a little bit generally just what the MCAD is?

**[Carolyn]:** Yeah, sure. So the MCAD, probably similar to New York and to Connecticut, it’s the state agency that we have here, it enforces a variety of anti-discrimination laws in Massachusetts.

**[Ari]:** Perfect. And you just anticipated my next question, which is what laws does the MCAD enforce? Can you tell our listeners, I’m assuming it’s employment, but maybe other areas are covered as well?

**[Carolyn]:** Yeah. So actually a variety are covered here in Massachusetts. But as a general matter, right, the discrimination laws of Massachusetts, they protect all people in Massachusetts from being treated differently or unfairly based upon their membership in a protected category. Right. Such as your race, your national origin, religion, disability, age, sexual orientation, or gender identity. So any of those things, the MCAD is enforcing those laws.

**[Ari]:** Got it. And thanks for kind of going through that, Carolyn. When one of our other guests was on, I think it was Debbie Kent, who's the director of the New York State Division of Human Rights, she made a point to say that she was reading off a list because it was a lot of protected classes that were covered.

**[Carolyn]:** No, it is a lengthy list. Yeah.

**[Ari]:** So, Carolyn, can you just give our listeners a little bit of general background or maybe a high overview of how the MCAD enforces those anti-discrimination laws?

**[Carolyn]:** Yeah, sure. And so at a really high level, right. What the MCAD does is they investigate and prosecute complaints of discrimination in employment, housing, credit and mortgage lending, public places. So your place is a public accommodation and where people are seeking access to educational institutions. So it's really this agency that investigates and prosecutes.

**[Ari]:** Good to know. So Carolyn, can you tell us a little bit about how the MCAD is organized? You know, we've gone through New York, we've gone through Connecticut, and there's been kind of like regions or regional offices throughout the state. Is it similar in Massachusetts?

**[Carolyn]:** Yeah. So similar. So MCAD here has four offices—as you'd expect, one in Boston. One out in the middle of the state in Worcester, one in Springfield, and even one down in New Bedford.

**[Ari]:** Got it. So I think that's a good general overview. Carolyn, thanks. That's super helpful. I kind of want to dive in or dig into the complaint process. So can you tell us how long an employee or former employee has to file a complaint with the MCAD if that employee believes that they've been subject to discrimination, that would fall under the purview of the organization.

**[Carolyn]:** Sure. So in most cases, right, it's 300 days. There's a 300-day statute of limitations where you need to file by then. And it's based on the last discriminatory act.

**[Ari]:** That is similar to how it is in New York as well. So let's assume, Carolyn, I think for purposes of our discussion this week and next week to our listeners, Carolyn will be back next week to kind of take us through the process. But let's assume for purposes of our discussion that we have a hypothetical employee or complainant who files the complaint or charge with the MTA. And is it a complaint or is it a charge before that organization?

**[Carolyn]:** Yeah, technically it's a charge. The terms are use interchangeably, but technically a charge.

**[Ari]:** Okay. Just want to make sure I got the nomenclature right. So let's assume our hypothetical employee has filed a charge with the MCAD. And how long does an employer have to respond to that charge?

**[Carolyn]:** Sure. So once the employer receives it, they get they get a notice. They get a copy of the charge, a bunch of other information from the MCAD, typically 21 days to respond. Now, the good news, if there's been a lag in getting that over to your counsel, or it hasn't landed on the right desk for whatever reason...you reach out MCAD, they're great about granting an extension. So you could just ask for additional time, which... you want to put in a very complete position statement. So if you're up against the deadline, you're going to want to request that extension.

**[Ari]:** Yeah, I think that's very helpful advice because to me, 21 days, at least in lawyer life, is a very short, short-term response. And, you know, sometimes in New York can be a little tricky to get an extension, you know, especially if there has been a delay and maybe you as the attorney are receiving the complaint, you know, the day before it's due. So does the MCAD pretty frequently or routinely grant extensions?

**[Carolyn]:** They do. Yeah. They, at least in my experience, have been really good about it. Ask for a reasonable amount of time that's going to allow you the time you need to investigate on your end. Interview people, collect the information that you need to put in the position statement that they're looking for.

**[Ari]:** So, Carolyn, you mentioned the position statement. I think you're clairvoyant. You're helping me and anticipating a lot of the things I'm going to ask you. But, I know you mentioned the position statement. Can you tell our listeners a little bit about how an employer should respond to the charge or complaint?

**[Carolyn]:** Yeah, sure. So unlike a lawsuit in court, right, where you would do an answer where you're admitting, denying certain things here, what you're doing at the MCAD is you're putting in a position statement. It's a much more like a brief where it lays out the facts, it lays out your legal arguments, it puts in really your side version of events. It's you know, it could be a lengthy document, but not like an "answer." Right. It's much more of a talking document where you're explaining, look, these things didn't happen or whatever your defenses are.

**[Ari]:** It's interesting because that's similar to how it is in New York. But I think in Connecticut before the CHRO there is more of a formulaic like deny this allegation, you know, DKI or admit that. So it's interesting how every state does it a little bit different, but it sounds like Massachusetts is pretty similar to New York.

**[Carolyn]:** It is, yeah. And unless you are presented with potentially a charge that like looks just like a complaint, right. Or where there's some reason to want to or where you feel compelled to be admitting and denying allegations—I've actually had one case where that and a position statement made sense—you're usually just going to do the position statement here.

**[Ari]:** And that's more of a narrative format, as you mentioned, more explaining why the discrimination didn't occur.

**[Carolyn]:** Exactly. Exactly right. Just this description of like your position, you want to include all the facts that you have. You want to respond to the allegations and you want to include your defenses.

**[Ari]:** So in New York, Carolyn, we often attach documents or exhibits to the position statement. Is that similar in practice in Massachusetts or is that later in the process? Or do you normally, you know, how do you normally deal with documents that support your position?

**[Carolyn]:** Yeah, so it can go both ways. Right. So oftentimes, yes, documents, exhibits are attached to the position statement. You know, there's actually an email that confirms this individual didn't apply for this program or the other program.

**[Ari]:** Right.

**[Carolyn]:** Something you want the commission to see when they're evaluating whether this charge has probable cause or not. So oftentimes, yes, you might want to attach some things, critical documents. We can get into this a little bit more, too. But the commission can investigate and sometimes they send requests for information and then you'll be producing documents.

**[Ari]:** Right, in which case you have to respond and have to mostly, in most instances, I would assume, provide the documents that are requested.

**[Carolyn]:** Exactly.

**[Ari]:** So, Carolyn, in New York—and I think this is helpful to point out for employers who have employees in both states—in New York there’s no requirement that the actual respondent or responding party sign or verify any piece of what we would submit to the New York State Division of Human Rights. Is that similar in Massachusetts, or are there additional requirements for who needs to kind of sign off on the position statement?

**[Carolyn]:** Yeah, so that’s interesting because here you do...the attorney, if you have one, signs off on it and as well as someone who has knowledge of the facts stated in the position statement. So if you have an individual respondent, you’ll want that person to sign in addition to the attorney signing off. And there’s a couple of different ways you can do it. We have a couple of different forms we use depending on, you know, the situation. But basically, you’re saying it’s “true and accurate to the best of my knowledge and, you know, information at this time.”

**[Ari]:** Yes, I think that makes complete sense. So if you have employees in Massachusetts, listen up, because, you know, this isn’t a situation where necessarily your attorney is going to take care of everything for you. And, you know, you just kind of have to give an okay, it’s okay. You really need to pay attention and make sure everything’s accurate. Your signature, not that you wouldn’t, but your signature has to want it. So.

**[Carolyn]:** Yeah, no, we work with our clients very carefully on these, making sure that everything that’s said in it—because they’re signing off on it—needs to be to the best of their information.

**[Ari]:** Right.

**[Carolyn]:** Now. At the time.

**[Ari]:** And I think as we’ll talk about next week, I mean, that’s all fair game in terms of the investigation of the allegations. And you don’t ever want to be in a spot as an employer where something could be construed as inconsistent.

**[Carolyn]:** Right. Exactly.

**[Ari]:** Yes. More to come on that. So, you know, this is more of a procedural question, Carolyn, but I think it’s important to point out, because I think this is different per state, at least from what I’ve seen from having guests come on the podcast. Does the complaining party or the employee before the MCAD get a copy of the position statement and whatever the employer submits in response to the charge?

**[Carolyn]:** They do. So interesting that it’s different in different places. Here yes, the complainant or their counsel gets a copy of the position statement. So sometimes we call it “free discovery.” It is a little bit of a balancing act, right, between what you need to put in to support your position and what you’re also telling the other side. Because as we may talk about in this podcast or later, a complainant can pull their charge from the MCAD after about 90 days and file it in, in Superior Court or wherever the appropriate court is. And then they have all of the information you provide it. Right.

**[Ari]:** Right. And Carolyn, and this is a little bit beyond the scope of the discussion, but I can’t help but asking now that you kind of opened the Pandora’s box, I’ll say, of Superior Court, but I would assume that whatever you submit to the MCAD is also at least fair game to be questioned about in the subsequent litigation or, you know, admissible in the subsequent litigation.

**[Carolyn]:** Yeah. So two parts there. Right. And I would think that complainant’s counsel certainly would say yes to both. I think that we take a different approach. I think, you know, for discovery purposes, yes, there’s some things in there that are fair game. I don’t know, though, that I would agree that the position statement

is admissible just as a matter of general practice. There may be some reasons why it's not in different circumstances.

**[Ari]:** Makes sense. But I think putting aside, I guess the, you know, what we lawyers call the admissibility piece of it, still want to be consistent to the extent you can be.

**[Carolyn]:** Absolutely, absolutely it's critical.

**[Ari]:** Great. So one thing one other thing I wanted to talk about in the context of the position statement, Carolyn, is the opportunity for a rebuttal. So and for our listeners "rebuttal," basically what I'm getting at is whether the complaining party has the opportunity to respond to what the employer says in writing. So, Carolyn, can you tell us a little bit about that?

**[Carolyn]:** Sure. Yeah. So here in Massachusetts, rebuttals are actually allowed and they're, encouraged by the MCAD and I think in part because it helps give them a more complete picture. Right. They have the charge, they have the position statement, which is the employer's you know, response. And then, okay, well, what would they say in reply to that? And usually I see pretty fulsome rebuttals. You can also request to do a surrebuttal and sometimes people do that to get another word in depending on the type of case, the complexity of the issues...

**[Ari]:** I was going to ask you that, Carolyn, but I'm glad you covered it. We're just one brain today, you and me. So I think that's all really helpful. And I think this is a good place to start for this week. I think next week we'll pick back up and we'll kind of delve into the investigation piece of the MCAD's process. But before we break, Carolyn, is there anything that maybe we didn't chat about or anything you think it's important for employers to keep in mind, maybe particularly when they are on the receiving end of one of these complaints or charges?

**[Carolyn]:** Sure. So, yes, maybe a couple of key takeaways, right? Don't let it just sit on a desk. You need to respond.

**[Ari]:** Very important.

**[Carolyn]:** Not responding is not a good idea. It's not going to go away and it's likely to get worse. Get it to your lawyer or get it to the appropriate person to investigate. Right? Look into what happened, collect the documents, put in your litigation hold. Right, so things are preserved. Interview the people you need to interview, collect the information you need so you can explain to the MCAD in your position statement why this isn't what happened and you can tell them what actually happened. So it's critical you get these; you need to take the steps that are required to respond.

**[Ari]:** Yeah, that is such an important takeaway and just generally probably good life advice, as to the first part of what you said right. Listeners, we're here to be your life coaches as well. (Just kidding!) It's not just ...All right. Well, thanks, Carolyn. Really appreciate it to our listeners. We will be back next week with Carolyn and we'll talk about the investigation.

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