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# Chapter 4: Employment Discrimination

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*CHAPTER 4*

# Employment Discrimination

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**§ 4.1. Introduction.** This is the first volume of the *Survey* to contain a chapter concerning the general subject of the Massachusetts statutes and caselaw prohibiting employment discrimination.[1] This chapter has been included in recognition of the increasing litigation growing out of employment discrimination on both the federal and state levels. In addition to reviewing the relevant developments that occurred in this area during the *Survey* year, this chapter will examine anti-discrimination statutes previously enacted by the legislature, and their prior judicial construction.[2]

**§4.2. Employment Discrimination Statutes.** The principal statute which prohibits discrimination generally is chapter 151B of the General Laws. Section 4(1) of chapter 151B provides, *inter alia,* that it shall be an unlawful practice for an employer[1] to refuse to hire or employ or to bar or discharge from employment any person, or to discriminate against any person in compensation or in terms, conditions or privileges of employment because of that person's race, color, religious creed,[2]

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§4.1. [1] Other volumes of the *Survey* have considered specific anti-discrimination subjects. *See, e.g.,* Lund & Healy, *Sex Discrimination* 1971 ANN. SURV. MASS. LAW c. 20, at 562-575.

[2] This chapter will not consider discrimination against individuals for engaging in activities protected under any labor relations statutes.

§4.2. [1] G.L. c. 151B, §1(5) specifically excludes from the definition of the term "employer" ". . . a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit. . . ." The Commonwealth, its political subdivisions, boards, departments and commissions are specifically denominated as "employers." § 1(5) excludes from coverage employers of fewer than six persons.

[2] G.L. c. 151B, §1(5), however, specifically permits any religious or denominational institution or organization, or any organization operated for charitable or educational

national origin, sex, age,[3] or ancestry, unless based upon a bona fide occupational qualification.

Section 5 of chapter 151B gives the Massachusetts Commission Against Discrimination[4] ("Commission") broad jurisdiction to administer and effectuate the provisions of that chapter. Under section 5, a person claiming to be aggrieved by an alleged violation of section 4(1) may, within six months after the alleged act of discrimination, file a complaint with the Commission.[5] After the filing of the complaint a Commissioner is assigned to conduct an investigation of the alleged unlawful practices. If the Commissioner finds on the basis of his investigation that there is probable cause to credit the complainant's allegations, he is to attempt to eliminate the alleged unlawful practices by "conference, conciliation and persuasion."[6] If these measures fail to eliminate the practices, or in advance thereof of the Commissioner finds that the circumstances so warrant, the Commission is required by section 5 to cause to be issued and served on the respondent employer a written notice of a hearing before the Commission at which the employer is to answer the charges of the complaint. If upon all the evidence presented at the hearing, the Commission finds that the employer has engaged in any unlawful practices, the Commission shall state its findings of fact and shall order the employer to cease and desist from the unlawful practices and to take other affirmative steps as it deems necessary.[7]

Section 6 of chapter 151B establishes the right to judicial review of orders or decisions issued by the Commission.[8] Under this section, a

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purposes, which is operated, supervised or controlled by or in connection with a religious organization and which limits enrollment, admission or participation to members of that religion, to give preference in hiring or employing members of that religion. G.L. c. 151B, §4(2) requires an employer to reasonably accommodate the religious needs of its employees.

[3] G.L. c. 151B, §1(8) provides that the term "age" "includes any person between the ages of forty and sixty-five."

[4] The Commission is established under G.L. c. 6, §56, and its functions, powers and duties are set forth in G.L. c. 151B, §§2, 3, 5, & 6. During the *Survey* year, §56 was amended to provide for the appointment of three (3) full time commissioners to be appointed by the Governor for a term of three (3) years. Acts of 1976, c. 463.

[5] The Attorney General may also file such complaints, and the Commission has the power to issue a complaint whenever it has reason to believe that an unlawful practice has occurred. G.L. c. 151B, §5.

[6] If the Commissioner determines that no probable cause exists for crediting the allegations of the complaint, the Commission is required to so notify the complainant in writing within 10 days after such service file with the Commission a written request for a "preliminary hearing" before the Commission. *Id.*

[7] *Id. See* East Chop Tennis Club v. Massachusetts Commission Against Discrimination, 364 Mass. 444, 447, 305 N.E.2d 507, 510 (1973).

[8] G.L. c. 151B, §9 gives the complainant a right at the expiration of 90 days after the

"complainant, respondent or other person aggrieved by such order" may initiate a proceeding in the superior court. The court shall review the Commission's order or decision in accordance with the standards of review established in section 14(8) of chapter 30A; shall not consider any objection that was not raised before the Commission except in extraordinary circumstances; and has the power to enter an order or decree enforcing, modifying or setting aside in whole or in part the Commission's order. Section 6 also empowers the court to enter an order or decree enforcing, modifying or setting aside in whole or in part the Commission's order.

In addition to the provisions of chapter 151B generally prohibiting employment discrimination, the legislature has also acted to prohibit particular forms of employment discrimination. Thus, the legislature has seen fit to prohibit certain discrimination on the basis of age. Section 24A of chapter 149 of the General Laws provides that it is ". . . against public policy to dismiss from employment any person between the ages of forty-five and sixty-five, or to refuse to employ him, because of his age." The penalty for violating this provision is set forth in section 24G of chapter 149 which permits the Commissioner of the Department of Labor and Industries to publish the names of any employer who violates section 24A in newspapers circulating within the commonwealth.[9] The Supreme Judicial Court has held that section 24 does not create a civil remedy.[10]

The legislature has also seen fit to take action to prohibit employment discrimination against the handicapped. Section 24K of chapter 149 makes it unlawful to dismiss from employment or to refuse to hire, solely because of his handicap, ". . . any rehabilitated handicapped person who possesses the physical and mental capacity to perform the functions required by said employment. . . ." Violations of section 24K may be punished by a fine of up to $200.

Section 105A of chapter 149 prohibits discrimination on the basis of sex. Section 105A provides that:

> No employer shall discriminate in any way in the payment of wages as between the sexes, or pay any female in his employ salary or wage rates less than the rates paid to male employees for work

filing of a complaint, or sooner if the Commission assents in writing, to bring a civil action for damages or injunctive relief, or both, in superior court. An action filed under that section must be filed within two (2) years after the alleged unlawful practice occurred. Presumably, if the complaint were not filed with the Commission within the six (6) month limitations period contained in c. 151B, §4, no action could be brought under §9.

[9] G.L. c. 149, §24B provides that any contract, agreement or understanding which prevents or tends to prevent the employment of any person between the ages of 45 and 65 because of his age shall be null and void.

[10] Johnson v. United States Steel Corp., 348 Mass. 168, 170, 202 N.E.2d 816, 818 (1964).

of like or comparable character or work on like or comparable operations; provided, however, that variations in rates of pay shall not be prohibited when based upon a difference in seniority.

Section 105A further provides that an employer who violates any provision thereof shall be liable in the amount of the unpaid wages, and in an additional amount of liquidated damages. Actions to recover such wages may be brought by any one or more employees for themselves and other similarly situated employees, and the statute specifically provides for an award of attorney's fees to a successful plaintiff.

In addition to the statutes prohibiting employment discrimination generally and in its particular forms, another more general prohibition on discrimination in all its forms is found in Part I, Article I of the state constitution which provides in part that: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." This provision, which is generally referred to as the "equal rights amendment," was added to Article I in 1976. While the amendment may ultimately become a potent weapon against discrimination, as of the end of the *Survey* year there appeared to be no reported decisions interpreting it.

**§4.3. Employment Discrimination—Standards of Proof—Rebutting a Prima Facie Case.** In *Wheelock College v. Massachusetts Commission Against Discrimination*[1] the Supreme Judicial Court considered for the first time the proof necessary to establish unlawful employment discrimination in violation of chapter 151B.

The genesis of *Wheelock College* was a complaint filed with the Massachusetts Commission Against Discrimination ("Commission") by Constance Kehoe ("the teacher"), a former faculty member at Wheelock College ("the college") who claimed that her contract for the 1971-72 academic year was not renewed because of her sex, in violation of chapter 151B.[2] In June of 1974, Commissioner Healey filed findings of fact and conclusions of law, based solely on her reading of the transcript and her review of the exhibits.

The Commissioner determined that the teacher had made out a prima facie case of discrimination and that principles enunciated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*[3] mandated that the burden then shift to the employer to "meet the issues with a defense that is credible, competent and reliable."[4] Examining the college's defense, the Commissioner found that the reasons given by the college for not rehiring the teacher were the teacher's numerous changes

§4.3. [1] 1976 Mass. Adv. Sh. 2334, 355 N.E.2d 309.

[2] *Id.* at 2335, 355 N.E.2d at 311.

[3] 411 U.S. 772, 802 (1973).

[4] 1976 Mass. Adv. Sh. at 2339, 355 N.E.2d at 313.

in her teaching schedule; her irregular attendance at faculty meetings; and student complaints.[5]

In examining each of these reasons separately, Commissioner Healy found first that Kehoe's schedule changes, apart from maternity leaves, were not substantially different from those of other faculty.[6] Moreover, the Commissioner could find no clear obligation on the teacher's part to attend faculty meetings.[7] Finally, the Commissioner found the evidence of student complaints unpersuasive in light of contrary evidence of favorable evaluations from other students.

The Commissioner concluded by finding that the college's stated reasons for terminating the teacher were not credible and supported by the evidence, and thus were insufficient to rebut a prima facie case of discrimination.[8] Therefore the Commissioner entered an order directing the college to reinstate the complainant with back pay. The college appealed this decision and order to the full Commission, and the full Commission affirmed.[9] The college then filed a petition for review in superior court under section 6 of chapter 151B, which provides for review of Commission orders in accordance with chapter 30A.[10] The superior court entered judgment for the college, finding, on the basis of its review of the record before the Commission, no merit in the teacher's claim of discrimination.[11] The Supreme Judicial Court granted the college's request for direct appellate review, reversed the Commission's decision, and remanded the case to the Commission.[12]

In reversing, the Court concluded that the Commission had in several respects misapplied the law governing the burden of proof in discrimination cases. First, the Court noted that the briefs for both the Commission and the teacher argued that there was substantial evidence to support a finding of discrimination but that neither brief had argued that a prima facie case had been established.[13] The Court thus inferred that the Commission had appeared to abandon its conclusion that the teacher had established a prima facie case. Accordingly, the Court concluded that the issue became "whether Kehoe has proved sex discrimi-

[5] *Id.* at 2338, 355 N.E.2d at 312.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 2335, 335 N.E.2d at 311.

[9] *Id.*

[10] *Id.* at 2336, 355 N.E.2d at 311.

[11] *Id.*

[12] *Id.* at 2344, 355 N.E.2d at 313. The Court indicated that its disposition of the case was based on its own review of the record before the Commission. *Id.* at 2336, 355 N.E.2d at 311. Thus, the Court did not consider the superior court's holding at length. However, the Court effectively modified the superior court's holding by remanding the case to the Commission.

[13] *Id.*

nation without regard to the prima facie case."[14] Since the Commission had not resolved this issue in its initial findings and conclusions, the Court remanded the case to the Commission for consideration of the issue.[15]

Moreover, the Court determined that there was an additional reason for remanding the case to the Commission. Particularly, the Court reasoned that even if a prima facie case were established, the Commission's treatment of the reasons advanced by the college to rebut the plaintiff's allegations was erroneous as a matter of law.[16] The Court concluded that the reasons for the failure to rehire advanced by the college were sufficient to answer a prima facie case in that the reasons were legitimate, nondiscriminatory and supported by the evidence.[17] In so concluding, the Court disagreed with the Commission's interpretation of *McDonnell Douglas* as mandating that, to answer a prima facie case an employer must put forth "a defense that is credible, competent and reliable."

In the words of the Court:

> All that is required by [*McDonnell Douglas*] in answer to the employee's prima facie case is that the employer "articulate some legitimate, nondiscriminatory reason" for its action. . . . Any consideration of whether the employer's defense was "competent" or "reliable" is clearly extraneous. Nor does the word "credible" fully describe the test to be applied. The first issue is not "credibility," but whether the reason is nondiscriminatory. The second issue, whether the reason given was the real reason or merely pretextual, may involve questions of credibility, but here, as we have said, the burden of persuasion rests on the employee.[18]

Having set forth its reasons for remanding the case to the Commission, the Court then expressed its views more generally "concerning the role of the commission and the proof required before it."[19] The Court first advised that it is not the Commission's function to protect employees against all cases of arbitrary management or poor managerial judgment, but rather only against unlawful discrimination.[20] However, the Court reasoned that a complainant can rarely prove employment discrimination by offering direct evidence.[21] The Court therefore accepted the principle that a complainant by showing certain basic facts can prove a prima facie case of unlawful discrimination and thereby shift the burden to the employer to produce a lawful explanation for its deci-

[14] *Id.* at 2340, 355 N.E.2d at 313.
[15] *Id.* at 2339, 355 N.E.2d at 313.
[16] *Id.* at 2340, 355 N.E.2d at 313.
[17] *Id.*
[18] *Id.* at 2341, 355 N.E.2d at 313-14.
[19] *Id.* at 2342, 355 N.E.2d at 314.
[20] *Id.*
[21] *Id.*

sion. The Court also adopted the federal standard which requires the employer to come forward with evidence to show that the reasons advanced were the real reasons for the employment decisions.[22] Thus if plaintiff proves a prima facie case which is unrebutted, or the employer produces evidence which is wholly disbelieved, the plaintiff will prevail. However, if the employer comes forward with apparently nondiscriminatory reasons for the employment decision, the burden then shifts to the complainant to prove by a preponderance of the evidence that the reason or reasons stated by the respondent were not the real reasons for its action.[23]

While the Court thus saw fit to establish general guidelines for allocating the burden of proof once a prima facie case is established, it declined to define exactly the elements a complainant has to prove to make out a prima facie case of sex discrimination. This omission seems particularly significant in light of the Court's recognition that, on remand, the Commission could reconsider the issue of whether the teacher had made out a prima facie case.[24] However, while it did not set forth precise standards for establishing a prima facie case, the Court seemed nevertheless to establish general guidelines. Thus, the Court indicated that "[w]e would not find support for a prima facie case resting solely on the fact that the college declined to rehire a woman who was qualified academically to hold a teaching position where that teaching position was abolished."[25] Moreover, the Court appeared more specifically to indicate that the proof required to establish a prima facie case under chapter 151B is akin to that which *McDonnell Douglas*[26] required to establish a prima facie Title VII violation. In particular, the adoption by analogy of federal standards seemed implicit in the Court's reasoning that because *McDonnell Douglas* involved a refusal to hire rather than a discharge or nonrenewal of an employment contract, it did not fully answer the question of the specific burden of proof in a case such as *Wheelock College*.[27] This reasoning implied that *McDonnell Douglas* standards would govern to the extent that a fact situation in a chapter 151B proceeding paralleled the fact situation in *McDonnell Douglas*.

Thus, since *Wheelock College* implies the application of federal standards to chapter 151B proceedings, it would appear instructive to note how certain lower federal courts that have adapted *McDonnell Douglas*

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[22] *Id.* at 2344, 355 N.E.2d at 315.

[23] *Id.*

[24] *Id.* at 2340 n.6, 355 N.E.2d at 313 n.6.

[25] *Id.* at 2339-40 & n.6, 356 N.E.2d at 313 & n.6.

[26] 411 U.S. 792, 802 (1973). *See* 1976 Mass. Adv. Sh. at 2339 n.5, 355 N.E.2d at 313 n.5.

[27] *Id.* at 2339-40 n.5 & 6, 355 N.E.2d at 313 n.5 & 6. In cases where the person is terminated as a result of not having received tenure, the plaintiff may also be required to prove that the procedure that led to the denial of tenure and termination was "irregular." Huang v. College of the Holy Cross, 15 FEP Cases 706, 718 (D. Mass. 1977).

to cases involving discharges or nonrenewals of employment. These courts have generally held that a plaintiff in order to make out a prima facie case under Title VII must show that (i) she belongs to a protected class under the Act; (ii) that she was qualified for the position she held and was not retained despite her qualifications for the position, and (iii) following her termination the employer retained an applicant with her qualifications.[28] While the Massachusetts courts are clearly not bound to adopt this approach, *Wheelock College* indicates a likelihood that they will do so.

**§4.4. Remedial Power of the Commission—Attorneys' Fees—Damages for Emotional Distress.** In *Bournewood Hospital v. Massachusetts Commission Against Discrimination,*[1] a complaint was filed with the Commission charging that Bournewood Hospital ("the hospital") was engaging in unlawful sex discrimination by paying women 10 cents less per hour than men performing equivalent work.[2] Subsequently, the complainant filed a second complaint alleging that the hospital had retaliated against her for making the initial complaint.[3] The basis for her claim of retaliation was that after the filing of her complaint the hospital had offered her a "promotional" position, but that the employer refused to raise her pay to the rate associated with the promotional position until and unless she proved capable of performing the duties; and that complainant had performed her promotional duties for only two weeks when the hospital hired an outside applicant with less experience to fill the position permanently at a higher salary without a trial period.[4] The Commission found that there had been both an equal pay violation and retaliatory conduct on the part of the hospital.[5] Accordingly, the Commission entered an order requiring the hospital to cease and desist from sex discrimination and to equalize wage rates.[6] In addition, the Commission ordered the hospital to make the complainant whole for the equal pay violation; to pay $2,000 in damages for complainant's "emotional distress, pain and suffering;" and to pay the complainant the difference between her salary and the salary associated with the promotional position from the date she was offered the position until her employment terminated.

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[28] Davis v. Weidner, 14 FEP Cases 544, 548 (E.D. Wis. 1976).

§4.4. [1] 1976 Mass. Adv. Sh. 2554, 358 N.E.2d 235.
[2] *Id.* at 2555, 358 N.E.2d at 236.
[3] *Id.*
[4] *Id.* at 2566, 358 N.E.2d at 241.
[5] *Id.*
[6] *Id.* at 2556, 358 N.E.2d at 237.

Finally, the Commission ordered the hospital to pay $2,000 in attorneys' fees for complainant.[7]

The hospital obtained review in the superior court. The court set aside the awards for attorneys' fees and emotional distress and modified the order to provide back pay at the promotional position for only the two weeks she actually held that position. This judgment was appealed by the complainant.[8] The Supreme Judicial Court affirmed the setting aside by the court of attorneys' fees and the court's modification of the back pay award, but it reversed the setting aside of the award of damages for emotional distress.[9]

As to attorneys' fees, the complainant had argued on appeal that the award of such fees was proper under the Commission's statutory authority to take such affirmative action as was appropriate[10] to remedy employment discrimination; and, alternatively, that fees should be recoverable under the "private attorney general" doctrine.[11] With regard to the second argument, the Commissioner had agreed with the complainant and found that the hospital had "pursued discriminatory policies which not only violate the interests of [the employee], but which have affected the public interest as well." The Court recognized that attorneys' fees have been awarded under similar fact situations in federal civil rights actions.[12] However, the Court rejected the Commissioner's finding and found support for a contrary determination in *Alyeska Pipeline Service Co. v. Wilderness Society.*[13] In *Alyeska Pipeline,* the United States Supreme Court held that in the absence of statutory authorizations the traditional "American Rule" of not granting attorney's fees to the winning litigant would apply.[14] The Court held that it was for Congress, not the courts, to reverse this long-standing tradition. In so holding the Supreme Court expressed disapproval of the growing trend of the lower federal courts to award attorneys' fees when those courts deemed the public policy furthered by a statute necessitated granting such an award.[15] The Supreme Judicial Court, although not bound by the *Alyeska Pipeline* decision, indicated that it was suffi-

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[7] *Id.*

[8] The complainant had been allowed to intervene at the superior court level. G.L. c. 30A, §14(2) provides that all "parties to the proceeding before the Agency" may intervene as of right in a proceeding for review of an agency decision. Whether or not this right extends to petitions for enforcement has apparently not been decided.

[9] 1976 Mass. Adv. Sh. at 2558, 358 N.E.2d at 237-38.

[10] G.L. c. 151B, §5.

[11] 1976 Mass. Adv. Sh. at 2558, 358 N.E.2d at 238.

[12] *Id.* at 2562, 358 N.E.2d at 239.

[13] 421 U.S. 240 (1975).

[14] *Id.* at 270-71.

[15] *Id.* at 271.

ciently persuaded by its reasoning to adopt the result of that case as Massachusetts law.

The Court also rejected the complainant's argument that the Commission possessed statutory authority to award attorneys' fees. The complainant had argued the appropriateness of the award on the ground that section 5 of chapter 151B gives the Commission broad remedial authority to "take such affirmative action, including, but not limited to, hiring, reinstatement or regrading of employees. . . ." Moreover, the complainant had noted section 9 provides for recovery of attorneys' fees if the complainant exercises his option to pursue an employment discrimination claim in court rather than with the Commission. Additionally section 5 explicitly precluded recovery of attorneys' fees in housing discrimination cases before the Commission while providing no such disqualification for employment discrimination claims. Thus, the complainant contended that section 5, particularly if read in conjunction with section 9, constituted an authorization to the Commission to award attorneys' fees. The Court disagreed, however, and found that the award of attorneys' fees was improper because the statute does not explicitly give the Commission such power.[16] The Court nevertheless appeared to indicate some dissatisfaction with this result, noting the incongruity existing between the legislature's authorization of attorneys' fees to successful litigants in cases originally brought in superior court and its nonauthorization of such fees in cases originally brought before the Commission. Moreover, the Court acknowledged the forum shopping which may inevitably result, which the Court characterized as "unfortunate and unhealthy." However, the Court interpreted the legislative silence as indicating that the Commission is not empowered to grant attorneys' fees in employment discrimination cases.[17]

The award of damages for emotional distress was found appropriate and upheld by the Court. In upholding that award the Court rejected the hospital's claim that an award of either compensatory or punitive damages for emotional distress was in excess of the Commission's statutory authority in employment discrimination cases.[18] In particular, the Court found in the statutory power of the Commission to take such affirmative action as will effectuate the purposes of chapter 151B an authorization to the Commission to fashion appropriate remedies for the natural and probable consequences of retaliation.[19] Emphasizing the

[16] 1976 Mass. Adv. Sh. at 2561, 358 N.E.2d at 239.

[17] *Id.*

[18] *Id.* at 2569, 358 N.E.2d at 242.

[19] *Id.* at 2569, 358 N.E.2d at 242. This is the same statutory provision on which the complainant based her claim for attorneys' fees. The Court took notice of its own seeming inconsistency in using a broad interpretation to grant the emotional distress award and a restrictive approach to bar the attorneys' fees. The Court resolved the contradiction by

"egregious" character of retaliations for filing a complaint with the Commission,[20] the Court reasoned that in many cases of such retaliation, a remedy short of damages, for emotional distress would fail to make the aggrieved party whole. While the Court thus found that the Commission could award compensatory damages for retaliation, it did not discuss the question of punitive damages, since it found "no suggestion in the record . . . [that the Commission] awarded emotional distress damages to punish Bournewood for engaging in a practice prohibited by [section 4 of chapter 151B]."[21]

The Court also considered whether there was substantial evidence to support the award of damages for emotional distress. Noting its obligation to give due weight to the experience, technical competence and specialized knowledge of administrative agencies, the Court upheld the Commission's determination that there was substantial evidence of retaliation.[22] In upholding the Commission's determination, the Court set aside the superior court's finding that the hospital had acted in good faith and not in a retaliatory fashion. Moreover, rejecting the hospital's contention that there had been insufficient evidence of actual emotional distress, the Court concluded that "the finding of retaliation alone permitted the inference of the emotional distress as a normal adjunct of the hospital's actions."[23]

*Bournewood Hospital* leaves open significant questions concerning the scope of the Commission's authority to award damages for emotional distress. One such question is whether the Commission is authorized to award such damages in cases not involving findings of retaliation for an employee's filing a complaint with the Commission. With regard to this question, the language in *Bournewood Hospital* emphasizing the particular egregiousness of retaliatory discrimination, appears to indicate that the Court views "emotional distress" damages as awardable only in

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citing to cases which point out that there is no common law basis for an administrative agency awarding attorney's fees but that such a basis exists for damage awards. *Id.* at 2569-70 n.10, 358 N.E.2d at 242. n.10.

[20] *Id.*

[21] *Id.* at 2568, 358 N.E.2d at 242.

[22] *Id.* at 2570, 358 N.E.2d at 243.

[23] *Id.* at 2569-70, 358 N.E.2d at 243. The Court affirmed the limitation of back pay for the promotional position to the two week period she served in that position, holding that the more liberal finding of the Commission was not supported by the evidence. *Id.* at 2570, 358 N.E.2d at 243.

During the *Survey* year the Commission has awarded damages for "emotional distress" in several cases, including $5,000.00 in David v. Chelsea Police Dep., No. 74-E-727-R, Jan. 1, 1977; and $1,000.00 in Zifack v. Reading School System, Case No. 72-S-166, Feb. 14, 1977. The latter case is notable because there were no allegations or findings of retaliation. None of these cases have required any evidence as to whether complainant actually suffered emotional distress, or as to how much the damages should be.

instances of egregious actions on the part of the employer. At the same time, the scope of employer actions which will be deemed sufficiently "egregious" to justify "emotional distress" damages is unclear. On the one hand, the Court could develop a "willfulness" or "maliciousness" standard which would apply to any instance of alleged discrimination. On the other hand, however, the Court could determine that retaliatory acts are sui generis in that they alone are sufficiently "egregious" to justify damages for emotional distress. Viewing cases of retaliation as sui generis, in turn, would presumably be based on those cases' peculiar capacity for disrupting the administrative processes of the Commission.

Another significant question left open by *Bournewood Hospital* is whether the Commission is authorized to assess punitive or exemplary damages in cases of retaliation or other egregious employer behavior. While punitive or exemplary damages would appear to be "affirmative action" which could effectuate the purposes of chapter 151B, such damages seem precluded by the principle of ejusdem generis. In particular, section 5, in authorizing the Commission to take affirmative action, indicates that this action includes, but is not limited to, "hiring, reinstatement or upgrading of employees, with or without back pay." All of the remedies specifically included in the Commission's power thus have the aim of compensating an injured employee. As a result, it would appear that section 5 would properly be construed as not authorizing punitive or exemplary damages, but rather as authorizing only damages of a compensatory nature.

**§4.5. Investigatory Power of the Commission—Subpoenas Duces Tecum.** In *Massachusetts Commission Against Discrimination v. Liberty Mutual Insurance Company,* the Supreme Judicial Court considered for the first time whether the Commission has the power to issue a subpoena duces tecum for the production of books and records during an investigation before a finding of probable case is made.[1]

In *Liberty Mutual,* the Commission, prior to a hearing, issued a subpoena duces tecum for certain books and records relative to a matter under investigation.[2] Liberty Mutual refused to comply with the subpoena and the Commission brought a bill of enforcement in superior court which was denied, whereupon the Commission appealed.[3] The Commission's appeal was transferred to the Supreme Judicial Court, and the Court reversed.[4] The Court found that as an agency created by statute, the Commission possessed only those powers "conferred upon it by statute and those reasonably necessary for its proper functioning."[5]

§4.5. [1] 1976 Mass. Adv. Sh. 2403, 356 N.E.2d 236.

[2] *Id.* at 2404, 356 N.E.2d at 237.

[3] *Id.* at 2405, 356 N.E.2d at 237-38.

[4] *Id.*, 356 N.E.2d at 238.

[5] *Id.*

Thus, absent a statutory grant, the Commission would be without authority to issue a subpoena. Therefore the question before the Court was whether chapter 151B indeed granted the Commission the power to issue subpoenas in the course of prehearing investigations.

Section 3(6) of chapter 151B confers on the Commission the power to "receive, investigate and pass upon complaints of unfair practices." Section 3(7) empowers the Commission "[t]o hold hearings, subpoena witnesses, . . . take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the commission."

The Commission argued that the clause "relating to any matter under investigation or in question . . ." controls and therefore its subpoena power extends to the investigatory stage as well as to the hearing stage.[6] Liberty Mutual, urging the acceptance of a literal reading of the statute, argued that the subpoena power exists only "in connection" with the hearings.[7] The Court found that the statute "lacked precision" and set for itself the task of determining which, if either, of the proponents' readings was correct.[8]

In construing the statutory language the Court initially looked to the purpose of chapter 151B. Specifically, the Court premised that the chapter's purpose was to put an end to discrimination in employment.[9] The primary means for accomplishing this purpose was through the education of employers. However, the Court emphasized that the Commission was also given "considerable power to proceed where appropriate to ensure that efforts to eliminate discrimination would be successful."[10] The Court further determined that the investigation of complaints constitutes an important step in the process, without which the Commission's functions would be hampered and the statutory purposes impaired.[11] Therefore, on the basis of the importance of the investigative stage and the legislative direction that the statute should be construed liberally,[12] the Court concluded that chapter 151B did grant the Commission the power to issue a subpoena duces tecum during investigatory proceedings.[13] In reaching this result the Court distinguished *Massachusetts Commission Against Discrimination v. Boston & Maine*

[6] *Id.* at 2406, 356 N.E.2d at 238.
[7] *Id.*
[8] *Id.* at 2407, 356 N.E.2d at 238.
[9] *Id.* at 2408, 356 N.E.2d at 239.
[10] *Id.*
[11] *Id.*
[12] G.L. c. 151B, §9.
[13] 1976 Mass. Adv. Sh. at 2409, 356 N.E.2d at 239.

*R.R.*,[14] in which it had affirmed a superior court denial of the Commission's attempt to enforce an investigatory subpoena.[15] The Court stated that in *Boston & Maine* it had not negated the power of the Commission under chapter 151B to obtain relevant information at the investigative stage through subpoenas duces tecum. Rather, it had merely determind that the information there sought was not relevant to the Commission's investigation and therefore not authorized by the statute.[16]

[14] 357 Mass. 783, 260 N.E.2d 159 (1970).

[15] *Id.* at 784, 260 N.E.2d at 160.

[16] 1976 Mass. Adv. Sh. at 2411, 356 N.E.2d at 240.