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Chapter 1: Employment Discrimination

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CHAPTER 1

Employment Discrimination

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§1.1. Pregnancy-Related Disabilities As Sex Discrimination—Class Actions—Standing. In a series of three decisions [1] during the *Survey* year, the Supreme Judicial Court comprehensively addressed most questions concerning the extent to which employers may exclude pregnancy-related disabilities from the coverage of their sick leave and disability benefit plans. These decisions dealt with disabilities which are incident to healthy pregnancies as well as claims resulting from complications which are not the result of normal pregnancies.

The first of the series, *Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination*,[2] involved the Massachusetts Electric Company's practice of excluding all pregnancy-related disabilities from its comprehensive disability insurance plan.[3] This practice was codified in collective bargaining agreements, pursuant to which temporary disability benefits, primarily in the form of salary continuation, were paid to employees for occupational and non-occupational disabilities.[4] The only disabilities excluded from the plan were those resulting from excessive use of alcohol or narcotics, from refusal to observe company safety rules, or from pregnancy.[5] In 1973 two pregnant women suffered miscarriages, resulting in their absence from work for three days and five weeks respectively.[6] In 1974 a third woman who suffered complications as a result of pregnancy was absent for approximately six weeks.[7] Upon being denied the same temporary disability benefits

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§1.1. [1] Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 1978 Mass. Adv. Sh. 1189, 375 N.E.2d 1192; School Comm. of Brockton v. Massachusetts Comm'n Against Discrimination, 1979 Mass. Adv. Sh. 500, 386 N.E.2d 1240; School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination, 1979 Mass. Adv. Sh. 543, 386 N.E.2d 1251.

[2] 1978 Mass. Adv. Sh. 1189, 375 N.E.2d 1192.

[3] *Id.* at 1189, 375 N.E.2d at 1195.

[4] *Id.* at 1190, 375 N.E.2d at 1195.

[5] *Id.* at 1190-91, 375 N.E.2d at 1195.

[6] *Id.* at 1191, 375 N.E.2d at 1196.

[7] *Id.* at 1192, 375 N.E.2d at 1196.

that they would have received had they suffered broken legs, the three women and their union filed complaints with the Massachusetts Commission Against Discrimination, charging violation of section 4 of chapter 151B of the General Laws.[8] One of the women and the union sought to file their complaints as class actions.[9]

A public hearing was held before a single commissioner.[10] He rejected the company's motion to dismiss the union's complaint on the ground that it was not a proper party.[11] He also denied the company's motion to dismiss the class action portions of the complaints. He found that the class represented by one of the women and the union consisted of all females of childbearing age employed at the company's Massachusetts facilities on or after November 30, 1972, who had been, continued to be, or might have become adversely affected by the company's practices with respect to pregnancy-related disabilities.[12] The commissioner ruled in favor of the plaintiffs and awarded back pay to all class members whose pregnancy-related disabilities had been excluded from the company's otherwise applicable temporary disability policies.[13] The commissioner also issued a comprehensive cease and desist order.[14] The company appealed this decision to the full commission which affirmed the single commissioner's order.[15] The superior court then reserved and reported the case, and the Supreme Judicial Court granted direct appellate review.[16] The Court affirmed the Commission's decision with respect to the individual plaintiffs but reversed the determination that the action could be maintained as a class action and that the union had standing.[17]

In a sweeping decision, the Court first noted that the company had urged it to follow the lead of *General Electric Co. v. Gilbert*,[18] in which the United States Supreme Court held that the exclusion of pregnancy-related disabilities from a temporary disability plan did not violate a provision of Title VII of the Civil Rights Act of 1964[19] that was virtually

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[8] *Id.* at 1193, 375 N.E.2d at 1196. G.L. c. 151B provides at § 4(1) that, *inter alia*, it is an "unlawful practice" for any employer to discriminate on the basis of sex against any individual in hiring, firing, compensation, or "terms, conditions or privileges of employment."

[9] 1978 Mass. Adv. Sh. at 1193, 375 N.E.2d at 1196.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 1193, 375 N.E.2d at 1197.

[13] *Id.* at 1194, 375 N.E.2d at 1197.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] 429 U.S. 125 (1976).

[19] *Id.* at 145-46. Title VII is codified at 42 U.S.C. §§ 2000e *et seq.* (1976).

identical to the provision at issue in chapter 151B of the General Laws.[20] Instead, the Court indicated that a federal interpretation of a federal statute was not determinative of its interpretation of a state statute and that Title VII did not prevent a state from imposing a higher standard on its employers than does Title VII.[21] The Court then embraced the simple and comprehensive proposition that pregnancy is a condition unique to women and that the ability to become pregnant is a primary characteristic of the female sex.[22] The Court thus concluded that any classification which relies on pregnancy as the determinative criterion is an impermissible distinction based on sex.[23] The Court went on to hold:

> The exclusion of pregnancy-related disabilities, a sex-based distinction, from a comprehensive disability plan constitutes discrimination. While men are provided comprehensive coverage for all disabilities which will necessitate their absence from work, including male-specific disabilities, women are not provided the assurance of comprehensive protection from the inability to earn income during a period of disability.[24]

Having stated that the exclusion of pregnancy-related disabilities from a comprehensive disability plan constitutes prima facie sex discrimination, the Court then considered the company's affirmative defenses and disposed of them in equally summary fashion. It noted the company's reliance[25] on section 105D of chapter 149 of the General Laws, which states in pertinent part that "maternity leave may be with or without pay at the discretion of the employer."[26] The Court then looked to another sentence of the same section which requires an employee's restoration to a position of "the same status, pay, length of service credit and seniority,"[27] after maternity leave, and held that the employer's discretion as to "pay" in the sentence at issue referred only to salary and not to disability benefits.[28] The Court dealt with the company's concern about costs by simply stating that "cost considerations alone cannot constitute a defense to a violation of G.L. c. 151B, § 4."[29] The Court also rejected the argument that the entire matter was preempted by federal labor law. It maintained that employment discrimination is

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20 1978 Mass. Adv. Sh. at 1195, 375 N.E.2d at 1197.
21 *Id.* at 1195-97, 375 N.E.2d at 1197-98.
22 *Id.* at 1197, 375 N.E.2d at 1198.
23 *Id.*
24 *Id.* at 1198, 375 N.E.2d at 1198.
25 *Id.* at 1203, 375 N.E.2d at 1201.
26 G.L. c. 149, § 105D.
27 *Id.*
28 1978 Mass. Adv. Sh. at 1203, 375 N.E.2d at 1201.
29 *Id.* at 1204, 375 N.E.2d at 1201.

only of peripheral concern to the National Labor Relations Act[30] and that state anti-discrimination legislation is therefore not preempted by that act.[31] The Court thus embraced a broad holding that comprehensive disability plans which exclude pregnancy-related disabilities constitute sex discrimination violative of section 4 of chapter 151B.

While upholding the Commission's decision on the merits, the Court nevertheless severely restricted the scope of its award by holding that the Commission was not authorized to allow the bringing of class actions.[32] It cited its decision in *Massachusetts Commission Against Discrimination v. Liberty Mutual Insurance Co.*,[33] as requiring that the maintenance of class actions before the Commission either be authorized by statute or be implicitly among those powers that are reasonably necessary to the proper functioning of the Commission.[34] The Court then rather summarily stated that the maintenance of class actions was neither authorized by statute in these cases nor reasonably necessary to the Commission's proper functioning.[35] It also observed that the maintenance of class actions was not authorized by any rule or regulation that purported to be issued pursuant to the Commission's rule-making authority.[36] The Court did, however, signal its skepticism that such a rule could be validly promulgated by noting that it need not decide whether the Commission could issue such a rule or whether class actions could be maintained only in a trial court after court certification.[37]

The final point addressed by the Court was the union's standing to maintain a complaint before the Commission.[38] Section five of chapter 151B provides that any "person aggrieved" by an alleged unlawful

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[30] 29 U.S.C. § 151 *et seq.* (1976).

[31] 1978 Mass. Adv. Sh. at 1204-08, 375 N.E.2d at 1201-03.

[32] *Id.* at 1208, 375 N.E.2d at 1203.

[33] 371 Mass. 186, 356 N.E.2d 236 (1976), discussed in Sherry and Watson, *Employment Discrimination*, 1977 ANN. SURV. MASS. LAW § 4.5. In this case, the Court held that the Commission had the power to issue a subpoena duces tecum under its statutory mandate. 371 Mass. at 187, 356 N.E.2d at 237.

[34] 1978 Mass. Adv. Sh. at 1209, 375 N.E.2d at 1203.

[35] *Id.*

[36] *Id.* G.L. c. 151B, § 3(5) empowers the Commission to "adopt, promulgate, amend, and rescind rules and regulations suitable to carry out the provisions of this chapter, and the policies and practice of the Commission in connection therewith."

[37] 1978 Mass. Adv. Sh. at 1208 n.10, 375 N.E.2d at 1203 n.10. Since the Commission is expressly empowered to initiate its own complaints whenever it has "reason to believe" that an unlawful practice exists, G.L. c. 151B, § 5, it is unclear why these procedural perils inherent in private class actions could not be avoided, in appropriate cases, by the Commission's issuing its own complaint upon the receipt of class allegations and sufficient supporting evidence.

[38] 1978 Mass. Adv. Sh. at 1204-12, 375 N.E.2d at 1203-04.

practice may file a complaint with the Commission.[39] The Court found that, while the union was a "person," it was not a "person aggrieved" since it did not sustain any direct, substantial injury as a result of the company's unlawful practice.[40] Therefore it lacked the standing to file a complaint. The Court nevertheless raised the possibility that the union might have standing to represent its members who suffered such injury.[41] It declined to resolve this point, however, because the record was unclear as to whether the union had agreed to the collective bargaining provision excluding pregnancy-related disabilities from coverage.[42] If such were the case, the union would be disqualified from representing its aggrieved members because of a conflict of interest.[43] The Court noted, however, that even if the union were not disqualified by such a conflict of interest, its standing to represent its members might be limited to invoking injunctive or declaratory relief.[44] The Court thus narrowed its broad holding by restricting the benefits of its ruling to the individual plaintiffs.

The Court's reasoning in *Massachusetts Electric Company,* while appealingly clear, is unsatisfyingly superficial in its failure to address a number of considerations that should have weighed in its decision. For example, where it is a company's practice to cover women for all of the hundreds of disabilities for which men were covered, plus such sex-specific female disorders as hysterectomies, mastectomies, and vaginal or uterine disorders, does the exclusion of pregnancy-related disabilities cause the plan to operate against women to a significantly disparate extent? Moreover, since it is not unlawful for a company to have refused to cover, on cost-related grounds, disabilities that were not sex-specific such as cosmetic surgery, are pregnancy-related disabilities that would also have been excluded on identical cost-related criteria immunized from exclusion merely because they are sex-specific? The Court's failure to ask, much less answer, these and similar questions leaves a residue of suspicion that it was more result–oriented than rigorous in its analysis. Its interpretation of section 105D of chapter 149 ignores the plain words of the statute, the ordinary construction of "pay" in an employment context as including all forms of compensation. It also ignores the fact that the form of the benefit at issue was nothing more than continuation of an employee's salary. In short, though the decision reached what may be a worthwhile result, its jurisprudential soundness is questionable.

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39 G.L. c. 151B, § 5.
40 1978 Mass. Adv. Sh. at 1209-11, 375 N.E.2d at 1204.
41 *Id.* at 1211, 375 N.E.2d at 1204.
42 *Id.*
43 *Id.*
44 *Id.* at 1211 n.12, 375 N.E.2d at 1204 n.12.

Although the Supreme Judicial Court's holding in *Massachusetts Electric Company* was broad and unequivocal, the disabilities in question there, two miscarriages and one set of unspecified complications, were not common to normal, healthy pregnancies. In *School Committee of Brockton v. Massachusetts Commission Against Discrimination*,[45] the Court addressed the issue of whether disabilities incident to normal, healthy pregnancies could legitimately be excluded from sick leave and disability plans. It resolved any such doubts in favor of women.

The *Brockton* case involved a collective bargaining agreement between the school committee and the local teachers' association, which allowed teachers to be absent with pay for limited periods for disabilities due to illness or injury.[46] Pregnancy-related disabilities were excluded from such coverage.[47] Instead, pregnant teachers were allowed unpaid maternity leaves of up to three years.[48] One such teacher, absent for seven weeks while recovering from childbirth, was denied the opportunity to apply her accrued sick leave benefits to her period of disability-induced absence.[49] She filed a complaint with the Massachusetts Commission Against Discrimination, which ruled that the school committee's refusal to apply its sick leave benefits program to pregnancy-related disabilities constituted unlawful sex discrimination violative of section 4 of chapter 151B.[50]

On appeal, the Supreme Judicial Court made it very clear that it saw any exclusion of pregnancy-related disabilities, whether or not incident to a normal pregnancy, from comprehensive sick leave or disability plans to be prima facie illegal sex discrimination.[51] The Court stated its holding in unequivocal terms:

> The result in this case is plainly governed by *Massachusetts Elec.* There is no functional or legal distinction between the disability plan challenged in that case and the sick leave policy at issue here . . . . By withholding from women what is offered to men—comprehensive protection from the inability to earn income during a period of disability—the school committee quite clearly treats females less favorably than it does males.[52]

Having concluded that the plaintiff had satisfactorily made out the elements of her case-in-chief, the Court turned to the school com-

[45] 1979 Mass. Adv. Sh. 500, 386 N.E.2d at 1240.
[46] *Id.* at 501-02, 386 N.E.2d at 1241.
[47] *Id.* at 502, 386 N.E.2d at 1241.
[48] *Id.* at 502, 386 N.E.2d at 1241-42.
[49] *Id.* at 503, 386 N.E.2d at 1242.
[50] *Id.* at 504, 386 N.E.2d at 1242.
[51] *Id.* at 506-07, 386 N.E.2d at 1243.
[52] *Id.*

mittee's affirmative defenses and rejected them in short order. The committee had maintained that the inclusion of the challenged sick leave and maternity policy in the collective bargaining agreement constituted a waiver of teachers' rights to receive sick pay for pregnancy-related disabilities.[53] The Court responded by saying that while a union can waive statutory rights related to the collective activities of its members, such as the right to strike, rights such as equal employment opportunities which are personal, and not merely economic, are beyond a labor union's ability to bargain away.[54] The school committee next contended that the Commission's interpretation of section 4 of chapter 151B was inconsistent with section 105D of chapter 149, which permits maternity leave to be with or without pay at the discretion of the employer.[55] The Court found a more persuasive basis for denying this claim than it had in *Massachusetts Electric Company*:[56]

> Section 105D simply states that an employer is not required to establish disability benefit programs for females taking maternity leave. Should an employer provide disability or sick leave benefits generally, the strictures of c. 151B, § 4, demand that these be administered free of discrimination on the basis of sex.[57]

Finally, the Court rejected the employer's cost-based decision, maintaining that a defense of "business necessity" is cognizable only when the challenged practice is vital to safe and efficient job performance.[58] Incurring additional costs by ending a discriminatory practice does not fall within the "business necessity" exception.[59] Thus, the Court in upholding the plaintiff's claim again indicated its view that the exclusion of any pregnancy-related disabilities from a comprehensive sick leave or disability plan constitutes virtually *per se* unlawful sex discrimination.

Having decided that section 4 of chapter 151B mandates the inclusion of short-term maternity leaves in the comprehensive sick leave and disability plans of school systems, the Supreme Judicial Court was next confronted with the applicability of such holdings to long-term leaves. It dealt with this issue in the last case in this series of decisions concerning pregnancy-related disabilities, *School Committee of Braintree v. Massachusetts Commission Against Discrimination*.[60] In this case, the Court

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[53] *Id.* at 507, 386 N.E.2d at 1244.
[54] *Id.* at 508, 386 N.E.2d at 1244.
[55] *Id.* at 509, 386 N.E.2d at 1244.
[56] See text at notes 25-28 *supra*.
[57] 1979 Mass. Adv. Sh. at 509-10, 386 N.E.2d at 1244-45.
[58] *Id.* at 510, 386 N.E.2d at 1245.
[59] *Id.* at 511, 386 N.E.2d at 1245.
[60] 1979 Mass. Adv. Sh. 543, 386 N.E.2d 1251, decided upon a combined appeal with a companion case, School Comm. of Needham v. Massachusetts Comm'n Against Discrimination. *Id.* The facts and resolution of both cases are virtually identical.

addressed a situation characteristic of most school systems, whereby pregnant teachers are routinely granted extended maternity leaves of a year or more, with their return to work scheduled to coincide with the beginning of a new school year. The single issue presented in this case was whether an employer's denial of accumulated sick leave pay to pregnant employees on such extended leaves violated section 4 of chapter 151B when that policy prohibits a teacher from using her accumulated sick leave during that portion of her long-term leave when her pregnancy actually disabled her from working.[61]

In *Braintree,* two teachers began maternity leaves of fifteen to sixteen months duration in anticipation of giving birth shortly after the beginning of their leaves.[62] Both teachers requested but were denied permission to apply their accrued sick leave to that portion of their leaves during which they were physically disabled.[63] After the Massachusetts Commission Against Discrimination ruled in favor of both women,[64] the school committees sought review in superior court.[65] That court reserved and reported the case to the Appeals Court, and the Supreme Judicial Court then granted direct appellate review.[66]

The Court found that the women had established prima facie cases of unlawful discrimination by showing that they were denied the use of their accumulated sick leave benefits for pregnancy-related disabilities.[67] The Court supported its decision by citing *Massachusetts Electric* and *School Committee of Brockton.*[68] The case then turned on the school committees' attempt to justify their actions by distinguishing between disabilities which occur during long-term leaves and those which cause only a short-term absence.[69] The school committees pointed out that long-term leaves had been awarded to both men and women for a variety of reasons such as sabbaticals, graduate education, military service, Peace Corps and VISTA service, as well as for pregnancy.[70] They asserted that it was the consistent, nondiscriminatory policy of the school systems to deny use of accumulated sick leave benefits for any disabilities that might arise during such long-term leaves.[71] While finding this defense

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The Court treated the two cases as if they were one; hence this chapter will do the same.

61 *Id.* at 544, 386 N.E.2d at 1251.
62 *Id.* at 544-47, 386 N.E.2d at 1252-53.
63 *Id.*
64 *Id.* at 548, 386 N.E.2d at 1253.
65 *Id.*
66 *Id.*
67 *Id.* at 551, 386 N.E.2d at 1255.
68 *Id.*
69 *Id.*
70 *Id.* at 551-52, 386 N.E.2d at 1255.
71 *Id.*

to have "surface appeal," the Court rejected the analogy between maternity leaves and the other kinds of leaves which an employer might permit.[72] The Court stated that:

> [u]nlike leaves of other kinds, maternity leave possesses an essential character of being medically necessary. During several weeks of maternity leave a woman, by necessity, is physically disabled and incapable of performing her job. No comparable situation exists with respect to men. Men, we can safely say, do not request long-term leaves with the intention of devoting some portion of such leaves to the treatment of foreseeable physical disabilities.[73]

The Court also appeared to question the school committees' good faith. It pointed out that they had admitted that they had followed the discriminatory practice of denying sick leave for all pregnancy-related disabilities, regardless of the length of the employees' absence from work.[74] It intimated that the school committees must have known that their practice operated to the disadvantage of women. It concluded that the challenged policy therefore served as a pretext to deny women their accrued sick leave benefits.[75] This suspicion certainly seems to be a major motivation for the decision.

Having attacked the school committees' policies as discriminatory, the Court then took pains to point out the limits of its decision. It stated that a pregnant worker's entitlement to benefits is of course limited to the period of time during which the teacher is actually disabled.[76] In the context of long-term leaves, the entitlement applies only to the pregnancy-related disability at the beginning of the leave that was the cause of the absence in the first place.[77] An employer may, therefore, properly disallow benefits for any subsequent disabilities which may occur during the long-term leave, including a second pregnancy, as long as such disallowances are applied nondiscriminatorily.[78] Finally, the Court acknowledged that employers may act to prevent abuses of their sick leave programs by requiring medical verification of pregnancy-related claimed disabilities or by predicating pregnant employees' utilization of their sick leave allowances on their giving written promise to return to work.[79] The only requirement is that such controls are not discriminatorily applied

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[72] *Id.* at 552, 386 N.E.2d at 1255.
[73] *Id.*
[74] *Id.* at 553, 386 N.E.2d at 1255-56.
[75] *Id.*
[76] *Id.* at 554, 386 N.E.2d at 1256.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 554-55, 386 N.E.2d at 1256.

to pregnancy-related disabilities alone.[80] Hence, with its decision in *Braintree,* the Court completed its broad statement that pregnancy-related disabilities must be included in comprehensive disability and sick leave plans.

One wonders if the Court might have reacted differently had the school committees offered their pregnant employees an uncoerced choice between (i) taking ordinary paid sick leave for pregnancy-related disabilities, with the consequent requirement that the employee return to work when no longer physically disabled from doing so, and (ii) taking a long-term unpaid leave of absence, in which the right to utilize accrued sick leave is surrendered in return for both the authorization to remain absent from work beyond any disability period and having a guaranteed right to return at the end of the authorized leave. Such an arrangement, assuming that the choice was truly unfettered, would treat pregnancy-related disabilities as well as, but no better than, other short-term disabilities and would appear to conform both to the Court's decisions and to the principles of chapter 151B. Such an approach has merit. Yet the broad holdings and language of the Court in these cases could indicate that it would be unwilling to accept such an alternative to a blanket mandated inclusion of pregnancy-related disabilities in all disability and sick leave plans. Such a rigid approach ignores the peculiar and long-term nature of pregnancy-related absences and makes for bad jurisprudence. More flexibility is needed in this area.

§1.2. Standards of Review—Standards of Proof—Parties' Burdens. In *Smith College v. Massachusetts Commission Against Discrimination,*[1] the Supreme Judicial Court reaffirmed and expanded its decision in *Wheelock College v. Massachusetts Commission Against Discrimination.*[2] In *Wheelock College,* Wheelock College had declined to renew the teaching contract of a part-time female instructor.[3] The teacher alleged that she had been dismissed because she had continually pressed for a full-time position which the college discriminatorily reserved for men.[4] The Commission had ruled that the teacher had established a prima facie case and that the burden of proof then shifted to the college, which burden it did not meet.[5] The Court remanded the case to the Commission because it had abandoned its prima facie theory on appeal.[6] The

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[80] *Id.*

§1.2. [1] 1978 Mass. Adv. Sh. 2350, 380 N.E.2d 121.
[2] 371 Mass. 130, 355 N.E.2d 309 (1976), discussed in Sherry and Watson, *Employment Discrimination,* 1977 ANN. SURV. MASS. LAW § 4.3.
[3] 371 Mass. at 131, 355 N.E.2d at 311.
[4] *Id.* at 133-34, 355 N.E.2d at 312.
[5] *Id.* at 134-35, 355 N.E.2d at 312-13.
[6] *Id.* at 135, 355 N.E.2d at 313.

Court also indicated that if a prima facie case is established, only the burden of going forward shifts to the defendant.[7] If the employer gives nondiscriminatory reasons for the dismissal, the burden shifts back to the employee, and she must prove that the employer's supposed reasons were not in fact the actual grounds for dismissal.[8] The Court developed these principles further in the *Smith College* case.

That case was initiated by two female faculty members of Smith College who were not granted tenure and whose teaching contracts were accordingly terminated at the end of the 1972-73 academic year.[9] Both filed complaints with the Massachusetts Commission Against Discrimination, alleging that sex discrimination was the reason for the adverse tenure decisions.[10] During the course of a twelve-day hearing before a single hearing commissioner,[11] each of the senior faculty members who had participated in the decision not to recommend the two women for tenure testified at length as to his or her academic nondiscriminatory reasons for doing so.[12] Contemporaneously written memoranda were submitted to corroborate these reasons.[13] Despite this extensive evidence, which was uncontradicted, the hearing commissioner dismissed the proffered reasons as incredible, subjective, and imprecise and accordingly found for the two women.[14] In so doing, the hearing commissioner relied primarily on evidence of a declining proportion of female faculty at the college that bore no apparent causal relationship to the motivations of the faculty members who participated in the decisions to deny tenure to the two complainants.[15]

Upon the college's administrative appeal, the full Commission affirmed the single commissioner's decision with minor modifications.[16] The Commission specifically affirmed the hearing commissioner's holding that any finding of discriminatory intent on the employer's part was unnecessary

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[7] *Id.* at 136, 355 N.E.2d at 314.

[8] *Id.*

[9] 1978 Mass. Adv. Sh. at 2350-51, 380 N.E.2d at 122.

[10] *Id.*

[11] *Id.* at 2351, 380 N.E.2d at 122.

[12] Adams & Schroeder v. Smith College (MCAD Nos. 72-S-53, 54, 12/30/74), *slip op.* at 2.

[13] *Id.*

[14] *Id.* at 27-32.

[15] *Id.* at 25-26. For example, the hearing commissioner stressed the declining proportion of women holding professional rank in the college as a whole and in the women's department, without attempting to relate this phenomenon to any actions by the faculty members involved in the tenure denials. Similarly, the single commissioner emphasized an untoward remark in a student-recruitment handbook, despite evidence that the handbook was not prepared by, used by, or even known to the senior faculty members who made the adverse tenure decisions. *Id.*

[16] 1978 Mass. Adv. Sh. at 2352, 380 N.E.2d at 123.

to a finding of a violation under chapter 151B.[17] The Commission seems to have treated the case as one in which the teachers established a prima facie case of sex discrimination which the College was unable to rebut.[18]

Smith College appealed, and a judge of the superior court, after a hearing, set aside the Commission's decision as based on errors of law and unsupported by substantial evidence in the record.[19] He ordered that the complaints before the Commission be dismissed.[20] The court was particularly critical of the Commission's amorphous reliance upon elements of proof that seemed to have little or nothing to do with the allegedly non-discriminatory reasons advanced by the College for the tenure denials at issue:

> The complainants in the instant case were obliged to present evidence sustaining their burden of proof *respecting the actual tenure decisions affecting them, and the* [*Commission's*] *decision in their favor must rest upon substantial evidence to this effect in the record,* taken as a whole. It is not enough to carry the burden of the complainants if strained and distorted rationalization seems to detect tracings of possible sexist attitudes somewhere in the history or in the environment of the College. The normal rules of causation between possible wrongdoing and injury, operative at common law, must still apply.[21]

The Commission appealed the superior court's judgment, and the Supreme Judicial Court granted direct appellate review.[22]

The Court determined at the outset that the superior court judge had applied the correct legal principles. It ruled, however, that he had erred by evaluating the evidence himself rather than remanding the case to the Commission so that it, as the appropriate fact-finding body, could apply the appropriate legal standards to the facts.[23] The Court then stated that the focus of its review would be on the single commissioner's

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[17] Adams & Schroeder v. Smith College (MCAD Nos. 72-S-53, 54, 11/19/75), *slip op.* at 9-10.

[18] 1978 Mass. Adv. Sh. at 2359, 380 N.E.2d at 126.

[19] *Id.* at 2352, 380 N.E.2d at 123.

[20] *Id.*

[21] Smith College v. Massachusetts Comm'n Against Discrimination, Superior Court of Hampshire County, Civ. Ac. 15494, *slip op.* at 10-11 (emphasis in text).

[22] 1978 Mass. Adv. Sh. at 2352, 380 N.E.2d at 123.

[23] *Id.* at 2353, 380 N.E.2d at 123. The Court, however, sympathized with the trial judge's assumption of a fact-finding role by noting that "[t]he temptation to do so is great where the record contains substantial factual support for a result not reached by the agency, and where the agency decision contains seemingly prejudicial factual errors and lacks a balanced analysis of the evidence." *Id.*

decision.[24] It declared that it would therefore disregard factual conclusions advanced for the first time in the Commission's appellate brief and would view critically any new legal theories that were not expressed in the Commission's decision affirming the decision of the single commissioner.[25]

Turning to the commissioner's decision, the Court found that it had been based on misconceptions of several fundamental legal principles.[26] The Court stated that the burden was on the complainants to prove that sex discrimination was more than a "factor" in the decision to deny them tenure.[27] Rather, the plaintiffs had to show a direct causal relationship between their sex and the tenure denials.[28] To prevail, the complainants had to prove that their sex was a determinative cause in their tenure denials and one but for which the tenure decisions would have been favorable:

> If a complainant proves that the tenure decision would have been favorable but for the unlawful discrimination, she has proved her case. . . . If, however, an employer discriminates on the basis of sex but the complainant would not have been hired even if he or she had been a member of the opposite sex, a complainant has not proved a case of discrimination under G.L. c.151B, § 4.[29]

Hence, even if there were discriminatory reasons for the denial of tenure, if the decision would still have been negative absent any discriminatory motives, then the teachers would have failed to meet their burden of proof.[30]

The Court also stated that the Commission had erred in not considering the voting faculty members' intent crucial.[31] It maintained that proof of discriminatory motive is critical in cases such as this one which allege "disparate treatment" of members of a sex, race, or class.[32] Furthermore,

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[24] *Id.* at 2354, 380 N.E.2d at 124.
[25] *Id.*
[26] *Id.* at 2356-57, 380 N.E.2d at 124-25.
[27] *Id.* at 2356, 380 N.E.2d at 124.
[28] *Id.* at 2356-57, 380 N.E.2d at 124-25.
[29] *Id.* at 2356 n.8, 380 N.E.2d at 125 n.8.
[30] *Id.* at 2356-57, 380 N.E.2d at 124-25.
[31] *Id.* at 2357, 380 N.E.2d at 125.
[32] *Id.* Following the reasoning of the U.S. Supreme Court in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Judicial Court distinguished between complaints of "disparate treatment," which were based on allegations that one individual had been treated less favorably than another individual because of his or her sex, race, religion, etc., and complaints of "disparate impact," which involved facially neutral practices of broad application that impacted more harshly on blacks than whites, women than men, etc. The great majority of discrimination complaints filed with the Commission fall into the former category.

proof of discriminatory intent need not always be based on direct evidence of discrimination but may be based on reasonable inferences drawn from comparisons of the treatment of men and women in tenure decisions.[33] The Court noted, however, that the single commissioner's findings did not constitute sufficient evidence to support such a conclusion.[34]

Having determined that the Commission had not applied the proper legal analysis to the case, the Court then proceeded to give guidelines that the Commission and lower courts could utilize on remand. It amplified the standards it had established in *Wheelock College v. Massachusetts Commission Against Discrimination*[35] concerning the burdens of proof and production in a case under chapter 151B.[36] The initial burden of establishing a prima facie case of discrimination before the Commission lies with a complainant.[37] As part of his or her burden in a tenure case the complainant must prove that he or she was qualified for tenure.[38] The complainant must adduce some evidence to show that discrimination was the motive of those who made the decision to deny her tenure.[39] A prima facie case may, however, be established by substantial evidence tending to show that a pattern exists whereby similarly situated candidates of different sexes have fared differently under the same tenure criteria.[40]

If a prima facie case is made out, the burden of going forward then shifts to the employer to produce a nondiscriminatory explanation for the treatment accorded the complainant.[41] This is merely a shift of the burden of production; the burden of persuasion remains on the complainant throughout the hearing.[42] The plaintiff's prima facie case meets that burden only if the defendant is unable to produce a nondiscriminatory reason for the denial of tenure and hence fails to meet its burden of going

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In "disparate treatment" cases, proof of discriminatory motive is critical; in "disparate impact" cases it is not. *Id.*

[33] *Id.* at 2357-58, 380 N.E.2d at 125.

[34] *Id.* at 2358, 380 N.E.2d at 125.

[35] 371 Mass. 130, 355 N.E.2d 309. See text at notes 2-7 *supra.*

[36] 1978 Mass. Adv. Sh. at 2359-63, 380 N.E.2d at 126-28.

[37] *Id.* at 2359, 380 N.E.2d at 126.

[38] *Id.* at 2360, 380 N.E.2d at 126. The Court suggested that expert testimony may be considered by the Commission on this issue to help compensate for its own lack of expertise in assessing academic credentials. *Id.* at 2361, 380 N.E.2d at 127. Since, however, the factors that weigh in tenure decisions tend to be unique to each academic institution and always involve teaching performance, it is difficult to see how an outside expert who is unfamiliar with the application of the tenure criteria at the defendant institution and perhaps with a tenure candidate's classroom performance can testify in the abstract as to his or her overall tenure "qualifications."

[39] *Id.* at 2357, 380 N.E.2d at 125.

[40] *Id.* at 2357-58, 380 N.E.2d at 125.

[41] *Id.* at 2359, 380 N.E.2d at 126.

[42] 371 Mass. at 139, 355 N.E.2d at 315.

forward with the evidence.[43] While the employer's explanation must be nondiscriminatory and not inherently implausible, it need not meet any standard of fairness or just cause. A managerial decision may be unsound, absurd, or even irrational and still satisfy the standards of chapter 151B.[44] The key issue is whether the nondiscriminatory reason is the real reason.[45] The Court indicated that the production of a nondiscriminatory reason, backed by a minimum of evidence that it was the real reason, satisfies the employer's burden of going forward.[46]

Upon the employer's discharge of this burden or explanation, the complainant must prove that the proffered reasons are not the real reasons for the denial of tenure but are mere pretexts.[47] Hence, in the case at bar, the complainants were required to prove not only that the tenure denials would not have occurred but for their sex but also that there were no independent, nondiscriminatory reasons for the college's adverse determination that by themselves led to the decision to deny tenure.[48] In conclusion, the Court indicated that a sincere belief that a person is not qualified for a job is an adequate justification for an employment decision and rebuts a complainant's prima facie case.[49] In such a situation, the plaintiff will essentially have failed to carry her burden of proof.[50]

One issue left unresolved by the Court in *Smith College* is how its standards apply to collective decisions which are typical of decisions at academic institutions. While noting that the departmental tenure decisions in *Smith College* were the collective results of eight professors' votes, the Court intimated that the votes of a majority of the professors would have to have been predicated on impermissible factors in order for relief to be granted.[51] This position is consistent with the Court's "but for" reasoning and its adoption of a causation test in determining whether a complainant has proved her case of discrimination.[52] Hence, it seems that the biased decisions of one or two faculty members would not be enough to warrant relief under chapter 151B if a majority of the decision-makers voted to deny tenure for nondiscriminatory reasons.[53]

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[43] *Id.*

[44] 1978 Mass. Adv. Sh. at 2359, 380 N.E.2d at 126.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 2356, 380 N.E.2d at 125.

[49] *Id.* at 2362, 380 N.E.2d at 127.

[50] *Id.* at 2362-63, 380 N.E.2d at 127-28.

[51] *Id.* at 2362, 380 N.E.2d at 127. The Court stated: "If those voting against tenure (or only perhaps a majority of them) truly believed that [the two female complainants] did not qualify for tenure, that may end the case." *Id.*

[52] *Id.* at 2356 n.8, 380 N.E.2d at 125 n.8.

[53] After the close of the *Survey* year, on remand in *Smith College*, the full Commission on March 13, 1980, summarily decided that under the standards articulated

The *Smith College* decision thus makes it clear that a teacher denied tenure allegedly on the basis of sex cannot establish a prima facie case by pleading that she is a woman. Furthermore, she cannot prove her case unless she is able to show that the actual adverse decision was motivated by discrimination and not by valid, nondiscriminatory, academic reasons. Such a ruling properly restores to the law of sex discrimination in Massachusetts the requisite common law causation nexus between alleged wrongdoing and injury. At the same time, if a complainant can prove that she was qualified for tenure, the employer must articulate nondiscriminatory reasons for the decision. If he does, the employee then has the opportunity to show that these reasons are pretexts for unlawful discrimination. The *Smith College* decision clarifies the placement of burdens of proof and production in sex discrimination cases that seem to have been confused in some of the Commission's deliberations. It strikes an appropriate balance between complainant and employer, one remarkably like those developed at common law for all civil cases and controversies.

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by the Supreme Judicial Court, the complainants had failed to carry their burden of proof that they were denied tenure because of their sex. Their complaints were accordingly dismissed. Adams & Carruthers v. Smith College (MCAD Nos. 72-S-53, 54, 3/5/80).