

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT
CIVIL ACTION NUMBER: 2007-00583

EDWARD M. NIZWANTOWSKI,)
Plaintiff,)
)
v.)
)
PEABODY SCHOOL DISTRICT,)
Defendant.)

**PLAINTIFF'S OPPOSITION TO DEFENDANT PEABODY SCHOOL DISTRICT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Now comes plaintiff Edward M. Nizwantowski and opposes the defendant's motion for partial summary judgment. In support of his opposition, the plaintiff incorporates herein by reference the accompanying (1) Memorandum of Law in Support of Plaintiff's Opposition to Defendant Peabody School District's Motion for Partial Summary Judgment and (2) Plaintiff's Response to the Concise Statement of Undisputed Material Facts in Support of Defendant's Motion for Partial Summary Judgment and Plaintiff's Concise Statement of Additional Material Facts and Legal Elements in Dispute.

Respectfully submitted,
Edward M. Nizwantowski
By his Attorneys,



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October 16, 2008

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EDWARD M. NIZWANTOWSKI,)
Plaintiff,)
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PEABODY SCHOOL DISTRICT,)
Defendant.)

**PLAINTIFF’S RESPONSE TO THE CONCISE STATEMENT OF UNDISPUTED
MATERIAL FACTS IN SUPPORT OF
DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT AND
PLAINTIFF’S CONCISE STATEMENT OF ADDITIONAL MATERIAL FACTS AND
LEGAL ELEMENTS IN DISPUTE**

Now comes plaintiff Edward M. Nizwantowski (“Nizwantowski”) who responds to the Concise Statement of Undisputed Material Facts and Legal Elements in Support of Defendant’s Motion for Partial Summary Judgment and sets forth additional material facts and legal elements in dispute as follows:

Plaintiff’s Response to Defendant’s Statement of Facts¹

1. Agreed.
2. Agreed.
3. Agreed.
4. Agreed.
5. Agreed.
6. Agreed.
7. Agreed.

¹ Nizwantowski objects to the Defendant’s attempt to reserve the right to contest at trial the facts the defendant relies upon for its Motion for Partial Summary Judgment.

8. Agreed.

9. Agreed, except that the reference to Exhibit A at ¶19 is incorrect.

10. Agreed.

11. Agreed.

12. Controverted. The football screening committee did not independently decide to not submit Nizwantowski's name to Patrick Larkin ("Larkin"). The committee knew that Larkin would not rehire Nizwantowski for the position as head football coach and therefore did not submit Nizwantowski's name. **Exhibit 1-Deposition of Patrick M. Larkin**, pp. 109-110.

Agreed that Paul Uva was hired as head football coach for the 2005 season.

13. Agreed.

14. Agreed.

15. Agreed.

16. Agreed.

17. Controverted. The timing of Paul Uva's resignation is not supported by the record. Agreed that there was a vacancy in the position of head football coach for the 2007 season.

18. Agreed.

19. Agreed.

20. Agreed, except that no language is emphasized.

21. Nizwantowski does not know why counsel asked any particular questions during the deposition of Nizwantowski. Agreed that paragraph 21 contains an edited excerpt from the transcript of his testimony and that the remaining portion of the deposition transcript attached in Exhibit C speaks for itself. Nizwantowski states that, earlier in his deposition, he also testified

that Larkin wanted to go in a different direction with the coaching positions. **Exhibit 3-**

Deposition of Edward Nizwantowski, p. 195.

22. Agreed.

23. Agreed. Nizwantowski further testified at his deposition that Larkin did not rehire Nizwantowski because Larkin wanted to go in a different direction with the coaching positions.

Exhibit 3, p. 195.

24. Agreed.

Nizwantowski's Statement of Additional Material Facts

1. The essential nature of Nizwantowski's claim before the MCAD was that defendant Peabody School District ("Peabody") failed to rehire him as a head coach because of his age. The only position then at issue was the baseball coach position. **Exhibit 2- Complaint filed by Nizwantowski with the MCAD.**

2. The core facts of Nizwantowski's claim before the MCAD were that (1) he was over the age of forty, (2) he was qualified to serve as a head coach, (3) that he was not re-hired as a head coach and (4) that a younger less qualified person was hired as head coach. **Exhibit 2.**

3. Nizwantowski's complaint filed with the MCAD put Peabody on notice of Nizwantowski's claim that Peabody discriminated against him on the basis of his age by not re-hiring him as a head coach. **Exhibit 2.**

4. In July of 2004, Patrick Larkin ("Larkin") became the new principal of Peabody High School. **Exhibit 1, p. 8.**

5. Larkin purported to initiate a new hiring process for head athletic coaches for the winter and spring sports in 2004-2005 and sought applications for, among others, the 2005 baseball coach position. **Exhibit 1, pp. 8, 24-26.**

6. Larkin determined unilaterally not to re-hire Nizwantowski as head baseball coach or head football coach for the 2005 seasons. **Exhibit 1**, pp. 8-9, 109 ; **Exhibit 4-Deposition of Philip Sheridan**, p. 5, 23; **Exhibit 5-Deposition of Nadine Binkley**, p. 5, 8-14, 104-107. On or about January 5, 2005, Larkin hired Mark Bettencourt as head baseball coach for the 2005 season. **Exhibit 3**, p. 197.

7. Larkin told Nizwantowski that he did not re-hire Nizwantowski as head baseball coach because Larkin wanted to go in a different direction. **Exhibit 3**, p. 195.

8. Larkin submitted an affidavit to the MCAD as part of Peabody's position statement filed in response to the claim filed by Nizwantowski with the MCAD in which Larkin claimed that Bettencourt was hired over Nizwantowski because Bettencourt gave better answers to questions and exhibited a better demeanor during the interview for the baseball position. **Exhibit 1**, p. 13-14 (including deposition Exhibit 1-Affidavit of Patrick M. Larkin).

9. Larkin's affidavit purported to contain the complete and accurate reasons for Nizwantowski not being re-hired. **Exhibit 1**, p. 14.

10. Larkin's reasons for not rehiring Nizwantowski as set forth in Larkin's Affidavit submitted to the MCAD were false, all as now admitted by Larkin. **Exhibit 1**, pp. 21-24.

11. Larkin has now admitted that the purported opening of all coaching positions, the creation of screening committees, and all of the other trappings surrounding the selection of coaches for the winter and spring seasons of the 2004-2005 school year and the fall season of the 2005-2006 school year were a sham and would not have occurred but for Larkin's determination not to re-hire Nizwantowski as baseball and football coach. **Exhibit 1**, pp. 83-89.

12. Nizwantowski served as the head football coach at Peabody High School from 1982 through the 2004 season. **Exhibit 3**, p. 24.

13. After filing his MCAD complaint, Nizwantowski applied, but was not hired, for the position of head football coach at Peabody High School for the 2005 season. **Exhibit 3**, pp. 215-216.

14. There was no circumstance or circumstances under which Larkin would have hired Nizwantowski for the head football coach position. **Exhibit 1**, pp. 109-110.

15. The screening committee charged with interviewing candidates for the position of head football coach at Peabody High School for the 2005 season knew that Larkin would not hire Nizwantowski for said position. The following is an excerpt from Larkin's deposition testimony:

"Q- You weren't going to recommend Mr. Nizwantowski?

A- That's correct.

Q- No matter what the process was, agreed?

A- Yes, and the group agreed with me, the screening committee agreed."

Exhibit 1, pp. 109-110.

Statement of Additional Legal Elements

1. An MCAD complainant is not required to amend his MCAD complaint to allege an additional, post-MCAD filing discriminatory act of his employer, where the nature of the discrimination is common to both acts. *See Riebold v. Eastern Casualty Insurance Co., Inc.*, 9 Mass. L. Rep. 599, *22-26 (1999). **Exhibit 6**.

2. The rationale for the decision in Riebold is as follows : (1) "Massachusetts courts are under a statutory mandate that G.L. c. 151B 'be construed liberally for the accomplishment of the purposes thereof'; (2) one of the purposes of the administrative procedure is to give the employer the opportunity to reconcile the claim and avoid a civil suit and afford the parties an

opportunity to resolve their differences; (3) the second purpose of the requirement of an MCAD filing prior to filing suit is to put the employer on notice of the scope of the potential action; and (4) requiring a complainant to re-file with the MCAD prior to instituting an action in Superior Court would increase litigation expenses and delay final resolution of the claims. Reibold at *22-26.

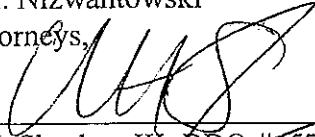
3. “A claim that is not explicitly stated in the administrative complaint may be asserted in the subsequent Superior Court action so long as it is based on the acts of discrimination that the MCAD investigation could reasonably be expected to uncover.” Windross v. Village Automotive Group, 71 Mass. App. Ct. 861, 863-864 (2008).

4. “The purpose of this requirement 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.” Windross at 864 *quoting* Cuddyer v. Stop& Shop Supermarket Co., 434 Mass 521, 532 (2001).

5. “Consistent with the scope of the investigation rule, the requisite degree of precision in the drafting of an MCAD complaint is satisfied if the core factual allegations underlying the claim are set forth such as to ‘fairly place[] [the issue] before the agency.’ Mole v. University of Mass., 58 Mass. App. Ct. at 48. This is sufficient to accomplish the twin purposes of the administrative filing requirement without unfairly prejudicing a claimant for inartful pleading.” Windross at 866.

6. “[F]or the claim to fall within the scope of the investigation, the plaintiff must ‘describe the essential nature of the claim and . . . identify the core facts on which it rests.’” Windross at 865. *quoting* Lattimore v. Polaroid Corp., 99 F.rd. 456, 464-465 (1st Cir. 1996).

Respectfully submitted,
Edward M. Nizwantowski
By his Attorneys,



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PEABODY SCHOOL DISTRICT,)
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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S OPPOSITION TO
DEFENDANT PEABODY SCHOOL DISTRICT’S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Edward M. Nizwantowski (“Nizwantowski”) hereby submits this memorandum in support of his opposition to defendant Peabody School District’s (“Peabody”) motion for partial summary judgment. Peabody’s motion for partial summary judgment must be denied because Nizwantowski was not required to amend his MCAD complaint to include a claim for his non-hire as football coach which occurred after he filed his MCAD complaint arising out of his non-hire as baseball coach where, as here, he timely filed his discrimination claim arising out of the non-hire as baseball coach and the nature of the discrimination, age, is common to both non-hires.

I. Standard of Review

Summary judgment shall be granted where there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); Cassesso v. Comm’r of Corr., 390 Mass. 419, 422 (1983); Comty. Nat’l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to

judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).

II. Facts

Nizwantowski served as the head baseball coach at Peabody Veteran's Memorial High School ("Peabody High School") from 1987 through the 2004 season. (See Peabody's Statement of Undisputed Material Facts, hereafter cited as "Defendants", ¶ 2).

In July of 2004, Patrick Larkin ("Larkin") became the new principal of Peabody High School. (See Nizwantowski's Statement of Undisputed Material Facts, hereafter cited as "Plaintiff", ¶ 4). Larkin purported to initiate a new hiring process for head athletic coaches for the winter and spring sports in 2004-2005 and sought applications for, among others, the 2005 baseball coach position. (Plaintiff, ¶5).

Larkin determined unilaterally not to re-hire Nizwantowski as head baseball coach or head football coach for the 2005 seasons. (Plaintiff, ¶ 6). Nizwantowski applied, but was not hired, for the position of head baseball coach at Peabody High School for the 2005 season. (Defendants, ¶¶ 3-5).

Mark Bettencourt was hired, on or about January 5, 2005, as head baseball coach for the 2005 season and was thirty-two years of age at the time he was hired. (Defendants, ¶ 8)(Plaintiff, ¶ 6). Nizwantowski was, at the time of his non-hire, fifty-eight years of age. (Defendants, ¶ 6). Larkin told Nizwantowski that he did not re-hire Nizwantowski as head baseball coach because Larkin wanted to go in a different direction. (Plaintiff, ¶ 7).

On or about February 15, 2005, Nizwantowski filed a charge with the Massachusetts Commission Against Discrimination ("MCAD") alleging that Peabody impermissibly discriminated against him on the basis of his age in violation of Mass.Gen.Laws c.151B § 4 and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C 621 et seq. by not re-

hiring him as the head baseball coach. (Defendants, ¶ 6). Nizwantowski's MCAD complaint put Peabody on notice of Nizwantowski's claim that Peabody discriminated against Nizwantowski on the basis of his age by not re-hiring him as a head coach. (Plaintiffs, ¶ 3).

Larkin submitted an Affidavit to the MCAD as part of Peabody's response to the claim filed by Nizwantowski with the MCAD in which Larkin claimed that Bettencourt was hired over Nizwantowski because Bettencourt gave better answers to questions and exhibited a better demeanor during the interview for the baseball position. (Plaintiff, ¶ 8). Larkin's affidavit purported to contain the complete and accurate reasons for Nizwantowski not being re-hired. (Plaintiff, ¶ 9). Larkin's reasons for not re-hiring Nizwantowski as set forth in Larkin's Affidavit submitted to the MCAD were false, all as now admitted by Larkin in his deposition in this Action. (Plaintiff, ¶ 10).

Larkin has now admitted that the purported opening of all coaching positions, the creation of screening committees, and all of the other trappings surrounding the selection of coaches for the winter and spring seasons of the 2004-2005 school year and the fall season of the 2005-2006 school year were a sham and would not have occurred but for Larkin's determination not to re-hire Nizwantowski as baseball and football coach. (Plaintiff, ¶ 11).

Nizwantowski served as the head football coach at Peabody High School from 1982 through the 2004 season. (Plaintiff, ¶ 12). After filing his MCAD complaint, Nizwantowski applied, but was not hired, for the position of head football coach at Peabody High School for the 2005 season. (Plaintiff, ¶13), (Defendant, ¶¶11, 12). There was no circumstance or circumstances under which Larkin would have hired Nizwantowski for the head football coach position. (Plaintiff, ¶ 14). The screening committee charged with interviewing candidates for the position of head football coach at Peabody High School for the 2005 season was aware that

Larkin would not hire Nizwantowski for said position. (Plaintiff, ¶ 15). Larkin testified at his deposition that he was not going to recommend Nizwantowski for the football position and “the group agreed with me, the screening committee agreed.” (Plaintiff, ¶ 15).

Paul Uva, who was younger than Nizwantowski by more than five years, was hired as head football coach for the 2005 season. (Defendant, ¶ 16).

Nizwantowski filed this Action on March 26, 2007, alleging that Peabody impermissibly discriminated against him on the basis of his age by not hiring him for the positions of head baseball coach and head football coach for the 2005 seasons. (Defendant, ¶¶ 13, 16).

III. Argument

Peabody’s motion for partial summary judgment must be denied because Nizwantowski’s inclusion in the allegations of his Superior Court complaint of his non-hire as football coach in 2005 is proper as a matter of law.

The Defendant contends that the Plaintiff can present to the jury only the issue of the baseball coach job because the Plaintiff failed to present the later non-hire of Plaintiff as football coach to the MCAD. That contention fails for the reasons set forth in Riebold v. Eastern Casualty Insurance Co., Inc., 9 Mass. L. Rep. 599 (1999). The defendant employer in Riebold argued for summary judgment on a number of theories, one of which was that the plaintiff had failed to present to the MCAD acts of alleged age and handicap discrimination which occurred after the act which was the subject of her MCAD complaint and her filing thereof, which subsequent acts were a part of her Superior Court complaint. The Superior Court framed the issue presented as follows: “The question is whether it was necessary for Ms. Riebold to amend the MCAD complaint in order to include the additional, post MCAD complaint incidents in the Superior Court complaint filed pursuant to G.L. c. 151B, §9.” Reibold 9 Mass. L. Rep. at *22-23.

That issue is precisely the issue raised by the Defendant in the instant case. Was it necessary for Mr. Nizwantowski to amend his MCAD complaint in order to include his non-hire as football coach, which occurred after the filing of his MCAD complaint for age discrimination in connection with his non-hire as baseball coach, in his Superior Court complaint?

The court in Riebold answered the question in the negative, holding that it was unnecessary for the employee to have amended the MCAD complaint and that subsequent discriminatory acts of the employer were properly the subject of a Superior Court complaint. Reibold at 25. Riebold's rationale included the following:

(1) "Massachusetts courts are under a statutory mandate that G.L. c. 151B 'be construed liberally for the accomplishment of the purposes thereof'; (2) one of the purposes of the administrative procedure is to give the employer the opportunity to reconcile the claim and avoid a civil suit and the first complaint afforded the parties an opportunity to resolve their differences; (3) the second purpose of the requirement of an MCAD filing prior to filing suit is to put the employer on notice of the scope of the potential action and Ms. Riebold's complaint "certainly put [the employer] on notice of the age and disability discrimination claims against it. Accordingly, because [the employer] was apprised of the claim against it, the additional incidents that Ms. Riebold included in her Superior Court complaint did not compromise its ability to formulate a defense."; and (4) requiring a complainant to re-file with the MCAD prior to instituting an action in Superior Court would increase litigation expenses and delay final resolution of the claims. Reibold at *22-26.

Riebold controls the instant case and its rationale is equally applicable here.

Peabody and its Principal Larkin were on notice of Nizwantowski's allegations of age discrimination prior to his not re-hiring Nizwantowski for the position of head football coach for

the 2005 season. Peabody cannot be surprised that Nizwantowski alleged in this Action that he suffered discrimination relative to that position as well as the position of baseball coach. Peabody's ability to defend this Action in its entirety is not in the least compromised by Nizwantowski having failed to amend his MCAD complaint or file a new MCAD complaint specific to the football position. In addition, Peabody had the ability, but declined, to reconcile the claims, choosing instead to present to the MCAD what Peabody now admits was fabricated evidence under oath seeking to avoid liability on Nizwantowski's claims.

Nothing in Reibold is inconsistent with the holding and teaching of Windross v. Village Automotive Group, 71 Mass. App. Ct. 861, 865 (2008) that "[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 repeats the rationale discussed above: "[t]he purpose of this requirement 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." Windross at 864 quoting Cuddyer v. Stop& Shop Supermarket Co., 434 Mass 521, 532 (2001).

Consistent with the scope of the investigation rule, the requisite degree of precision in the drafting of an MCAD complaint is satisfied if the core factual allegations underlying the claim are set forth such as to 'fairly place[] [the issue] before the agency.' Mole v. University of Mass., 58 Mass. App. Ct. at 48. This is sufficient to accomplish the twin purposes of the administrative filing requirement without unfairly prejudicing a claimant for inartful pleading." Windross at 866.

"[F]or the claim to fall within the scope of the investigation, the plaintiff must 'describe the essential nature of the claim and . . . identify the core facts on which it rests.'" Windross at 865, quoting Lattimore v. Polaroid Corp., 99 F.rd. 456, 464-465 (1st Cir. 1996). Where a

complaint filed with the MCAD puts the defendant on notice of the discrimination claim against it, additional incidents included by the plaintiff in a Superior Court complaint do not compromise its ability to formulate a defense.

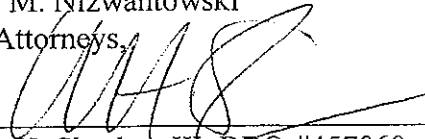
The essential nature of Nizwantowski's claim before the MCAD was that Peabody failed to re-hire him as a head coach because of his age. The core facts of Nizwantowski's claim before the MCAD were that (1) he was over the age of forty, (2) he was qualified to serve as a head coach, (3) that he was not re-hired as a head coach and (4) that a younger less qualified person was hired as head coach. These facts and allegations apply equally to the head baseball and football coaching positions.

Larkin told Nizwantowski that he did not re-hire him for the baseball position in 2005 because Larkin wanted to go in a different direction. From Larkin's comments, and the facts that the purported non-discriminatory reason for Nizwantowski's non-hire given under oath by Peabody to the MCAD was admittedly false and that the entire "opening of all positions" was a sham designed to cover the wrongful non-hire of Nizwantowski, as well as other facts not pertinent to Peabody's present motion, a fact finder could reasonably infer that Larkin wanted to, and did, hire a younger coach than Nizwantowski. Nizwantowski's claim that Peabody discriminated against him on the basis of his age when it did not hire him for the position of head football coach for the 2005 season, after not hiring him for the 2005 baseball position, is based on an act of discrimination that the MCAD investigation into Nizwantowski's not being re-hired for the 2005 baseball position would have uncovered.

IV. Conclusion

For the reasons set forth herein, Peabody's motion for partial summary judgment must be denied.

Respectfully submitted,
Edward M. Nizwantowski
By his Attorneys,




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October 16, 2008

CERTIFICATE OF SERVICE

I, Robin Stein, attorney for the Plaintiff hereby certify that I served an original and a copy of the within documents upon all counsel of record, via hand delivery this 16th day of October 2008, to the following:

Peri B. Karger, Esq.
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Robin Stein

Dated: October 16, 2008