COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
No. SJC-10238

JOSEPH R. EVERETT,

Plaintiff/Appellee,

v.

THE 357 CORP. & TRANS-LEASE GROUP,

Defendants/Appellants.

On Appeal From A Judgment Of The Superior Court

BRIEF OF AMICI CURIAE

CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE,
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW
OF THE BOSTON BAR ASSOCIATION,
GAY AND LESBIAN ADVOCATES AND DEFENDERS,
GREATER BOSTON LEGAL SERVICES
ON BEHALF OF THE CHELSEA COLLABORATIVE,
JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION,
MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION, AND
MASSACHUSETTS LAW REFORM INSTITUTE

Nina Joan Kimball
BBO #547567
Kimball Brousseau LLP
One Washington Mall
Boston, MA 02108
(617) 367-9449

December 1, 2008

TABLE OF CONTENTS

STATEMENTS OF INTEREST OF AMICI CURIAE 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW . . . 6

STATEMENT OF THE CASE 8

ARGUMENT. 14

I. PLAINTIFF EXHAUSTED HIS ADMINISTRATIVE REMEDIES BECAUSE HIS 1999 FAILURE TO REHIRE CLAIM WAS WITHIN THE SCOPE OF THE INVESTIGATION THAT REASONABLY COULD HAVE GROWN OUT OF HIS 1996-97 FAILURE TO REHIRE CLAIM 14

A. The Administrative Filing Requirement and the Scope of the Investigation Rule 15

B. The Adverse Actions at Issue are Both Failure to Rehire Claims 19

C. Plaintiff Exhausted his Administrative Remedies Because His Second Failure to Rehire Claim is Within the Scope of the Investigation the MCAD Could Reasonably Have Conducted on His Charge 21

II. THE CONTINUING VIOLATION DOCTRINE DOES NOT, AND NEED NOT, APPLY IN THE CIRCUMSTANCES OF THIS CASE. 24

A. The Continuing Violation Doctrine Is Backward Looking Whereas The Scope of the Investigation Rule is Usually Forward Looking 24

B. Whether Or Not The 1999 Failure To Rehire Was A "Discrete Act" Of Discrimination Or Part Of A Continuing Pattern Of Discrimination Is Not Conclusive Of Whether It Is Within The Scope Of The Investigation That The MCAD Could Reasonably Have Conducted On Plaintiff's Charge 26

1. This Court's jurisprudence recognizes that certain types of discrete acts can be part of a continuing violation 27

2. The scope of the investigation rule is broader than the continuing violation rule as it applies to a broader range of "related" acts of discrimination. 30

CONCLUSION 34

RULE 16(k) CERTIFICATION 35

TABLE OF AUTHORITIES

Cases

Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367 (2005) 5

Bragdon v. Abbott, 524 U.S. 624 (1998) 3

Carter v. Commissioner of Correction, 43 Mass. App. Ct. 212 (1997) 16

Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611 (2005) 16, 26, 28, 29

City of Boston v. MCAD, 47 Mass. App. Ct. 816 (1999) 24

Conroy v. Boston Edison Co., 758 F. Supp. 54 (D. Mass. 1991) 16-17, 23, 32

Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521 (2001). 15, 18, 24, 25, 26, 28, 29, 33

Gasior v. Mass. Gen. Hosp., 446 Mass. 645 (2006) 5

Harrison v. Kraft Foods, Inc., 2007 WL 3232552 (D. Mass. Oct. 30, 2007) 32

Ingels v. Thiokol Corp., 42 F.3d 616 (10th Cir. 1994) 18

Josephs v. Pacific Bell, 443 F.3d 1050 (9th Cir. 2006) 23

Melnychenko v. 84 Lumber Co., 424 Mass. 285 (1997) 2

Muzzy v. Cahillane Motors, 749 N.E.2d 691 (Mass. 2001). 2

National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002) 29, 30

Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632 (2004) 24, 28

Oubichon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973) 32

Powers v. Grinnell Corp., 915 F.2d 34 (1st Cir. 1990) 23

Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) 3

Smith v. Bell Atlantic, 63 Mass. App. Ct. 702 (2005) 33

Smith v. Mitre Corp., 949 F. Supp 943 (D. Mass. 1997) 18, 31

Thomas v. EDI Specialists, Inc., 437 Mass. 536 (2002) . .5

Waiters v. Parsons, 729 F.2d 233 (3rd Cir. 1984) . 31

Walters v. President & Fellows of Harvard College, 616 F. Supp. 471 (D. Mass. 1985) 32

Weber v. Cmty. Teamwork, Inc., 434 Mass. 761 (2001). . . 5

White v. New Hampshire Dep't of Corrections, 221 F.3d 254 (1st Cir. 2000) 17

Windross v. Village Automotive Group, 71 Mass. App. Ct. 861 (2008) . . 15, 16, 17, 18, 32-33

Statutes

42 U.S.C. § 2000e et seq. 29

42 U.S.C. § 2000e-5(e)(1). 29-30

42 U.S.C. § 12012(2) 12

42 U.S.C. § 12112(a) 11-12

Mass. Gen. L. c.151B 2, 11, 16

Mass. Gen. L. c. 151B, § 1(17) 11

Mass. Gen. L. c. 151B, § 4(9) 32

Mass. Gen. L. c. 151B, § 4(16) 11

Mass. Gen. L. c. 151B, § 5 15

Mass. Gen. L. c. 151B, § 9 24

2002 Mass. Acts c. 223, §§ 1, 4 15

Mass. R. Civ. P. 8(a) 19

804 C.M.R. § 1.10(2) 27

Other Authorities

2 B. Lindemann & P. Grossman, Employment Discrimination Law 1351 (3d ed. 1996) 24-25

STATEMENTS OF INTEREST OF THE AMICI CURIAE

THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE

Established in the fall of 2005 at Harvard Law School, the Charles Hamilton Houston Institute for Race and Justice ("CHHIRJ") seeks to continue the work of one of the great lawyers of the twentieth century, Charles Hamilton Houston, who dedicated his life to using the law to address matters of racial discrimination. CHHIRJ is committed to using research, instruction and advocacy directed to the judicial, legislative and executive branches of government, with a consistent and particular emphasis on securing racial fairness and equality. Through its research and litigation, CHHIRJ addresses issues of disparity and racial justice, both on the national and local levels. It is of critical importance to CHHIJ's work that civil rights laws designed to eradicate discrimination remain vital remedial tools, available to all who need them.

THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW OF THE BOSTON BAR ASSOCIATION

Founded in 1968, the Lawyers' Committee for Civil Rights Under the Law of the Boston Bar Association ("LCCR") is a non-profit civil rights law office that specializes in law reform litigation and advocacy to redress race and national origin discrimination with a

particular focus on employment, housing, and police misconduct. The LCCR's mission is to provide a "safeguard for the civil, social, and economic rights of residents in the Greater Boston area and throughout Massachusetts." LCCR is signing this Amicus brief because it has a strong interest in ensuring that administrative filing requirements are interpreted in a manner that is consistent with the remedial purposes of Mass. Gen. L. c. 151B.

GAY AND LESBIAN ADVOCATES AND DEFENDERS

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS.

GLAD's history includes litigating and providing amicus support in a wide range of anti-discrimination and employment matters. *See, e.g., Muzzy v. Cahillane Motors*, 749 N.E.2d 691 (Mass. 2001) (amicus brief addressing appropriate level of specificity of jury instruction on "reasonable person" standard in same-sex sexual harassment case); *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 676 N.E.2d 45 (1997) (amicus brief

arguing that same-sex sexual harassment is prohibited by Chapter 151B regardless of the sexual orientation of the parties); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (establishing that people with HIV are protected under the Americans with Disabilities Act); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that transgender person denied opportunity to apply for loan may state sex discrimination claim under Equal Credit Opportunity Act). GLAD has an enduring interest in ensuring that employees receive full and complete redress for the violation of their civil rights in the workplace.

GREATER BOSTON LEGAL SERVICES ON BEHALF OF THE CHELSEA COLLABORATIVE

Greater Boston Legal Services (GBLS) and its client organization, the Chelsea Collaborative, engage in legal representation, community organizing, and other services and support for the low-wage immigrant workforce of Massachusetts. These low-wage immigrant workers are highly vulnerable to workplace exploitation and abuse, particularly workplace discrimination and harassment because of their limited or non-existent English skills, low levels of education, worries about their immigration status (even when they have valid work authorization), and lack of knowledge of their workplace rights. Thus *amici* have a strong interest in ensuring that these workers have access to the legal

system and protecting their right to pursue valid claims in court.

As many of the workers represented by GBLS and assisted by the Collaborative work low-wage jobs, individual damages are generally not significant enough to make representation financially feasible for or attractive to private counsel. *Amici* have had great difficulty in finding private counsel for their clients. As a result many of these workers pursue their discrimination claims *pro se*. Thus, the outcome of this case will significantly affect the ability of low-wage and immigrant workers to pursue discrimination claims *pro se*.

JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION

The Jewish Alliance for Law and Social Action (JALSA) is a membership organization based in Boston working on issues of social justice. JALSA's members have been involved in the drafting and passage of Massachusetts anti-discrimination statutes since the 1950s, having major roles in passage of statutes prohibiting discrimination in education, housing, and employment. More recently, JALSA's members participated in coalition efforts to pass legislation to end discrimination on the basis of gender, sexual orientation, and denial of civil rights by intimidation or coercion. JALSA has provided amicus briefs in a number of cases where it believes that the issue under

discussion has major significance to the understanding and breadth of statutes designed to broadly protect civil rights.

MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION

The Massachusetts Employment Lawyers Association ("MELA") is a voluntary membership organization of over 110 lawyers who regularly represent employees in labor, employment, and civil rights disputes in Massachusetts. MELA is an affiliate of the National Employment Lawyers Association. As part of its advocacy efforts, MELA has filed numerous amicus curiae briefs before the Massachusetts courts, singly or jointly with other amici, including: *Gasior v. Mass. Gen. Hosp.*, 446 Mass. 645 (2006); *Ayash v. Dana-Farber Cancer Inst.*, 443 Mass. 367 (2005); *Thomas v. EDI Specialists, Inc.*, 437 Mass. 536 (2002); and *Weber v. Cmty. Teamwork, Inc.*, 434 Mass. 761 (2001).

The interest of MELA in the case at bar lies in protecting the rights of its members' clients by ensuring that the Commonwealth of Massachusetts' oft-stated goal of eradicating employment discrimination is fully realized. The issues raised in this case could have far-reaching consequences for employees' ability to bring claims under the state anti-discrimination statute and whether the scope of the investigation rule is interpreted broadly, consistent with a liberal

reading the Chapter 151B, or narrowly, which could result of meritorious claims being dismissed.

MASSACHUSETTS LAW REFORM INSTITUTE

Massachusetts Law Reform Institute (MLRI) is a nonprofit statewide legal services advocacy and support center that has represented low-income individuals and groups since 1968. MLRI represents clients, including group clients, on legal issues of statewide impact to low-income persons in the areas of employment and disability rights, among others, and it also advocates for policies making adjudicatory agencies and the courts as accessible as possible for litigants who are proceeding pro se. MLRI has filed many amicus briefs in the Massachusetts appellate courts.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Justices have solicited amicus briefs on several legal issues raised by this case. This brief is submitted to address the issue of "whether the 1999 failure to rehire was a discrete act or a continuing violation for purposes of the plaintiff's 1996 discrimination claim before the MCAD."

Amici believe that the continuing violation doctrine does not, and need not, apply to determine whether Plaintiff's 1999 failure to rehire claim was properly part of the lawsuit filed in this case. The continuing violation doctrine is a backward-looking rule that seeks to bring discriminatory acts that

occurred prior to the filing period at the Massachusetts Commission Against Discrimination (MCAD) into the lawsuit. By contrast, the "scope of the investigation" rule, which applies in this case, is more flexible, allowing complainants to include discriminatory acts that have occurred after the filing of the MCAD Charge, without requiring them to have filed separate charges each time a subsequent related act occurs. While the rule usually applies to subsequent related acts, it can apply to related acts that occurred before the filing of the MCAD Charge but that were not explicitly included in the Charge.

This brief will show that Plaintiff exhausted his administrative remedies. He was not required to refile his failure to hire claim at the MCAD in 1999 because that claim would have come within the scope of the investigation that could reasonably have grown out of the MCAD's investigation into his 1996-97 failure to rehire claim. Even though the 1999 failure to rehire is a "discrete act" it comes within the scope of the investigation because it is "like or related to" the claim that was filed at the MCAD.

Applying the continuing violation doctrine to the "scope of the investigation" rule would unnecessarily narrow the analysis under that rule to allow litigation in a subsequent court action of only those claims that meet the continuing violation test. Such a ruling

would erect an administrative barrier and result in the dismissal of valid discrimination claims. This would especially harm *pro se* plaintiffs who are already at a disadvantage in pleading their claims.

Where the purposes of the administrative filing requirement are met, because the agency has had an opportunity to investigate and conciliate related claims raised in the administrative charge, and the employer is on notice of potential liability, forcing litigants to file new charges at the MCAD simply because the employer has committed subsequent related acts of discrimination does not effectuate the remedial purposes of the statute. To do so would waste time and resources, result in unnecessary delays, and prevent the prosecution of valid claims. It is important that administrative filing requirements are interpreted in a manner that is consistent with the remedial purposes of the statute, and not in a way that create technical traps to dispose of discrimination claims.

STATEMENT OF THE CASE

In 1986, Defendant-Appellant 357 Corporation ("357"), a commercial trucking company and subsidiary of Defendant-Appellant Trans-Lease, hired the plaintiff Joseph Everett ("Mr. Everett") as a commercial truck driver. Record Appendix ("RA") 463-65.

On March 15, 1996, Mr. Everett voluntarily sought treatment from a psychologist, Dr. Sober-Ain, and was

diagnosed with an adjustment disorder, depressed mood and PTSD (delayed onset). Dr. Sober-Ain continued to see Mr. Everett regularly for therapy until February 1997. RA 308-17, 1207-08.

On June 25, 1996, Mr. Everett was involuntarily committed by his family after he began having paranoid episodes. Mr. Everett was in the hospital for two weeks where he was given a diagnosis of paranoid schizophrenia. RA 492-500, 1895-96.

On July 9, 1996, Mr. Everett was discharged from the hospital and placed on two anti-psychotic drugs (Haldol, Trilafon). RA 1699-1700. Shortly thereafter he sought reinstatement with 357. RA 504-505, 676-77.

357's President testified at trial that Mr. Everett was terminated in 1996, RA 1629-30, 1657, and the evidence indicates the termination occurred on July 9, 1996. RA 173-75, 306, 1630, 1657.

Nevertheless, Mr. Everett's reinstatement request remained active. On July 18, 1996, 357 required Mr. Everett to see Dr. David Roston, a medical doctor (but not a psychiatrist). RA 318-22 & Exhibits 47-50. Dr. Roston evaluated Mr. Everett and concluded he was not medically qualified to return to work. RA 318-22, 1996.

On September 26, 1996, Dr. Roy Lubit, an independent psychiatrist, examined Mr. Everett and found that he was not fit to return to work. However,

Dr. Lubit did not concur with the diagnosis of schizophrenia. RA 1693-94, 1700-01, 1771-72, 1777-78, 1813, 1817-18. In addition, Dr. Lubit never said that Mr. Everett had a mental disease or psychiatric disorder that was likely to interfere with his ability to drive a truck safely, a U.S. Department of Transportation (DOT) medical standard (see RA 270-71). RA 1781-87, 1793-94, 1817-18, 1821-22, 1825, 1833.

On January 25, 1997, Mr. Everett sought another independent examination, from Dr. James Bieber, who ultimately concluded that Plaintiff was fit for service and could return to work. On February 14, 1997, 357 asked its medical advisor, Dr. Roston, to review Dr. Bieber's report. Dr. Roston concluded that Mr. Everett was still not fit to return to work stating "he has the risk of future psychotic episodes" that "could interfere with safe operation of a commercial vehicle." RA 283, 2025-26.

In February 1997, Mr. Everett initiated a grievance through his union alleging that his employer had refused to return him to work on the basis of a perceived disability. Mr. Everett maintained that he was able to drive a truck safely and was mentally fit for reinstatement. RA 255-257, 260-261, 1231-34. Because the parties could not agree on the status of Mr. Everett's mental condition, it was agreed that Mr.

Everett would be evaluated by a neutral third party doctor. RA 1233.

On June 26, 1997, Dr. Lubit re-evaluated Mr. Everett, and again found him unfit to return to work. RA 203-06, 1735-36, 1741-44.

Mr. Everett, through his union, then filed for arbitration. RA 1233. In response, the 357 filed a "point of order" claiming that Mr. Everett was bound by the determination of Dr. Lubit and therefore could not proceed to arbitration. A neutral arbitration panel agreed and dismissed the grievance. RA 255-56, 1233-34.

On July 3, 1997, Mr. Everett filed claims at the MCAD and the Equal Employment Opportunity Commission (EEOC) pursuant to Mass. Gen. L. c. 151B and the Americans with Disabilities Act (ADA), alleging that 357 engaged in unlawful discrimination when it "refused to return [him] to work because of [his] perceived disability" in violation of Mass. Gen. L. c. 151B[1] and the ADA.[2] RA 323, Exhibit I for identification.

---

[1] Chapter 151B makes it unlawful for an employer to "dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against because of his handicap, any person alleging to be a qualified handicapped person. . ." Mass. Gen. L. c. 151B, § 4(16). Chapter 151B defines "handicap" as (a) a physical or mental impairment which substantially limits one or more major life activities . . . or (c) being regarded as having such impairment." Mass. Gen. L. c. 151B, § 1(17).

[2] The ADA prohibits an employer from "discriminat[ing] against a qualified individual with a disability

On December 11, 1998, the MCAD issued a Lack of Probable Cause Finding (LOPC) RA 23, 232. Mr. Everett appealed the LOPC finding and the MCAD Investigating Commissioner held a preliminary hearing on that appeal on February 9, 1999 (after Mr. Everett had filed a second grievance against 357, seeking to return to work). RA 232.

From January 1997 onward, Mr. Everett worked as a commercial truck driver for other employers. He was given medical clearance under DOT regulations by his other employers. He was not symptomatic and he was not receiving treatment for any mental conditions. RA 286-307, 1236-46, 1644-46.

On January 12, 1999, while Mr. Everett's appeal was pending at the MCAD, the Mr. Everett, through his union, filed a second grievance against 357 seeking to return to work. RA 286, 292, 1234-1248, 1644-1646, 1671-72. He sought to return to work based on new medical evaluations and evidence of his stable mental condition and ability to drive commercial trucks safely. Specifically, Mr. Everett produced evidence that the he had been medically certified to drive under DOT regulations five times since 1997, he had a valid

because of the disability of such individual. . ." 42 U.S.C. § 12112(a). The ADA defines disability to include an individual who is "regarded as having" a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12012(2).

commercial driver's license, he had been driving commercial trucks without incident since 1997, he had been evaluated by a psychologist who did not find any symptoms of psychiatric illness present, and he was not receiving treatment for any mental disabilities. RA 286-307, 1234-46, 1267-68, 1644-46.

357 did not consider this new evidence. Instead, 357 relied on Dr. Roston's two year old 1997 report to make the determination that Mr. Everett was still not medically qualified to drive commercial trucks under DOT regulations. RA 1246-1247, 1649-1650, 1652-58. 357 again requested, and was granted, a dismissal of the grievance as a point of order, which was granted by the arbitration panel. RA 258-259, 1246-47.

On May 4, 1999, the MCAD, after considering the information presented at the February 9, 1999 appeal hearing and reviewing the evidence produced by its investigation, affirmed the LOPC and dismissed the case. RA 232.

On February 11, 2000, Mr. Everett filed a civil complaint in Norfolk Superior Court alleging that 357 discriminated against him due to a record of and a perceived handicap. RA 22-23. *See also* Amendments to Complaint, allowed after trial. RA 171-172. In the parties' Joint Pre-Trial Memorandum, 357 stipulated that, since the time of the Mr. Everett's discharge from the hospital in July, 1996, they have continued at

all times to believe that Mr. Everett had a mental disease or psychiatric disorder that was likely to interfere with his ability to drive a commercial motor vehicle safely. RA 31.

On April 26, 2005, after a three week trial in Norfolk Superior Court, the jury returned a unanimous verdict in favor of the plaintiff for $757,701 in compensatory damages. RA 173-75. Judgment on the jury verdict was entered on June 1, 2006, in the amount of $1,128,379.58 (which included attorneys' fees and costs) plus statutory interest. RA 248.

The Defendants appealed, raising for the first time the question whether Mr. Everett was barred from litigating the propriety of the second refusal to rehire by virtue of his "failure" to file a second Charge of Discrimination. Defendants press this argument even though the rationale for the second adverse action was the same as that used to justify the first; even though the decision-maker in the second adverse action was the same as the first; and even though the second adverse action occurred while the matter was still pending at the MCAD.

ARGUMENT

I. PLAINTIFF EXHAUSTED HIS ADMINISTRATIVE REMEDIES BECAUSE HIS 1999 FAILURE TO REHIRE CLAIM WAS WITHIN THE SCOPE OF THE INVESTIGATION THAT REASONABLY COULD HAVE GROWN OUT OF HIS 1996-97 FAILURE TO REHIRE CLAIM.

A. The Administrative Filing Requirement and the Scope of the Investigation Rule.

In 1997, Chapter 151B required an individual to file his charge of discrimination at the MCAD within six months of the alleged act of discrimination. Mass. Gen. L. c. 151B, § 5.[3] The purpose of requiring an individual to file a timely charge at the MCAD before being able to file a court action is two fold: "(1) to provide the MCAD with an opportunity to investigate and conciliate the claim of discrimination; and (2) to provide notice to the defendant of potential liability." *Cuddyer v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 531 (2001); *Windross v. Village Automotive Group*, 71 Mass. App. Ct. 861, 864 (2008).

The "scope of the investigation" rule makes clear that where a complainant has already filed a timely charge of discrimination, where the MCAD has had an opportunity to investigate and/or conciliate, and where the employer is fairly on notice of potential liability, administrative filing requirements do *not* apply to matters that the MCAD's investigation could reasonably be expected to uncover. Thus under the

[3] Section 5 provided in relevant part: "Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination. Mass. Gen. L. c. 151B, § 5 (1996). Chapter 151B was amended in 2002 to extend the filing period to 300 days. 2002 Mass. Acts c. 223, §§ 1, 4.

"scope of the investigation" rule, a plaintiff need not have precisely articulated every possible theory of discrimination in his or her administrative charge, and need not have filed subsequent administrative charges every time a subsequent discriminatory act occurred in order to have satisfied the administrative filing requirements of Mass. Gen. L. c. 151B. As the Appeals Court has explained,

> consistent with the general scope of the investigation rule, a claim that is not explicitly stated in the administrative complaint may be asserted in the subsequent Superior Court action so long as it is based on the acts of discrimination that the MCAD investigation could reasonably be expected to uncover.

Windross, 71 Mass. App. Ct. at 864-65.

The "scope of the investigation" rule thus allows subsequent discriminatory acts to be part of a subsequent court action as long as those acts are "related" to the acts that were the subject of the charge such that they would have come within the investigation that the MCAD could reasonably have conducted on the charge. *See Clifton v. Massachusetts Bay Transp. Auth.*, 445 Mass. 611, 618 (2005) ("So long as the alleged retaliatory acts related to an earlier complaint, a plaintiff is not required to exhaust his administrative remedies before he may bring to court a retaliation claim."); *Carter v. Commissioner of Correction*, 43 Mass. App. Ct. 212, 218 (1997) (same); *Conroy v. Boston Edison Co.*, 758 F. Supp. 54, 58 (D.

Mass. 1991) ("the scope of a civil action is not determined by the specific language of the charge filed with the agency, but rather, may encompass acts of discrimination which the MCAD investigation could reasonably be expected to uncover.").

In *Windross*, analyzing the scope of the investigation rule, the Appeals Court determined that a hostile environment claim, even though not explicitly stated in the MCAD charge, could be brought in a subsequent lawsuit because sufficient facts were alleged in the charge that could have alerted the MCAD to that alternative theory of discrimination. *Windross*, 71 Mass. App. Ct. at 865-67. The court recognized that the administrative charge is not conclusive as to what acts or theories the MCAD might investigate. "In accordance with this rule, '[a]n administrative charge is not a blueprint for the litigation to follow . . . [and] the exact wording of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow." *Id.* at 865 (quoting *White v. New Hampshire Dep't of Corrections*, 221 F.3d 254, 263 (1st Cir. 2000)).

There are many important reasons for the rule. The rule developed for retaliation claims, as a recognition that the purposes of the administrative filing requirement - conciliation and notice - are not

furthered by requiring administrative filing of a retaliation claim where the employer is alleged to have retaliated because of the underlying discrimination that is the subject of the agency charge. "[I]n the retaliation context, notice has already been given and there is little likelihood that a second administrative complaint would lead to conciliation." *Smith v. Mitre Corp.*, 949 F. Supp 943, 947 (D. Mass. 1997) (quoting *Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1994)).

The rule also conserves time and resources. Where the agency's investigation could reasonably have included the subsequent related acts, requiring additional filing would increase the costs of litigation, increase the risks of delay, and waste limited resources of the agency. *Id.*; *see Cuddyer v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 529 n.8. (2001) ("additional filing would serve only to increase costs and delay final resolution").

Finally, it would defeat the remedial purposes of the statute and impose heightened pleading requirements on discrimination plaintiffs if charges were read narrowly to exclude possible theories of discrimination or require more than a concise statement of the alleged discriminatory acts. *See Windross*, 71 Mass. App. Ct. at 865-66 (hostile work environment claim, though not pleaded in MCAD Charge, came within the scope of the

investigation, explaining that "[c]onsistent with general notice pleading requirements under Mass. R. Civ. P. 8(a) this language does not require the claimant to state the specific legal theory on which the claim for recovery is based.").

B. The Adverse Actions at Issue are Both Failure to Rehire Claims.

Where, as here, the issue involves a subsequent related act, the scope of the investigation analysis focuses on determining whether the subsequent act is sufficiently "related" to acts that were alleged in the charge of discrimination such that they could reasonably have been investigated by the agency. In order to make that relatedness determination, as an initial matter in this case, it is important to clarify the nature of the adverse actions at issue.

In order to differentiate the 1996 and the 1999 employment decisions, 357 attempts to characterize the first as a termination and the second as a failure to reinstate or failure to rehire. Brief of Defendants/Appellants The 357 Corp & Trans-Lease Group ("357 Br.") at 43-44. A careful reading of the record, however, indicates that both decisions are refusals to rehire, based upon the same evidence, based upon the same rationale, and made by the same decisionmaker.

357's president testified at trial that Mr. Everett was terminated in 1996. RA 1629-30, 1657. In its Reply Brief, 357 notes that the Teamster's doctor's

report of February 9, 1999 states that Mr. Everett was "discharged" on July 9, 1996, a fact 357's president confirmed. Reply Br. of Defendants/Appellants The 357 Corp. and Trans-Lease Group ("Reply Br.") at 11 n.6. On the Verdict Form, the jury found that Mr. Everett was terminated in July 1996. RA 173-75. This indicates that Mr. Everett was terminated right after his hospitalization ended in July 1996.

Next we turn to how the adverse actions have been characterized. They have been variously described by Plaintiff as a failure to return to work and a failure to reinstate, and by 357 as a termination and a failure to rehire. Mr. Everett's own words are ambiguous; while it is in 357's interest to obfuscate the issue in an attempt to make what happened in 1996-97 as unrelated as possible to what occurred in 1999.

In his 1997 Charge of discrimination Mr. Everett claims that the 357 "refused to return me to work because of my perceived disability." RA 323. Similarly, in his January 1999 grievance he asked to "be put back to work." RA 286, 1234-35. Asking to be "returned to work" is possibly ambiguous as it does not indicate whether Mr. Everett was seeking to return to work from some type of leave of absence or seeking to be rehired.

What the jury determined should be conclusive, however. The jury answered "yes" to the question on

the Verdict Form that asked whether Mr. Everett was terminated or failed to be rehired. RA 173 ("Do you find that Mr. Everett proved by a preponderance of the evidence that the Defendants terminated him or failed to rehire him as a commercial truck driver at any time from July 1996 to January 1999.").

These facts indicate that Mr. Everett was fired in July 1996, and thereafter sought to be rehired. Thus both the 1996-97 adverse action and the 1999 adverse action are failure to rehire claims.

C. Plaintiff Exhausted his Administrative Remedies Because His Second Failure to Rehire Claim is Within the Scope of the Investigation the MCAD Could Reasonably Have Conducted on His Charge.

As discussed above, in the Statement of the Case, Mr. Everett filed his MCAD Charge on July 3, 1997. On December 11, 1998, the MCAD issued a Lack of Probable Cause Finding (LOPC), which Mr. Everett appealed. The MCAD Investigating Commissioner held an appeal hearing on February 9, 1999. While the LOPC was on appeal, Mr. Everett filed a second grievance through his union on January 12, 1999, seeking to return to work based on new evidence showing that he had been driving commercial trucks for other companies since February 1997 and was mentally fit to do so. Without considering the new evidence, 357 succeeded in getting this second grievance dismissed for the same reason and based on the very same 1997 doctor's report that lead

to the dismissal of the 1997 grievance. In February 2000, Mr. Everett filed this lawsuit in Superior Court without filing another claim at the MCAD concerning the dismissal of his 1999 grievance.

In these circumstances, the scope of the investigation rule dictates that Mr. Everett need not have returned to the MCAD to file another charge of discrimination before proceeding to court.

Here the two claims are closely "related." The adverse action is the same in 1999 as it was in 1996-97, a failure to rehire. The theory of discrimination is the same, perceived disability. The reason is the same, and indeed is based on the same medical report, and 357 refused to consider any of the new evidence that Mr. Everett produced in 1999. It is reasonable that the MCAD could have investigated the second claim because all of the facts are the same as the facts that were part of the initial claim. In addition, the MCAD case was still pending when Mr. Everett sought rehire and filed a second grievance in January 1999. Mr. Everett had appealed the LOPC in December 1998 and appeared at the appeal hearing before the Investigating Commissioner in February 1999. Had Mr. Everett been successful in having the LOPC overturned, the case would have been returned to the investigator for further investigation, which could very likely have included looking into Mr. Everett's then current

attempts to be rehired. It is not what the MCAD actually investigated that is conclusive, but what it could reasonably have investigated. *See Powers v. Grinnell Corp.*, 915 F.2d 34, 39 (1st Cir. 1990) ("what controls is not what the EEOC did but what it was given the opportunity to do.").

Even if one accepts the ambiguity in the parties' pleadings as to the nature of the adverse action, still Plaintiff need not have refiled his 1999 claim at the MCAD. Defendant argues that the two acts are unrelated because in 1999 Plaintiff was seeking to be rehired, whereas in 1996-97 he was terminated. Reply Br. 43-44. The distinction is immaterial. Courts have found termination claims and rehire claims closely enough related to come within the scope of the investigation rule. *See Josephs v. Pacific Bell,* 443 F.3d 1050, 1062 (9th Cir. 2006) (plaintiff's failure to reinstate claim is "unquestionably" like or related to his subsequent termination claim; the same employer allegedly refused to reinstate him for the same discriminatory reason that allegedly caused his discharge); *Conroy*, 758 F. Supp. at 59 ("the 'scope of the charge' rule indicates that a reasonable investigation of the charge of a sex-based failure to hire would have encompassed an allegation of sex-based discharge."). In one case the MCAD investigated the complainant's termination, even though he had only mentioned in his charge a failure to

be rehired. *City of Boston v. MCAD*, 47 Mass. App. Ct. 816, 820 (1999).

Where Plaintiff in 1999 faced rejection of his attempts to be rehired for the very same reasons that he was not rehired in 1997, and where the MCAD had had a chance to conciliate, but had dismissed the case, and the employer was on notice of potential liability, it would have simply increased the costs and delays of litigation to require Plaintiff to file again at the MCAD before filing in court. Given that "the legislative mandate in G.L. c. 151B, § 9, that the 'provisions of this chapter shall be construed liberally' in order to eliminate discriminatory conduct and practices," *Cuddyer*, 434 Mass. at 534 (quoting Mass. Gen. L. c. 151B, § 9), this Court should conclude that, pursuant to the scope of the investigation rule, it was perfectly appropriate for Plaintiff to have litigated his 1999 failure to hire claim without refiling a charge at the MCAD.

II. THE CONTINUING VIOLATION DOCTRINE DOES NOT, AND NEED NOT, APPLY IN THE CIRCUMSTANCES OF THIS CASE.

A. The Continuing Violation Doctrine Is Backward Looking Whereas the Scope of the Investigation Rule is Usually Forward Looking.

While the continuing violation doctrine has been called "the 'most muddled area in all of employment discrimination law,'" *Ocean Spray Cranberries, Inc. v. MCAD*, 441 Mass. 632, 642 n.13 (2004) (quoting 2 B.

Lindemann & P. Grossman, Employment Discrimination Law 1351 (3d ed. 1996)), one thing that can be agreed upon is that it is a backward-looking rule that looks to whether discriminatory conduct that occurred prior to the filing period can be brought into and become part of a claim that was timely filed. By contrast, the scope of the investigation rule often, and as applied here, is a forward-looking test that looks to whether discriminatory acts that occurred after the charge was filed at the MCAD can become part of a subsequent lawsuit.

The *Cuddyer* case illustrates this distinction. In that case, the defendant objected to incidents of sexual harassment that occurred more than six months prior to the filing of the MCAD charge on March 6, 1995, as untimely. Defendant also objected to including a 1997 incident of sexual harassment because it was never asserted at the MCAD, claiming plaintiff had failed to exhaust her administrative remedies. *Cuddyer,* 434 Mass. at 528, 529, n8. This Court addressed the incidents in the two time periods differently. The Court only applied the continuing violation analysis to the incidents of sexual harassment that occurred prior to the six-month filing period. After a detailed discussion, the Court set out its continuing violation rule and determined that the earlier acts were timely. *Id.* at 540. By contrast,

the Court dealt with the 1997 incident only in a footnote. Without discussion, the Court determined that the 1997 incident was properly admitted as plaintiff had not failed to exhaust her administrative remedies, citing two decisions applying the scope of the investigation rule to retaliation claims. *Id.* at 529 n.8. *See also Clifton*, 445 Mass. at 616-18 (applying continuing violation rule to retaliatory conduct occurring prior to MCAD filing period; as to conduct occurring after first MCAD complaint was filed, plaintiff was not required to refile at the agency as long as retaliatory acts related to earlier complaint).

B. Whether or Not the 1999 Failure To Return Plaintiff To Work Was a "Discrete Act" of Discrimination or Part of a Continuing Pattern of Discrimination Is Not Conclusive of Whether It Is Within the Scope of the Investigation.

By asking in the Amicus Announcement "whether the 1999 failure to rehire was a discrete act of discrimination or a continuing violation for purposes of the plaintiff's 1996 discrimination claim before the MCAD," it appears this Court is considering alternatives. Yet there should be no choice between "a discrete act" or "a continuing violation." They are not mutually excusive.

In their brief, Defendants appear to be confusing the continuing violation rule with the scope of the investigation analysis. Defendants appear to be arguing

that because the 1999 failure to rehire claim is a discrete act, and because no charge was filed on that discrete act, it is untimely, arguing that as a discrete act, it cannot be part of a continuing violation. *See* 357 Br. at 42-45. There are several problems with Defendants' argument. First, the continuing violation doctrine does not apply. Second, even if it did, this Court has not followed the U.S. Supreme Court's reasoning that discrete acts can never be subject to a continuing violation. In addition, the scope of the investigation rule is broader than the continuing violation rule. It applies to a broader range of "related" acts of discrimination, and is the proper analysis to apply here.

1. This Court's jurisprudence recognizes that certain types of discrete acts can be part of a continuing violation.

The continuing violation doctrine arises out of the MCAD's regulation that makes an exception to the six-month (or since 2002, the 300-day) filing period when "the unlawful conduct complained of is of a continuing nature." 804 C.M.R. § 1.10(2).[4] The "serial" form of continuing violation has been applied most often in the harassment context and "is comprised

[4] The MCAD's regulation provides: "provided however, that the six month requirement shall not be a bar to filing in those instances where facts are alleged which indicate that the unlawful conduct complained of is of a continuing nature . . ." 804 C.M.R. § 1.10(2).

of an interlinked succession of related events, stemming from a common discriminatory animus, with at least one act of harassment occurring within the limitations period." *Cuddyer*, 434 Mass. at 531 n.12.

This Court, however, has applied the continuing violation rule beyond harassment claims, to discrete acts of discrimination in certain circumstances. For example, in *Ocean Spray Cranberries, Inc. v. MCAD*, 441 Mass. 632 (2004), the Court applied the continuing violation doctrine to a reasonable accommodation claim. While recognizing that "each new denial constitutes a separate violation and triggers a new limitations period," the complainant would be able to "assert previous violations outside the limitations period" unless "at the time of the earlier violations, the complainant knew or could have formed a reasonable belief that the earlier violations were discriminatory." *Id.* at 644. This Court has also applied the continuing violation to retaliation claims. In *Clifton v. Massachusetts Bay Transp. Auth.*, 445 Mass. 611 (2005), this Court recognized that retaliation claims typically involve "a discrete and identifiable adverse employment decision (e.g., a discharge or demotion)." *Id.* at 616. However, the Court recognized that retaliation can also consist of "a continuing pattern of behavior." *Id.* The Court explained that it is the nature of the conduct, not the

formulation of the claim, that determines if the continuing violation applies. *Id.* at 617 & n.6 (MCAD's continuing violation regulation "focuses on the nature of the conduct and makes no distinction among different types of claims").

Contrary to Defendants' argument (357 Br. at 42-43), this Court has applied the rule more broadly than the U.S. Supreme Court, which has drawn a bright line between discrete acts, to which the continuing violation rule does not apply, and to harassment claims, to which the rule alone applies. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14, 117-18, 122 S. Ct. 2061, 2072-75 (2002) (applying continuing violation rule to racial harassment but not to retaliation claim). *Morgan* can be distinguished as it was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which does not have a continuing violation rule analogous to the MCAD's regulation. This Court has not followed U.S. Supreme Court decisions where our statutory scheme and the federal scheme have material differences. *See Cuddyer*, 434 Mass. at 536-38. In addition, Title VII uses different language to describe the filing requirement, requiring an individual to file a charge within 180 or 300 days "after the alleged unlawful employment

practice occurred." 42 U.S.C. § 2000e-5(e)(1).[5] The Supreme Court ruled that, except in cases of harassment (where a series of related acts do amount to a single unlawful employment practice), there is "simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." *Morgan*, 536 U.S. at 111, 122 S. Ct. at 2071.

Under the SJC's broader reading of the continuing violation doctrine, 357's 1999 refusal to rehire Mr. Everett may properly be considered as a continuation of the 1996-97 refusal; 357 agreed at all times that it considered Mr. Everett to have been unfit to work, and refused to consider evidence to the contrary. The 1999 refusal, while a discrete act, was the result of the same discriminatory reasoning as had applied to the first refusal.

2. The scope of the investigation rule is broader than the continuing violation rule as it applies to a broader range of "related" acts of discrimination.

---

[5] Section 2000e-5(e)(1) provides in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter . . .

42 U.S.C. § 2000e-5(e)(1).

The scope of the investigation rule is broader than the continuing violation rule as it can apply to a broader range of "related" acts, which can include different theories of discrimination.

The rule has its origins in the retaliation context, allowing a plaintiff to litigate a retaliation claim that was not filed at the MCAD or EEOC, as long as it grows out of the discrimination claim that was filed with the agency. *See, e.g., Waiters v. Parsons*, 729 F.2d 233, 237-38 (3rd Cir. 1984) ("the policy of promoting conciliation would not be furthered by allowing the defendants to delay having to answer in court for retaliatory action allegedly taken against appellant for asserting her rights"); *Smith v. Mitre Corp.*, 949 F. Supp. 943, 948 (D. Mass. 1997) (concluding "the SJC would eschew the First Circuit's narrow approach, and follow the more lenient approach of a majority of the federal circuits—those that find it unnecessary for a plaintiff to exhaust administrative remedies before she can bring to court a retaliation claim not previously made known to the administrative agency, but arising out of a charge filed earlier with that agency.").

In addition to retaliation claims, the scope of the investigation rule has been applied to allow the litigation of a claim that was not identified in the administrative charge as long as it grows out of the

facts that could have been investigated. *See, e.g., Harrison v. Kraft Foods, Inc.*, 2007 WL 3232552 *5 (D. Mass. Oct. 30, 2007) (allowing litigation of claim for unlawful inquiry into criminal history in violation of Mass. Gen. L. c. 151B, § 4(9) where claim was not identified in MCAD Charge but some facts in charge could have alerted MCAD to claim); *Conroy*, 758 F. Supp. at 59 ("a reasonable investigation of the charge of sex-based failure to hire would have encompassed an allegation of sex-based discharge").

The rule applies to additional acts of discrimination not identified in the charge. *See, e.g., Walters v. President & Fellows of Harvard College*, 616 F. Supp. 471, 475 (D. Mass. 1985) ("The civil action may also include 'relief for incidents not listed in his original charge to the EEOC . . . [which are] like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC") (quoting *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973)).

The scope of the investigation rule has also allowed a plaintiff to litigate a different theory of discrimination not identified in the MCAD Charge as long as sufficient facts were contained in the charge that could have led the MCAD to investigate an alternative theory. *Windross*, 71 Mass. App. Ct. at

866-67 (underlying facts of racial harassment claim were set forth in MCAD Charge such that the theory was within the scope of the investigation).

Finally, the scope of the investigation rule also applies in a situation in which the discrimination alleged in the MCAD Charge is ongoing to allow subsequent litigation of continuing discriminatory acts without requiring refiling at the MCAD. In *Smith v. Bell Atlantic*, 63 Mass. App. Ct. 702 (2005), the plaintiff tried her reasonable accommodation claim introducing incidents of failure to accommodate that occurred after she had filed her MCAD Charge and that were never part of her MCAD Charge. The Appeals Court determined that because those incidents were part of an "ongoing violation," the statute did not require her to amend her complaint with the MCAD as a prerequisite to relying on those incidents in her subsequent court action. *Id.* at 722-723 (citing *Cuddyer*, 434 Mass. at 529 n.8).

As this discussion indicates, the scope of the investigation rule allows Mr. Everett to litigate his 1999 failure to rehire claim even though it was not filed at the MCAD. The acts were closely related, and indeed could be considered an ongoing violation. In these circumstances, where the MCAD had investigated closely related facts and had failed to conciliate, and where 357 was on notice of its potential liability, it

would have simply increased the costs and delayed the litigation to have required Mr. Everett to file another charge at the MCAD.

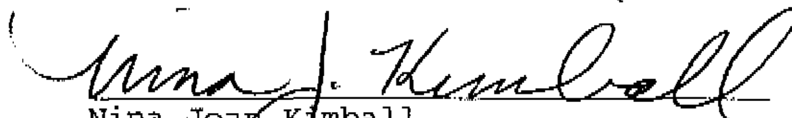
CONCLUSION

This Court has not had an opportunity to address in great detail the scope of the investigation rule. *Amici* hope that this discussion of the rule will assist the Court in understanding why it should not make a distinction between a "discrete act" and a "continuing violation" for purposes of applying the scope of the investigation rule, which should be applied liberally to effect the remedial purposes of the statute.

Respectfully submitted,

AMICI CURIAE THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW OF THE BOSTON BAR ASSOCIATION, GAY AND LESBIAN ADVOCATES AND DEFENDERS, THE CHELSEA COLLABORATIVE, JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION, MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION, AND MASSACHUSETTS LAW REFORM INSTITUTE

By Their attorney,



Nina Joan Kimball
BBO #547567
KIMBALL BROUSSEAU LLP
One Washington Mall, 14th Floor
Boston, MA 02108
(617) 367-9449

Date: December 1, 2008