



Episode 49: “Dealing With MA Commission Against Discrimination Claims, Part 2”

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[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]: Everyone, welcome to episode 49. We are off to Massachusetts again this week and I am joined again by my colleague, partner Carolyn Crowley in our Boston office. And Carolyn is giving us tips for handling discrimination claims before the MCAD. Carolyn, welcome back.

[Carolyn]: Thanks for having me again, Ari.

[Ari]: Absolutely. I’m so glad you’re able to be here again and join us this week. I think last week, you know, we really went through the overview of the beginning process in terms of the filing of the complaint, responding to it. And you know what the employer should include in terms of a response. So unless you think otherwise, I think we’ll start the episode by talking about the investigation. Can you tell our listeners who at the MCAD performs the investigation?

[Carolyn]: Sure. And so just generically, right. It’s going to be a MCAD staff member. They’re investigators, they’re trained in these types of things. But what they’re trying to do, right, is determine if the treatment alleged constitutes unlawful discrimination.

[Ari]: Makes sense. And Carolyn, I think it would be helpful if you could tell our listeners what that investigation entails, kind of in a broad sense. So just to orient everyone, our hypothetical employee has filed their complaint or charge. The employer has responded, and now we’re in investigation. So, Carolyn, if you could shed some light on what that process looks like.

[Carolyn]: Sure. So the staff member or investigator. Right. To do an investigation is going to review the parties’ submissions. Then they have a number of additional tools. The one I see most frequently is requests for information to the respondents. I think sometimes there are requests for information to the complainants. Right, do they have any documents? Do they have emails that support some of the things they’re saying? But certainly request out to the respondent or respondents about... for documents. Also, they can ask for witness interviews. Right. So they may want to talk to a couple, a handful of key people. And you want to schedule those so that you can be there, obviously, for the interview. They can also send out subpoenas. They can send document requests, though the most typical that I see here are the requests for information, RFIs or interviews.

[Ari]: Got it. And Carolyn. So just I know this is probably specific for each matter, but can you give our listeners a sense of the type of information that the MCAD is looking for when they send out a request for information?

[Carolyn]: Yeah. So it obviously does vary claim by claim, but, you know, sometimes they’re looking for information to understand the organization. Right. Maybe an organization chart. Who did this person work with? Maybe something focused on the department, just so they can understand. Right. Maybe some additional background information if it’s not laid out in your position statement, then key documents. Right. Is this a request for an accommodation? And the person is saying they put in three emails asking for something. Right.

They haven't provided them for whatever reason, those types of documents. Right. What was the response? Maybe the personnel file. That's a typical one. If the employee doesn't already have it or the MCAD thinks they need it for some reason. So documents of that nature, you know, has there been any performance issues, maybe, maybe handbook policies or kind of generic, too. Stuff like that.

[Ari]: Yes, I think that's consistent with what the New York State Division of Human Rights, which I would request, and you and I both know, Carolyn, from handling EEOC charges in New York State. A lot of times they'll just ask for general documents about like composition of the workforce and... as it relates to certain protected classes and things like that.

[Carolyn]: Sometimes they are actually looking for statistics sometimes, depending on the claim, we've put those in in our position statement and maybe follow up. They want more detail. They want a little further information. But statistics would be another category.

[Ari]: Makes sense. So one of the things I think that like I get a lot of questions about in the court when we're at this kind of phase of things is, you know, the ability of the New York State Division of Human Rights to contact current and former employees basically on notice, or not on notice to the employer. So like in New York State, you know, they ask for the information you give. You know, say one of the central witnesses isn't employed by the employer any longer. Right. And we would have no way of knowing as counsel to the employer in that situation that the division has contacted that former employee. So is it similar in Massachusetts or does the MCAD kind of let you know who they're going to be interviewing or how does that work?

[Carolyn]: Yes. If they know that the employer or the respondents have counsel, they typically, well, will let us know. Right. Whether we're going to represent that person or not is one issue, but whether we want the ability to be there. So I think for the most part, they let us know. I guess there could be occasions where they're not doing that and they're just calling those people on their own. So you do need to be mindful of the information you're giving out and whether it makes sense to proactively reach out to someone, have a discussion, maybe you already did in connection with the position statement, but if not, at least consider that before giving out the information.

[Ari]: Yes. And it's so interesting, too, because, you know, you and I know from representing employers in these types of matters that a lot of it, too, is dependent on the relationships with the employees. If it's a former employee, you know their circumstances for departure and things like that. So it's... if you're an employer and you've been named in a charge or complaint before the MCAD. It's definitely something to keep in mind and you probably need some help of counsel to navigate.

[Carolyn]: Exactly, exactly. These and even just these little nuances of, you know, can this person be contacted? Should I contact them? What can I say if I do contact them. Good to get advice on all that stuff.

[Ari]: Yes, agreed. So one of the things that I was doing, some perusing on the MCAD's website in preparation for this episode, one of the things that I saw was mention of an investigative conference. Could you tell our listeners a little bit about what that is, Carolyn?

[Carolyn]: Sure. So an investigative conference, right? Once the parties have put in their filings, the charge, the position statement, or anything else, the MCAD, whoever is investigating usually has an investigative conference. It's a formal proceeding in a way. Right. You're there with your attorney, usually a representative from the company needs to be there. The complainant and his or her counsel is there. It's all together. The ones I've been at most recently were all together in a room post-COVID, or we were all together. And the investigator can ask questions, can try to understand things that they may not have already understood from the written submissions. I think in a way, it's helpful for everybody to be together. You can hear directly from people. You can kind of see how they present. You can also see what the MCAD is asking about to see where they may be going with this. It's a way to understand better, "Okay. They're going to be looking for this

information from us, if they haven't already requested it." Here is, you know, the request for information on X, Y or Z is probably coming. It's a tool for them to use ...Well, I say it's formal. It's also informal the way they can just gather some information so they can see the parties and meet with them, and collect some information.

[Ari]: Yeah. And I think you made a really good point about it being helpful to just kind of see where the other side's at and it's just kind of like cuts out the middle person because we have a similar, you know, we call it a fact-finding conference in New York, but it's very similar. And basically, you kind of ...each side, I feel like, gets to suss out what the other side is thinking to some extent.

[Carolyn]: Yeah.

[Ari]: So last week, or two weeks ago, I should say, I chatted with Dan Elliott, who, you know, is in our New Haven office. And he told me that in Connecticut, these fact-finding conferences were like, you know, different nomenclature, same thing in the states are actually recorded and that the Connecticut CHRO provides like the audio recording to the parties after the fact. And that is not the case in New York. I kind of wish it were. I'm curious, is that the case in Massachusetts?

[Carolyn]: No. So that's really interesting they do that in Connecticut. So no, no recording. There's nobody there's no stenographer or anything like that.

[Ari]: It's just our notes.

[Carolyn]: Yeah. The investigator is also you can usually see them taking notes, but, you know, it's really the handwritten notes. But again, want to be consistent, right? Anything you say there. The commission, the investigator hears, is writing down. So consistency throughout the process is key.

[Ari]: Yes. I think that's a very, very good point to make. So, Carolyn, I think that's a good overview of kind of the investigation process. One of the things I wanted to ask you about that has come up as we're kind of doing our multistate discussion of handling these types of complaints or charges is mediation. Can you tell our listeners a little bit about how that works with the MCAD and when in the process the parties would consider a mediation?

[Carolyn]: Sure. So the MCAD does have a mediation program. And typically, at least in the last couple of years, what I've been seeing is when you receive notice of a charge, it comes with the charge and it typically comes with information about mediating. Right. And so you can let the commission know, yes, we receive this. We're interested in mediating. It's more likely that if the parties are going to mediate, probably after the position statement is when. Right. But so perhaps unlike other states, the option is there and available to the parties throughout, whether it's through the MCAD itself or, you know, of course, the parties could let the MCAD know, you know, look, we're going to we're going to privately mediate this case, and you could likely do so at any time.

[Ari]: So, Carolyn, if you decide to pursue mediation, not through like a private mediator, is the investigator the one who would conduct a mediation or is there like a different third party, like at the MCAD that would conduct it that doesn't have as much knowledge of the matter? How does that work?

[Carolyn]: Yeah, so it's set up to be the investigator being the mediator, but whether they rotate or assign some to other people just to control the workflow. You know, you could end up with somebody else.

[Ari]: Got it. So you probably want it to be the investigator because they're the one who knows everything thus far. But sometimes it doesn't always work out that way, at least in New York.

[Carolyn]: Yeah, exactly.

[Ari]: Makes sense. So I think this is a question that... I get this question a lot. When we have a client, like a client who has been named in a complaint or a charge, and the question is, how long is this all going to take?

When am I going to know either way what the MCAD thinks happens here? And it's not always an easy one to answer, especially with the pandemic. But I'm curious, in your experience, Carolyn, how long the investigation process takes?

[Carolyn]: Yeah. So it can take quite some time for a number of reasons, right. So the submissions need to go in and the MCAD needs to do its investigation. Depends how much they do. If they're requesting information, if they're doing interviews, they got to be scheduled... even considering all of that. I would say it could take two years. It's not out of the question for someone to file a charge and you don't get a determination for two years. And even after that, there's a whole bunch of additional steps, right, that we can talk about. Right. That's why here in Massachusetts and it may be the same elsewhere, people will after 90 days, you can withdraw your case from the MCAD for a variety of reasons, including to file in state court.

[Ari]: Understood. Yeah, I think it's a similar timeframe in New York, but I think right now—and we'll talk about this in a minute, at least here, it's really backed up in terms of like the scheduling of the public hearing.

[Carolyn]: Yeah.

[Ari]: We're looking at years like, you know, more than two for sure. So it's crazy times.

[Carolyn]: I know. Covid set a lot of things back in settling and scheduling cases.

[Ari]: Yeah. So Carolyn, I think that's a good overview of the investigation process. So let's assume in our hypothetical that, you know, the parties have been through the investigation. There's been an investigative conference, let's assume, let's make it spicy, that the parties try to mediate, but unfortunately, were not able to. What is the next step in the process before the MCAD?

[Carolyn]: Sure. So at the conclusion of the investigation, there should be a determination. Right. And so it's either going to be a finding of probable cause or as my clients would like, a lack of probable cause. Right. Right. And just a point on that, too, if there's multiple claims, there's going to be a finding as each claim.

[Ari]: Right. That makes sense.

[Carolyn]: Could get yeah, you could get a split decision. But obviously you're looking for the LOPC, whatever.

[Ari]: So I think I know what those mean. But could you just kind of explain that a little more detail for our listeners? You know what basically each of those determinations means and their significance.

[Carolyn]: Sure. So a lack of probable cause. Right. Means that the investigative commissioner/staff person has determined that the investigation or the complete that there's insufficient evidence to support a determination of probable cause to credit the allegations of the complaint. Right. A lack of probable cause determinations issued and the complaint is dismissed.

[Ari]: Yes, that's probably what that's what we're looking for. Now, on the one side, probable cause means.

[Carolyn]: Yeah. So probable cause is the determination that after the investigation. Right. That there's sufficient evidence upon which a fact-finder could form a reasonable belief that it's more probable than not that the respondent committed an unlawful practice. So it's just a...it's an initial determination, just so that's understood. There's additional steps that that can be taken, if that is the outcome.

[Ari]: Yes. So if there is a lack of probable cause, let's assume, does the complaining party or the charging party have the ability to appeal that determination?

[Carolyn]: They do. And they have to do so within ten days.

[Ari]: Okay. Very quick turnaround.

[Carolyn]: Very quick. Mm hmm.

[Ari]: Okay. So let's assume there's a probable cause. Can you tell us a little bit in our hypothetical what would happen next in that case?

[Carolyn]: Yeah, sure. So if there is probable cause, right. And the employer or respondents disagree with that, they can file a motion for reconsideration. Now what you want to do there is just are you everything that you've already argued, you need to argue why that's the wrong determination in these circumstances and explain why, "No, it really should be a lack of probable cause here."

[Ari]: Is that a quick turnaround as well, Carolyn?

[Carolyn]: Actually, no. So you can technically file a motion for reconsideration almost at any time. Until I think you go to the public hearing.

[Ari]: Got it. Okay. That's good to know. So you kind of... I know you mentioned the public hearing. Is there a step in between or like in New York, you know, you have the ability to essentially mediate the case, even though it's called something different. Is that is it similar in Massachusetts?

[Carolyn]: Yeah. So there is a formal proceeding called a conciliation. Right. Somewhat similar to a mediation. But you're at least required to go to the conciliation, though, of course, the commission can't make you agree to a settlement, but conciliation would be the next step. And for the parties to agree to a mediation at that point as well.

[Ari]: And what does the conciliation process look like just generally?

[Carolyn]: Yeah, sure. So similar to the mediation, the investigating commissioner, the person investigated, the charge is likely going to handle that. Try to bring the parties together for some type of resolution in light of the determination. Right. So if they can... if there's a way to get it resolved. Right. And if not, you've got to move to the next step.

[Ari]: Which is... drumroll.

[Carolyn]: A public hearing. Right. So I don't know if it's called the same thing in New York and Connecticut, but here we call it a public hearing. It's really a trial.

[Ari]: Yeah. So I think we could probably talk. We could have one or more episodes just talking about the public hearing, what it is and how to prepare and, you know, tips for that, Carolyn. And I know you would be the person to talk to about that, but for purposes of our discussion, could you just give our listeners just kind of like a general overview of what the public hearing is and what it entails?

[Carolyn]: Sure. So think of it like a trial, right, in court. You're going to have... both sides are going to make their presentations, arguments, present evidence, documents are going to be present and admitted, witnesses are going to appear and testify just as they would in court. Could be additional arguments, perhaps briefing. There may be some motions to exclude certain things. So very much like a trial.

[Ari]: I think that's a good overview. And I think really what that translates to, Carolyn, to some extent is money. Right. Time and money.

[Carolyn]: It's both. It's very expensive, right. And time consuming.

[Ari]: Okay, Carolyn, so let's assume that the parties have gone through the public hearing and for purposes of our discussion, we'll assume that the employer won, for lack of a better word, articulate word. Is there any ability for the charging party or complaining party to seek review of that decision?

[Carolyn]: Yeah. So initially the complainant could appeal to the full commission. There may be some additional rights outside of that. But just for purposes of our discussion here today, thinking within the MCAD. Right. They could appeal to the full commission.

[Ari]: Got it. Carolyn, I really appreciate...I think this has been such a good overview of the investigation process. And I think for employers that, you know, our clients are employers that have employees in kind of like the general Tristate/Northeast area this has been really helpful. Before I let you go, is there anything you think that we didn't cover or any last words of wisdom that you think are important for employers to keep in mind during this process?

[Carolyn]: So I think it's worth repeating, right: consistency. If the story is consistent right throughout, you're in a much better position.

[Ari]: Yes.

[Carolyn]: I also think, too, like I said before, you've got to respond. You can't ignore it. And you want to make sure you investigate, you get the facts right and you give them to the commission. And then when they ask for additional information, assuming it's reasonable, and you don't have some objections to it, you cooperate, you provide the information. Assuming they ask for a reasonable amount of people to interview, let them be interviewed, you know, prepare and do the things you need to do. But if you cooperate, and you can show, look, this, this isn't what happened. This isn't the circumstances, these are... Maybe you'll be able to get your lack of probable cause determination.

[Ari]: Yes, I think it's such a good point to emphasize cooperation, because I think, understandably, if you're an employer and you're named in a complaint or a charge, you know, a lot of our clients understandably take it personally because their business, it's, you know, their life's blood. I totally understand. I think it is important to keep in mind that with the MCAD cooperation, like consistency, is probably key.

[Carolyn]: Yeah. And show them, you know show them through the documents, show them through the evidence. No, here's what we did. You know, we try to accommodate this person. We didn't discriminate against that person. We did these things instead. This is what... this is the story.

[Ari]: Right. Makes sense. Thank you so much, Carolyn. I think this has been great and I think that this has just been really educating for me and I'm sure for our listeners. So thanks so much again for joining.

[Carolyn]: Great. Thanks for having me, Ari. Appreciate it.

[Ari]: Absolutely. See you guys next week.

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