

Massachusetts Supreme Judicial Court Holds That Former Employee Can Bring Retaliation Claim Based on Conduct Which Occurred Two Years After the Termination of Employment

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Last week, the Massachusetts Supreme Judicial Court held that an employer may be liable under Massachusetts General Laws Chapter 151B to a former employee for retaliatory conduct that occurs after the employment relationship has ended. In *Psy-Ed Corp. v. Klein*, the Court ruled that the employer's filing of a "baseless" lawsuit against a former employee could constitute unlawful retaliation under Chapter 151B.

Stanley Klein was a co-founder and an employee of Psy-Ed Corp. While he was still employed by the company, Klein had submitted an affidavit to the Massachusetts Commission Against Discrimination in support of the company's defense of a discrimination claim brought by another employee. Thereafter, Klein was part of an unsuccessful attempt to take over the company's board of directors. As a result of this failed coup, Klein and the company agreed that he should terminate his employment as part of a negotiated settlement agreement. Unbeknown to the company and while these settlement discussions were still ongoing, Klein submitted a new affidavit to the MCAD, which was supportive of the pending charge. In this affidavit, Klein claimed to have remembered details that he had previously forgotten in his first affidavit.

Two years after the termination of his employment, Psy-Ed sued Klein for, among other things, defamation based on his assertions in the second affidavit. It also accused Klein of fraud because he had failed to disclose the second affidavit while negotiating the terms of the settlement agreement. Klein in turn sued the company, alleging that the company's lawsuit was in retaliation for his submission of the second affidavit. Despite concluding that the company's lawsuit was baseless, the trial court ruled that Klein could not bring a claim of retaliation because the filing of the lawsuit was not an adverse employment action, as he was no longer an employee of the company.

The Supreme Judicial Court reversed the dismissal of Klein's retaliation claim. It explained that Chapter 151B was broad and did not specifically require an "adverse employment action" to establish a claim for retaliation. Rather, the statute prohibited any adverse action taken by "any person" against "another person" as a result of the latter's engaging in protected conduct. Therefore, the Court concluded that Chapter 151B does not require that "an employer-employee relationship exist at the time of the wrongful conduct, or at any other time."

Although the facts of the case were unique, the decision has practical implications for employers when faced with a reference request regarding a former employee. Under *Psy-Ed*, the provision of a negative reference or refusing to provide a reference could constitute an adverse action for purposes of a retaliation claim. The *Psy-Ed* decision also signals that the Supreme Judicial Court continues to take a broad view as to what constitutes retaliation under Chapter 151B. It thus is a reminder that employers should act with caution when interacting with current or former employees who have engaged in protected conduct under the statute.

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