



The Pitfalls of Discretion

Three police sergeants, tied on a Civil Service list for promotion to Lieutenant. One candidate is female, two are male. Sounds like the City gets to exercise discretion. In 21st century employment law, however, it is a gender discrimination case whichever candidate is selected.

In Keough v. City of Cambridge, one of the male candidates sued the City because the City Manager, after 30 minute interviews with each of the candidates, selected the female candidate. Six years after the promotion, the discrimination case went to trial before a jury in Superior Court. A 7-day trial, followed by a jury deliberation of 1-hour came back with a verdict for the City. This jury understood discretion.



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MCAD: Duty To Accommodate May Exceed FMLA Limits

On February 5, 2017, a Massachusetts Commission Against Discrimination (MCAD) hearing officer held that an employer's obligation to provide a reasonable accommodation may exceed the leave time guaranteed by the Family and Medical Leave Act (FMLA). *MCAD v. Country Bank For Savings*, 10-SEM-02769 (J. Kaplan). The Complainant, Amanda LaPete, charged her former employer with disability and gender discrimination for failing to accommodate her maternity leave, and for ultimately terminating her.

LaPete had sought an undefined extension of her 12 week FMLA leave due to post-partum depression following the pregnancy that prompted her leave. The employer refused to extend the leave, and terminated her employment when she did not return to work. The Hearing Officer admonished the employer for failing to grant, or even respond to, LaPete's extension requests, especially where it provided no evidence demonstrating it would be burdened by the request for extended leave.

Employers should, at a minimum, engage in a dialogue with an employee who wants to extend leave beyond the FMLA maximum, as observance of the FMLA will not necessarily protect the employer from liability under disability discrimination laws. Employees on long term leaves can present sticky situations that can benefit from review and advice from experienced labor and employment counsel.

Department of Labor Relations Abuse of Discretion

Massachusetts Department of Labor Relations Arbitrator Tim Hatfield arguably substituted his judgement for that of a School Superintendent in finding that a School District violated the collective bargaining agreement by denying a psychologist's request to use three consecutive personal days. In *Spencer-East Brookfield Reg'l Sch. Dist. and Spencer-East Brookfield Teachers Assoc.*, the Superintendent rejected the request to use three consecutive personal days without providing a rationale that met the requirements of the agreement, and failed, in the arbitrator's view, to make a sufficient inquiry into the reasons for the requested leave.

The request for three consecutive personal days off did not include a specific explanation, but the grievant checked the boxes on the form for "Personal" and "Family." Upon review, the Superintendent denied the request without comment or inquiry. The employee submitted the request again indicating negative answers to the two questions posed in the contract. The Superintendent denied the modified request but invited the employee to provide the reason for the leave which she declined to do.

The Superintendent's failure to conduct further inquiry meant no finding was ever made regarding whether the leave request was in accordance with the contract. Therefore, the Arbitrator ruled that denying the employee's request was arbitrary and capricious.

Although the Superintendent could have inquired further before denying the request, the real culprit in this case was poor contract language that failed to provide clarity around the responsibilities of the players to justify the use of personal leave. Involving qualified labor counsel in the negotiation of contract language can avoid disputes of this kind and protect the discretion that should be accorded to routine managerial decisions of this kind. For more details on this case see our Employment Blog.