

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
CIVIL ACTION NO. 2007-00583

EDWARD B. NIZWANTOWSKI,  
Plaintiff

v.

PEABODY SCHOOL DISTRICT,  
Defendant

**CONCISE STATEMENT OF UNDISPUTED MATERIAL FACTS AND  
LEGAL ELEMENTS IN SUPPORT OF DEFENDANT'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

NOW COMES the defendant, Peabody School District ("Peabody"), and hereby submits this Concise Statement of Undisputed Material Facts and Legal Elements in Support of Its Motion for Partial Summary Judgment on counts asserted against it in the Complaint stemming from Peabody's decision to not hire plaintiff, Edward Nizwantowski ("Nizwantowski") as the head football coach for the positions posted for the 2005 and 2007 seasons.

**STATEMENT OF UNDISPUTED MATERIAL FACTS<sup>1</sup>**

1. This case arises out of Peabody's alleged unlawful discrimination of the plaintiff in violation of M.G.L. c. 151B § 4 and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, et seq. ("ADEA") (Exhibit A, Plaintiff's Complaint).

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<sup>1</sup> The Statement of Undisputed Material Facts is made for the purposes of the motion for summary judgment only. Peabody reserves the right to contest any of these facts at the trial of this matter.

2. Nizwantowski served as the head baseball coach at Peabody Memorial High School (“Peabody High School”) from 1987 through the 2004 season. (Exhibit B, Deposition of Edward Nizwantowski Vol. 1. at pp. 25, 28).

3. Nizwantowski was required to go through an application process in order to apply for the position of head baseball coach for the 2005 season. (Exhibit C, Deposition of Edward Nizwantowski Vol. 2 at pp. 189-190).

4. As part of the application process, Nizwantowski submitted a letter and resume and was interviewed by a screening committee who selected him as one of two finalists to interview with the Principal, Patrick Larkin. (Exhibit C at pp. 190, 193-194).

5. After Nizwantowski interviewed with Mr. Larkin, he was ultimately notified that he had not been chosen for the head baseball position. (Exhibit C at p. 195).

6. On February 15, 2005, Nizwantowski, who was then 58 years old, filed a charge with the Massachusetts Commission Against Discrimination (“MCAD Charge”) alleging that Peabody’s decision to not hire plaintiff as the head baseball coach for the 2005 season was a violation of M.G.L. c. 151B, § 4 and the ADEA. (Exhibit D, MCAD Charge; Exhibit A at ¶18).

7. In the MCAD Charge, Nizwantowski asserted he was the baseball coach for 18 years and that during this time he never had to apply for the coaching position; however, when the school hired a new principal in June of 2004, he was required to apply for the baseball position. (Exhibit D).

8. Although Nizwantowski claimed he was “well qualified for [the] position . . . a younger man (Mark Bettencourt) age 32 was hired in [his] place” because the newly hired principal wanted to “get rid of [him] because of [his] age.” (Exhibit D).

9. On July 11, 2006 the MCAD found probable cause supporting plaintiff's claims against Peabody for age discrimination stemming from of its decision to not hire Nizwantowski as the head baseball coach. (Exhibit A at ¶19).

10. After Nizwantowski filed the MCAD Charge, Peabody High School began accepting applications for the head football coach position for the fall 2005 season. (Exhibit C at pp. 215-216).

11. Nizwantowski went through the hiring process and interviewed with the football screening committee, which was made up of approximately five individuals. (Exhibit C at pp. 222-223).

12. The football screening committee decided not to recommend Nizwantowski as a finalist and he, therefore, did not interview with Mr. Larkin. Instead, Peabody hired Paul Uva, who was five years younger than Nizwantowski, to serve as the head football coach for the 2005. (Exhibit C at pp. 255-257).

13. Twenty-five months after filing the MCAD Charge, Nizwantowski filed the instant complaint in this Court on March 26, 2007. (Exhibit A).

14. In his Superior Court complaint, Nizwantowski asserts he was wrongfully denied the position of head baseball coach for the 2005 season when Mark Bettencourt, a younger allegedly less qualified candidate was selected to fill the position. (Exhibit A at ¶¶12, 15).

15. Nizwantowski also asserts in the complaint in the instant action that Peabody discriminated against him on the basis of age when it "failed to re-hire plaintiff for the position of head football coach, hiring Paul Uva, who is younger than plaintiff by more than five years." (Exhibit A at ¶¶13, 15).

16. He contends that Peabody “failed to re-hire plaintiff for both positions based on plaintiff’s age in violation of law.” (Exhibit A at ¶15).

17. After the instant complaint was filed, Mr. Uva resigned from his position as head football coach and as a result, there was a coaching vacancy for the 2007 season. (Exhibit C at pp. 267-268, 289).

18. Nizwantowski again applied for the head football coach position and interviewed with the football screening committee during the late winter or early spring of 2007. (Exhibit C at pp. 289-292).

19. Nizwantowski was notified around April 6, 2007 that he was not selected as the finalist for the football coach position. (Exhibit C at pp. 293-296).

20. Nizwantowski was deposed on two separate days regarding his allegations that Peabody discriminated against him on the basis of age as a result of its decision to not hire him for the football coach for the 2005 and 2007 seasons, among other things. Specifically, Nizwantowski was asked:

Q: “Mr. Nizwantowski, do you contend that the City of Peabody intentionally discriminated against you because of your age?”

A: Yes, I do.

(Exhibit C at p. 343)(emphasis added).

21. Since Nizwantowski asserts in his complaint that Peabody committed age discrimination as a result of its decision to not hire him as the head football coach for the 2005 season, counsel asked plaintiff the following under oath:

Q: Why do you think that age was a factor in the decision to hire Mr. Uva?

A: Why was age?

Q: A factor, why do you believe age was a factor in the decision to hire Mr. Uva over you?

A: Like I mentioned earlier, when you do your job effectively and efficiently over the course of time and they hire somebody younger than you, it would lead me to think there's nothing but discrimination.

...

Q: . . . Given the fact that he [Mr. Uva] too is over 50 years old at the time he got the position, is there anything about his hiring that you believe was the product of age discrimination?

A: Nothing, but what I just said earlier.

(Exhibit C at pp. 257-259).

22. Although it was not asserted in the complaint, at his deposition when asked whether Nizwantowski is “contesting in this lawsuit that [he] was improperly denied the football coaching position” and was “discriminated against by not being hired in 2006 or 2007 for the football position,” when Mr. Woodbury was hired, Nizwantowski stated “I believe I was discriminated against at all times.” (Exhibit B at p. 35)(emphasis added).

23. Niwantowski stated:

“I did my job effectively, I did my job efficiently. I never had a bad evaluation, whether it be coaching or teaching, my dedication, my loyalty to the community, to the children that I served. When you do things like that and they replace you with a younger person who doesn't meet your qualifications, it leads me to believe that they discriminated against me.”

(Exhibit C at pp. 343-344).

24. Nizwantowski did not amend the MCAD charge or file a new charge with the MCAD to assert the new claims against Peabody for age discrimination stemming from its decision to not hire him as the head football coach for the 2005 and 2007 seasons before the filing the instant complaint on March 26, 2007. (Exhibit A).

### STATEMENT OF LEGAL ELEMENTS

1. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits demonstrate that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983).

2. Further, the Supreme Judicial Court has ruled that a party moving for summary judgment on a claim in which the opposing party will have the burden of proof at trial, is entitled to summary judgment if it demonstrates through pleadings, depositions, answers to interrogatories, admissions, and affidavits, unmet by countervailing materials, that the opposing party “has no reasonable expectation of proving an essential element of that party’s case.” Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

3. To succeed on a summary judgment motion, the moving party “need not negate, that is disprove, an essential element of the claim of the party on whom the burden of proof at trial will rest.” Id. at 714. Rather, the moving party need only show that proof of the essential element is unlikely to be forthcoming. Id.

4. The ADEA provides that, in order to bring a private claim for age discrimination, an aggrieved party must file a charge with the Equal Employment Opportunity Commission (“EEOC”) within 180 days of the alleged act of discrimination. 29 U.S.C. § 626(d)(2).

5. In states such as Massachusetts that have their own discrimination law, however, the charge must be filed with the EEOC within 300 days. Kale v. Combined Ins. Co. of Am., 861 F.2d 746, 750 (1st Cir. 1988); Ciccone v. Textron, Inc., 651 F.2d 1, 2 (1st Cir. 1981) (per curiam), cert. denied, 452 U.S. 917, 69 L. Ed. 2d 420, 101 S. Ct. 3052 (1981).

6. Similarly, as a predicate to bringing a civil action in the Superior Court, a claimant must file a complaint of unlawful discrimination with MCAD within six months of the last alleged act of discrimination. M.G.L. c. 151B, § 5.

7. Massachusetts courts have strictly construed these provisions, and it is well settled that failure to satisfy the requirements of M.G.L. c. 151B mandates dismissal of the complaint. Charland v. Muzi Motors, 417 Mass. 580, 586 (1994); Tardanico v. Aetna Life & Cas. Co., 41 Mass. App. Ct. 443, 444 (1996)(“resort to judicial process is not available to a party claiming age discrimination . . . unless that party has first lodged a complaint of unlawful discrimination with the MCAD within six months of the occurrence of the discriminatory event”); Jancey v. School Comm. of Everett, 421 Mass. 482, 497-498 (1995); Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 512-513 (1985), *S. C.*, 397 Mass. 1004 (1986)(employee’s complaint dismissed for failure to follow the procedures set forth in G. L. c. 151B); Cherella v. Phoenix Technologies Ltd., 32 Mass. App. Ct. 919, (1992).

8. The filing requirement has a dual purpose. First, it is meant to provide the agency with an opportunity to investigate and conciliate the claim of discrimination. Second, the filing requirement provides notice to the defendant of a potential suit. Carter v. Comm’r of Corr., 43 Mass. App. Ct. 212, 217 (1997), quoting Conroy v. Boston Edison Co., 758 F. Supp. 54, 57 (D.Mass. 1991).

9. Consequently, because those purposes would be frustrated if the claimant were permitted to allege one thing in the MCAD complaint only to allege something entirely different in the ensuing civil action, the scope of the subsequent civil proceeding is strictly limited to matters alleged in the administrative complaint. Windross v. Vill. Auto. Group, Inc., 71 Mass.

App. Ct. 861, 864 (2008); Sivieri v. Commonwealth of Massachusetts, 16 Mass. L. Rep. 531  
(June 26, 2003).

The Defendant,  
PEABODY SCHOOL DISTRICT  
By Its Attorneys,

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Dated: November 4, 2008

**CERTIFICATE OF SERVICE**

I, Peri B. Karger, hereby certify that on this 19<sup>th</sup> day of September, 2008, I served the foregoing by hand to:

William H. Sheehan III, Esq.  
Robin Stein, Esq.  
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Peri B. Karger