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## No Application, No Problem: The Recent Expansion of Retaliation Claims Based on Failure to Hire

by Casey Sack, Esq.

For nearly two decades, the First Circuit has recognized that there can typically be no failure to hire an individual without allegations that the individual applied for the job at issue. While noting that there may be certain facts that render an application unfeasible, this has been a rare finding. The United States District Court for the District of Massachusetts recently issued a promising decision for employees that clarifies the broad reach of retaliation claims. The decision cracks open the door ever so slightly to invite retaliation claims that do not fit squarely within the recognized framework established by federal courts.

### Case Background

Recently, an office manager overcame dismissal of his retaliation claim based on failure to rehire even though he never applied for the job opening on which the claim was based. The office manager was reportedly fired for lack of work resulting in the elimination of his job position. But just a month later, the employer posted a job matching the description of the office manager's former job. A manager of the employer told the former office manager that he was not qualified for the job and discouraged him from applying.

### Court's Analysis

The United States District Court for the District of Massachusetts acknowledged that federal courts are less inclined to recognize a broader category of retaliatory actions than Massachusetts state courts. Notwithstanding, the court found that the employer's actions of discouraging the former employee from applying, as well as changing its long-standing posting practice by filling a position the former office manager was qualified for without posting it, was sufficient to survive dismissal of his retaliation claim based on failure to hire. In making this finding, the court insinuated that the application process, although typically required to sustain a retaliation claim, was a mere formality here where the employer already made it clear that the former office manager would not be considered for the position.

### Takeaways

This decision may create an influx of more creative retaliation claims. Indeed, the hard and fast rule that retaliation claims based on failure to hire should be accompanied by evidence of an application for the position at issue may soon very well be a rule of the past.

## Tenants Beware: Rent Acceleration Clauses Found Enforceable in Recent Massachusetts SJC Decision

by Annabelle Hentz, Law Clerk

The Supreme Judicial Court of Massachusetts recently upheld a Superior Court's ruling that rent acceleration clauses are enforceable by commercial landlords against defaulting commercial tenants. Rent

acceleration clauses allow for unpaid rent to constitute liquidated damages when a tenant defaults—regardless of the amount of unpaid lapsed time.

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