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*Real Estate; Civil Litigation; Bankruptcy & Insolvency; Corporate & Partnership; Commercial Matters; Personal Injury; Construction; Business & Estate Planning; Divorce; Hotel & Restaurants; Patent & Intellectual Property*

## Method of Employee Termination Can Be Discriminatory

By Zachary Tuck, Esq.



Zack Tuck

It is common knowledge among employers that it is impermissible to terminate an employee for discriminatory reasons such as the employee's race, gender, religion, or national origin. However, it is important for employers to recognize that not only can the reason for an employee's termination be viewed as discriminatory, but the *method* by which that employee is terminated can also subject the employer to liability. The recent case

*of Trustees of Health and Hospitals of the City of Boston, Inc. v. Massachusetts Commission Against Discrimination* illustrates this important point.

In the *Trustees* case, which was decided by the Supreme Judicial Court of Massachusetts in August 2007, five female African-American employees were among eight employees laid off by the employer. It was undisputed that the reason for the layoffs was non-discriminatory. However, the African-American employees challenged the manner in which they were fired, spe-

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## LLC Owner Liable for Employment Taxes

Sean was the sole owner of an accounting firm that was set up as a limited liability company (LLC) under state law. When the firm went out of business, it had not paid any payroll taxes for the preceding 18 months. Perhaps thinking that an accounting business, of all things, should have stayed current in its payment of payroll taxes, the IRS went after Sean personally for the \$65,000 in unpaid taxes. A federal court upheld a judgment against him.

The authority of the government to look to the business owner in his personal capacity for satisfaction of the tax liability went back to the

formation of the business. Treasury Regulations allow an individual who is the only owner of an LLC to elect to have the business classified as either an "association" or a "sole proprietorship." In the former situation, the entity is treated like a corporation. In the latter case, which had been selected by Sean, the business is not considered an entity separate from the owner.

Sean challenged the tax assessment against him, but to no avail. The court rejected his argument that the Regulation imposing liability on him as an individual was invalid because the leg-

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## Employee Termination

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cifically the way they were treated by the employer on the day of the actual terminations.

Prior to the terminations, the employer had developed a written procedure stating how the layoffs would be carried out. Under the procedure to be followed, all employees selected for layoffs would receive no advance notice of their firing, and they would be monitored as they gathered their belongings. When the five complainants were informed that they were being laid off, they were told that the terminations were effective immediately. In addition, they were closely monitored as they packed up their belongings, and were immediately escorted from the building without being permitted to say goodbye to co-workers. Generally, the terminated women felt they were treated like criminals, and had been humiliated and degraded in front of their friends and co-workers.

Conversely, one of the other employees included in the same layoff was a white male. Contrary to the written procedure, he was given advance notice of his layoff. In addition, he was not monitored as he cleaned out his desk, and was permitted to walk freely through the building to say goodbye to his co-workers. In defending against the claims of discrimination, the employer claimed that the white male had different job duties and responsibilities than the complainants and did not handle confidential client records.

The Court held in favor of the complaining employees. In support of its decision, the Court concluded that even though the complaining employees and the one white male employee did not have similar jobs with respect to their duties and responsibilities, they were "similarly situated" for the purposes of the implementation of the employer's layoff procedure. This comparison of "similarly situated" employees is often a critical factor in the analysis of an employment discrimination lawsuit.

The Court ruled that the differences in job duties and responsibilities between the white male and the female African-American complainants had nothing to do with why the white male received more dignified treatment at the time of the layoffs. The Court further noted that only

two of the complainants actually had jobs with access to confidential records, and that in any event the written procedure made no distinction about how the layoffs were to be carried out for employees who handled confidential records versus those who didn't.

One lesson for employers is that if a written procedure is used to dictate how employee terminations are to be carried out, it is crucial to ensure that the procedure is followed uniformly and fairly. While it is certainly permissible to devise different layoff procedures for different categories of employees and different situations, the differences must arise from legitimate, non-discriminatory business concerns. If a written procedure is created, it should set forth the categories of employees and types of situations where close monitoring or other potentially objectionable means of protecting the employer's legitimate business interests are to be utilized.

In the *Trustees* case, the outcome might have been different if the only employees closely monitored were those who *did* handle confidential records. However, the absence of a legitimate reason for the differential and harsh treatment of *all* the African-American employees made it obvious, in the Court's view, that the only explanation for treating the five complainants differently was their race. Because of its failure to ensure that all employees were treated fairly and respectfully in the particular situation, the employer paid a heavy price which could have easily been avoided.

## Firm News



Jim Rudolph

Jim Rudolph and Jim Singer recently spoke at a seminar for the National Association of Credit Managers of New England (NACMNE). The topic was "*Legal Remedies for Creditors in the Construction Business*." They also presented a seminar for a client on "*Pursuing and Defending Delay Damages on Construction Projects*."



Jim Singer