SJC-10238

JOSEPH R. EVERETT vs. THE 357 CORP. & another.[1]

Norfolk. December 2, 2008. - April 13, 2009.

Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

Anti-Discrimination Law, Handicap, Employment. Americans with Disabilities Act. Practice, Civil, Judgment notwithstanding verdict. Massachusetts Commission Against Discrimination. Jurisdiction, Administrative matter, Superior Court, Primary jurisdiction. Administrative Law, Primary jurisdiction.

Civil action commenced in the Superior Court Department on February 11, 2000.

The case was tried before Charles M. Grabau, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Gary M. Feldman for the defendants.
Jeffrey M. Feuer (Lee D. Goldstein with him) for the plaintiff.
Beverly I. Ward, for Massachusetts Commission Against Discrimination, amicus curiae, submitted a brief.
Nina Joan Kimball, for Charles Hamilton Houston Institute for Race & Justice & others, amici curiae, submitted a brief.

MARSHALL, C.J. The plaintiff, Joseph R. Everett, brought suit in the Superior Court alleging that his former employer, The

[1] Trans-Lease Group. Trans-Lease Group, a holding company, provides administrative services to The 357 Corp. (collectively, the company).

357 Corp. and Trans-Lease Group (collectively, the company), discriminated against him in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq. (2000 ed.), and the Massachusetts antidiscrimination statute, G. L. c. 151B, when it did not permit him to return to work as a commercial truck driver after his discharge from a psychiatric hospital in 1996. In his complaint and pretrial pleadings, Everett asserted that he was seeking damages for wrongful actions occurring "in February 1997 and thereafter." As we describe below, on February 14, 1997, in conformity with regulations promulgated by the Federal Motor Carrier Safety Administration of the United States Department of Transportation (DOT), the company's physician declined to certify Everett as medically qualified to drive a commercial motor vehicle.[2]

At trial, Everett changed his theory of liability to cover alleged acts of discrimination occurring only in 1999, expressly and repeatedly waiving all claims of discrimination by the company before 1999.[3] The company vigorously contested the "waiver" of the earlier claims at every step. See infra. After the close of evidence, again over the company's vigorous

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[2] See 49 C.F.R. § 391.1 (1991) (regulation promulgated by the Federal Motor Carrier Safety Administration of the United States Department of Transportation [DOT] describing rules establishing "minimum qualifications for persons who drive motor vehicles" for motor carriers, and "minimum duties of motor carriers with respect to the qualifications of their drivers").

[3] We designate Everett's allegations of discriminatory action by the company concerning events that occurred in 1996 and 1997 as the "1996-1997 claims," and allegations of discriminatory action by the company concerning events that occurred in 1999 and thereafter as the "1999 claims."

objection, Everett moved to amend his complaint to conform to the evidence by asserting, among other things, a claim for damages based solely on his 1999 claims. The judge submitted both the 1996-1997 claims and the 1999 claims to the jury. The jury found that the company had acted lawfully in connection with Everett's 1996-1997 termination, but had discriminated against Everett by refusing to reinstate him in 1999. They awarded Everett damages in the amount of $757,701 on the 1999 claims. The trial judge then allowed Everett's motion to amend, and subsequently awarded Everett fees and costs in the amount of $370,678.58. The company appealed, and we transferred the case here on our own motion.

Of the several grounds to vacate urged by the company, we consider only the dispositive issue whether the judge erred in permitting Everett's 1999 claims to go to the jury where, as we shall explain, he did not file a complaint with the Massachusetts Commission Against Discrimination (MCAD) related to those claims. We conclude that Everett's failure to file a predicate complaint with MCAD deprived the court of subject matter jurisdiction on the only claims for which the jury awarded Everett damages, his 1999 claims. G. L. c. 151B, §§ 5, 9. The company's motion for judgment notwithstanding the verdict on that ground should have been allowed. We set aside the jury verdict and the award of fees and costs, and remand the case to the Superior Court for the entry of a judgment of dismissal.[4]

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[4] We acknowledge the amicus brief submitted by the Massachusetts Commission Against Discrimination (MCAD) in support of the company, and the brief submitted by the Charles Hamilton Houston Institute for Race & Justice, the Lawyers' Committee for

1. Factual background. We recite the relevant facts as the jury could have found them and, where relevant, include additional uncontested material. See Pardo v. General Hosp. Corp., 446 Mass. 1, 3 (2006).

a. The events of 1996 and 1997. This dispute has its origins in 1996. In late January or early February of 1996, Everett, who had been employed as a commercial truck driver by the company since 1986, was suspended for one month for sending an inappropriate letter to a woman coworker. Fearing that his job was in jeopardy, Everett contacted Dr. Lillian Sober-Ain, a clinical psychologist, for mental health treatment. Dr. Sober-Ain diagnosed Everett as suffering from an adjustment disorder with depressed mood, and posttraumatic stress disorder with delayed onset.[5]

Everett returned to work but, as he testified at trial, when he did so, he was "very nervous," and "I thought I was being followed by different people, groups of people, whether it be the company, or that girl." Everett's mother testified that, when her son returned to work, "he started telling us" that the women

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Civil Rights Under the Law of the Boston Bar Association, Gay and Lesbian Advocates and Defenders, Greater Boston Legal Services on behalf of the Chelsea Collaborative, Jewish Alliance for Law and Social Action, Massachusetts Employment Lawyers Association, and Massachusetts Law Reform Institute in support of Everett.

[5] At trial, Dr. Lillian Sober-Ain testified that she arrived at the diagnosis of posttraumatic stress disorder based on traumatic experiences Everett related involving a former girl friend. Everett testified that, in 1987 or 1988 when he confronted the woman about her drug use, she assaulted him with a knife, cutting a major artery. Everett was taken to a hospital, and subsequently required emergency surgery.

who were "involved in his being suspended were following him to his work places." Everett's mother also testified that, in June, 1996, while Everett was visiting his family, she became concerned because "he was very upset and yelling about these girls," saying "they're following me again." He would "sometimes" run outside in the dark, stating that "he heard something," "thought somebody was trying to do something to his car," and said that he "heard voices." His mother testified that her son began "to seem a little paranoid."

A physician recommended by Everett's union was consulted by the family, who were told that Everett "could be a danger to himself or others and should be in the hospital." Everett's family persuaded him to receive treatment at Cape Cod Hospital, and then involuntarily committed him to Bournewood Hospital. See G. L. c. 123, § 12. Everett remained an inpatient at Bournewood Hospital for two weeks, during which time he was diagnosed with paranoid schizophrenia.[6] His treating physician at that hospital testified that Everett's condition was a "lifelong" illness. On his discharge on July 9, 1996, Everett was given prescriptions for antipsychotic medications, including Haldol and Cogentin.[7]

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[6] During his involuntary commitment at Bournewood Hospital and during subsequent psychiatric evaluations, Everett denied that he had any psychological problems or needed hospitalization. At trial, Everett testified that he never believed that he had a mental disorder.

[7] Everett later reported to one of his doctors that Haldol made him drowsy. Dr. David M. Roston, a physician who evaluated Everett's fitness to drive commercial trucks, stated in a July, 1996, letter to the company that "Haldol may cause side effects which could interfere with Mr. Everett's ability to drive a truck safely." In a subsequent September, 1996, medical report to the

Following his discharge from Bournewood Hospital, Everett sought to return to work with the company. Consistent with Federal regulations governing the commercial trucking industry,[8] the company required Everett to be medically evaluated to determine whether he remained physically and mentally qualified under DOT regulations to drive heavy commercial vehicles on the public roads. Dr. David M. Roston, a psychiatrist at Atlantic Health Group, conducted the evaluation. On July 18, 1996, based on his examination, Dr. Roston refused to issue Everett a medical

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company, psychiatrist Dr. Roy Lubit wrote that Everett had "ceased his Haldol, which treats psychotic disorders, about a month ago [August, 1996], and he says he does not plan on going back to his psychologist or his psychiatrist. It is not clear to what extent his psychiatrist or psychotherapist are in agreement with his plans, it seems the patient is refusing treatment at this time."

[8] As the driver of a commercial motor vehicle, Everett was subject to certain regulations promulgated by the DOT pursuant to congressional authority. See 49 U.S.C. § 31102(a) (2006 ed.). The regulations prohibit motor carriers from employing as a commercial truck driver any individual who does not have a DOT certificate attesting to his physical and mental fitness to drive. See 49 C.F.R. § 391.41(a) (1996) ("A person shall not drive a commercial motor vehicle unless he/she . . . has on his/her person . . . a medical examiner's certificate that he/she is . . . qualified to drive a commercial motor vehicle").

Examining physicians were, and are, required to follow a set protocol in determining whether to issue the DOT medical certification. See 49 C.F.R. § 391.43 (1996). To obtain a DOT certificate, DOT regulations explicitly state that a driver have "no mental . . . disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely." 49 C.F.R. § 391.41(b)(9) (1996). See F.F. v. Laredo, 912 F. Supp. 248, 254 (S.D. Tex. 1995), Daugherty v. El Paso, 56 F.3d 695, 698 (5th Cir. 1995) ("Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident"). Since 2000, the regulations have expressly provided that "[h]istory of certain conditions may be cause for rejection." See 49 C.F.R. § 391.43 (2008).

examination certification of fitness to drive a commercial motor vehicle (DOT certificate) at that time. Dr. Roston also recommended to the company that Everett "undergo an independent psychiatric evaluation." On September 26, 1996, at the company's request and expense, Everett was evaluated by psychiatrist Dr. Roy Lubit. Using criteria established by the DOT, 49 C.F.R. § 391.41(b)(9), Dr. Lubit concluded that "I cannot certify this individual as healthy to drive." Dr. Lubit stated that he had "discussed this issue with Dr. Roston who agrees."

Everett then sought an examination by a doctor of his own choosing, Dr. James R. Bieber. On January 25, 1997, Dr. Bieber evaluated Everett to determine whether "he is able to return to his job of driving a truck while on medication." Dr. Bieber concluded that Everett "is able to return to the work of driving a truck," noting, however, that Everett should be "carefully" monitored, and that either emotional or physical stress "could lead to another decompensation." Dr. Bieber's report made no reference to DOT qualification requirements.

Dr. Roston reviewed Dr. Bieber's report and the mental health qualification requirement of 49 C.F.R. § 391.41, and on February 14, 1997, reported to the company that, although Everett was responding well to his medications, "he has the risk of future psychotic episodes which could interfere with his ability to safely operate a truck." In light of the requirements of the DOT regulations, he again declined to issue the DOT certificate. The company refused to permit Everett to return to work.

In February, 1997, Everett, through his union, filed a

grievance seeking reinstatement. In connection with the grievance, Everett and the company sought a mutually agreed-on third-party medical evaluation of Everett by an expert, whom Everett's business agent termed at trial "a neutral third party." The parties agreed to have Dr. Lubit serve in that role. In a June 26, 1997, report that again cited DOT regulations, Dr. Lubit concluded: "I cannot state that [Everett's] psychiatric problems will not be a problem. They are a continual risk to his driving and I would be unable to qualify him."

DOT regulations require drivers who wish to overturn adverse medical evaluations to appeal from the decision to the DOT.[9]

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[9] See 49 C.F.R. § 391.47, entitled "Resolution of conflicts of medical evaluation," which provides, in relevant part, that when a driver desires review of a motor carrier's conclusion that he is medically unqualified, the driver "must submit [to DOT] proof that there is a disagreement between the physician for the driver and the physician for the motor carrier concerning the driver's qualifications," along with, among other things, "a statement of his agreement to submit the matter to an impartial medical specialist in the field [in which the medical conflict arose]" whose selection is "agreed to by the motor carrier and the driver," 49 C.F.R. § 391.47(b)(2),(3); "a statement explaining in detail why the decision of the medical specialist . . . is unacceptable," 49 C.F.R. § 391.47(b)(4); and "all medical records and statements of the physicians who have given opinions on the driver's qualifications." 49 C.F.R. § 391.47(b)(7). DOT may then either "request further information," 49 C.F.R. § 391.47(c), or "notify the parties that the [appeal] has been accepted and that a determination will be made." 49 C.F.R. § 391.47(d)(1). If the driver disagrees with the DOT's determination, he is entitled to judicial review in the United States Court of Appeals, 49 C.F.R. § 386.67 (2008), which has "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all . . . final orders of . . . the Secretary of Transportation." 28 U.S.C. § 2342(3) (2006 ed.). No State may "establish[]" or enforce[] any law that would prevent "full compliance" with DOT regulations. 49 C.F.R. § 390.9 (2008). Accordingly, DOT's authority to resolve conflicts concerning DOT certification (subject to Federal judicial review) is exclusive.

While the administrative appeal is pending, the driver is deemed not medically qualified to operate commercial motor vehicles. 49 C.F.R. § 391.47(f) (where driver and motor carrier disagree about medical certification, "the driver shall be deemed disqualified until such time as the [DOT] makes a determination" [emphasis added]). See Carolina Freight Carriers v. Pennsylvania Human Relations Comm'n, 99 Pa. Commw. 428, 436 (1986) ("where there is a conflict in the medical evidence a driver will remain unqualified until the federal government decides to the contrary" [emphasis in original]). Everett did not file an appeal with the DOT at any time to review the adverse conclusion of the mutually agreed-on medical specialist, Dr. Lubit. He did, however, through his union, file a request to arbitrate his grievance. The arbitration panel dismissed Everett's claim.

On July 3, 1997, one week after Dr. Lubit had declined a second time to certify Everett as medically qualified to drive a commercial motor vehicle, Everett filed a charge of discrimination with the MCAD, which also was filed with the Equal Employment Opportunity Commission (EEOC).[10] He asserted, among other things, that in June, 1996, he "went on a medical leave of

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[10] Equal Employment Opportunity Commission (EEOC) regulations designate the MCAD as a fair employment practice (FEP) agency. See 29 C.F.R. § 1601.74(a) (2008). "EEOC policy is to defer to FEP agencies for a limited period of time to allow those agencies to resolve problems at a local level. . . . A charge filed with the MCAD automatically becomes filed with the EEOC 60 days after its filing, or earlier if the MCAD terminates its investigation. See 29 C.F.R. § 1601.13(a)(4). A charge filed with the EEOC in a jurisdiction having a designated FEP agency, as Massachusetts does, is automatically referred to that state agency." Davis v. Lucent Techs., Inc., 251 F.3d 227, 230 n.1 (1st Cir. 2001).

absence," that he was "well enough to return to work in July, 1996 but [the company] refused to allow me to return," and that the company "has refused to return me to work because of my perceived disability, even though I am capable of performing the essential elements of my driver's position." On December 11, 1998, after an investigation, see 804 Code Mass. Regs. § 1.13(7) (1993); G. L. c. 151B, § 5, the MCAD issued a Lack of Probable Cause (LOPC) determination, and closed its investigation.

At some point -- no appeal date is indicated in the record -- Everett administratively appealed from the LOPC determination; a hearing on his appeal was held on February 9, 1999. 804 Code Mass. Regs. § 1.15(7)(d) (1999). On May 4, 1999, the investigating commissioner affirmed the LOPC determination "[b]ased upon information presented at the appeal hearing and a review of the evidence adduced in investigation . . . ."

b. The events of 1999. In the meantime, and notwithstanding that both Dr. Roston and Dr. Lubit had refused to certify him as medically qualified in conformity with DOT regulations to drive commercial motor vehicles, Everett drove heavy commercial trucks for other employers. To obtain these jobs, beginning in 1997, Everett acquired at least five DOT certificates from various physicians. At trial Everett testified that he did not disclose to any of the certifying physicians his previous psychiatric history either during any medical examinations or on the forms required for each examination. To the contrary, when asked directly, he informed each examining

physician that he had "no" history of a psychiatric disorder.[11] See note 8, supra.[12]

Before January 12, 1999, the company had no knowledge that Everett had acquired these DOT certificates and was driving commercial vehicles for other employers. On that date Everett initiated a second union grievance against the company, in which he sought "[t]o be put back to work as a driver" with "his seniority and lost wages and benefits since January 12, 1999."[13]

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[11] In contrast, in July, 1996, following his discharge from Bournewood Hospital, Everett had indicated on the medical examination form he gave to Dr. Roston that he had a "history" of "psychiatric disorder."

Since 2000, DOT medical history forms have required drivers to affirm the following: "I certify that the above information is complete and true. I understand that inaccurate, false or missing information may invalidate the examination and my Medical Examiner's Certificate." 49 C.F.R. § 391.43, at 339 (2008). See 65 Fed. Reg. 59,363 (Oct. 5, 2000) (promulgating new version of medical examination form because the form in effect "has remained unchanged since it was adopted by the DOT in 1970"). The medical history forms completed by Everett did not contain certification language.

[12] Everett testified that he did not disclose a history of psychiatric disorder when seeking the post-1996 DOT medical certificates because "I never believed I had a mental illness" and because "I knew had I put down yes . . . 90 percent of the road jobs wouldn't hire me. They'd discriminate against me for that reason." In closing arguments, his counsel pressed the point: "Now, it's certainly true that in applying for those jobs, [Everett] marked down on the medical forms that he did not have a history of mental illness or psychiatric disorders. He told you he did that. He wasn't hiding anything. He told you why he did that. First and foremost he told you that he didn't want to be discriminated against because of his past, the same way that he felt [the company] was discriminating against him."

[13] The grievance stated, among other things, that Everett "has been employed driving over the road -- cross country trips for other employers since January 1997. Driving larger equipment and handling more responsibility than he had at the [company]. He also has current D.O.T. physical cards in his possession that

He asserted, through a union representative, that he had "new" evidence to support his request. The "new" evidence included, among other things, a personal affidavit, a driver's road test, a seniority list from the company dated September 9, 1998, that included his name, Dr. Bieber's evaluation of January 25, 1997, a letter from one employer stating that he had been qualified to serve as a "lead driver," a physical examination form from another employer, several DOT certificates obtained since 1997, and an affidavit from a union doctor attesting that "it appears that Joe Everett is in remission" from his emotional problems and his "case appears to be one in which any disabilities he incurred are now resolved and he has returned to normal baseline functioning" sufficient to "resume" his duties with the company.

The company raised as a "point of order" to the 1999 grievance that the issue of Everett's medical qualification had been definitively resolved in the 1997 grievance, and that, based on the 1997 conclusions of Dr. Lubit and Dr. Roston, as upheld in the 1997 grievance proceeding, Everett was not DOT-certified to drive a commercial motor vehicle. The 1999 arbitration panel dismissed Everett's grievance. See EEOC v. Allied Sys., Inc., 36 F. Supp. 2d 515, 522 (N.D.N.Y. 1999), quoting Campbell v. Federal Express Corp., 918 F. Supp. 912, 918 (D. Md. 1996) (motor carrier "not required to accept the determination of . . . a physician for one of [the motor carrier's] competitors. 'As a matter of

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he has provided to his employers. The [company] said they need a D.O.T. card from Dr. Roston (their company doctor). [Everett] feels . . . he will never get a card from Dr. Roston."

law, [the motor carrier] was not bound to accede to determinations made by medical professionals retained by its competitors; [the motor carrier] was entitled to rely on the determinations made by its medical professionals'").

2. Procedural background. We recount the procedural background in some detail, as befits the jurisdictional issue in this case. On February 11, 2000, approximately thirteen months after filing his second grievance and almost three years to the day from Dr. Roston's final rejection of Everett's DOT qualifications on February 14, 1997, Everett filed a complaint in the Superior Court. See G. L. c. 151B, § 9 (establishing three-year statute of limitations for filing discrimination claims pursuant to G. L. c. 151B). The allegations of the complaint are ambiguous. Everett specifically referenced discrimination by the company "[s]ince February 14, 1997," the date of Dr. Roston's letter reviewing and rejecting Dr. Bieber's opinion that Everett was medically certified to drive commercial trucks; it also referred to the MCAD's LOPC determination of December 11, 1998. The complaint alleged that the company "failed and refused to re-employ Everett" or to offer him reasonable accommodation "even in the face of Mr. Everett's exemplary truck driving record with other companies" since February 14, 1997. The Superior Court complaint did not allege that any act of discrimination had occurred in 1999, did not allege that in 1999 Everett had presented the company with "new" evidence about his mental health, and did not allege that the company had failed to rehire Everett in 1999 in the face of such "new" evidence or

otherwise.[14] The complaint included a generally worded request for damages as a "result of [the company's] discriminatory actions." Fairly read, the complaint alleged that Everett had not been returned to work by the company on February 14, 1997, that his complaints of discrimination had been investigated by the MCAD and their basis found lacking in probable cause, and that Everett nevertheless had suffered damages for the alleged wrongs encompassed within the MCAD investigation that had ended in 1998. There was no allegation that the company did or did not do anything on January 12, 1999, or thereafter.

On July 31, 2000, the company moved to dismiss the complaint for failing to comply with the applicable statute of limitations, which period, the company argued, commenced in July, 1996, when Everett sought to return to work after his hospitalization. Everett opposed the motion. He argued that, while "it was not clear in July 1996 that [the company's] refusal to allow Mr. Everett to return to work stemmed from a discriminatory animus," such animus was evident by February 14, 1997, when the company's refusal to reemploy him was based on a discriminatory perception that he was still mentally disabled. Thus, Everett continued, he had properly alleged a continuing violation, that "save[d]" what might otherwise have been the time-barred 1996 event. See Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 531-532 (2001); 804 Code Mass. Regs. § 1.10(2) (1999) (describing

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[14] A business agent for the union which represented Everett in his 1997 and 1999 grievances testified that the "new" evidence Everett claims supports his 1999 claims had not been submitted to the company before 1999.

continuing violation doctrine). Neither party mentioned any events in 1999, either in their memoranda or in their reply memoranda; the entire focus of the motion was whether the 1997 event anchored the 1996 event and brought it within the statute of limitations by way of the continuing violation doctrine. The company's motion to dismiss was denied.

After lengthy and acrimonious discovery disputes not material to our decision, in April, 2005, the case proceeded to trial. In the October, 2004, joint pretrial statement of expected evidence, Everett asserted that his theory of liability was that the company's "continuing" refusal to allow him to return to work due to an "unjustified" perception that he still had a disability in "February, 1997 and thereafter" constituted discrimination in violation of the Massachusetts and Federal antidiscrimination statutes. At the commencement of, and continuing throughout, the trial, however, Everett took the position that the only issue for resolution by the jury involved events that had occurred in January, 1999.[15] His theory of liability now rested on the fact that in January, 1999, he had submitted to the company (in connection with his second grievance) new evidence that he had been working safely as a DOT certified commercial truck driver for other companies since 1997, and that the company refused for discriminatory reasons to recognize his qualifications and to rehire him at that time. The

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[15] Everett also argued at trial that he had not been terminated from his position at the company but that he had been on a leave of absence from the company from which he was wrongly prevented from returning, a theory we discuss infra.

company vigorously contested Everett's attempts to limit the evidence to events occurring in 1999. The company argued, in the main, that the 1999 claims were unrelated to the 1996-1997 events that formed the basis of Everett's MCAD complaint, and that, because Everett had not filed a MCAD complaint related to any 1999 action of the company, the 1999 claims should be dismissed. The judge denied Everett's attempts to limit the evidence to events beginning in January, 1999.

During the trial, the parties submitted proposed jury verdict forms. Everett's proposed jury verdict form focused exclusively on questions from January, 1999, and going forward. In contrast, the company's proposed jury verdict form focused exclusively on the company's refusal to reinstate Everett in July, 1996. The judge's proposed solution was to "compromise" to "reflect[ ] the different views," which he found essentially irreconcilable. His proposed jury verdict form included as a separate question the allegations of discrimination that occurred in July, 1996, and as a separate question the allegations of discrimination that occurred on January 12, 1999. The company objected to the judge's proposed verdict form "because January 12, 1999 was never pled in the complaint" and did not appear in "the [MCAD] charge of discrimination," and that "[w]e only heard about 1999 two weeks ago when this trial began." Everett in turn objected to the judge's "compromise" on the grounds that the questions would be confusing because "[w]e're not making any claims for any damages that have occurred prior to January 12, [1999]," and "you are placing a burden on the plaintiff to

produce evidence . . . about claims that the plaintiff is not making." The judge refused to modify his proposed verdict form.[16]

Everett's final, and most direct, attempt to refocus the trial on his claim that liability rested solely on events that occurred in January, 1999, took place the day the jury began their deliberations. That morning, Everett submitted a motion to amend the complaint to conform to the evidence. In his motion, Everett "waived all claims for damages prior to [January 12, 1999]" (emphasis added). In his proposed amended complaint he claimed damages only for the "[company's] discriminatory actions on and after January 12, 1999" (emphasis added). Everett's counsel conceded that the move was a tactical one. He told the judge, "We don't have to make an argument for something we feel we may have difficulty proving. . . . Now, they don't like our theory of the case, and they don't like the fact that we've switched." The company's counsel vigorously objected to the motion and stated that the company would press its argument that the 1999 claims were not before the MCAD in a motion for judgment notwithstanding the verdict. The judge reserved decision on Everett's motion to amend the complaint, and sent the case to the jury. In his closing argument, Everett's counsel made clear to the jury that "Mr. Everett is not making any claims whatsoever for any damages for events that occurred before January 12,

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[16] The judge told Everett's counsel, "You want to negate everything the employer did in [1996], and you want to start the whole thing over in [1999]. That's not -- those aren't the facts in this case."

1999."

The verdict form ultimately submitted to the jury required the jury to determine separately whether the company discriminated against Everett from "July 1996 to January 1999," and separately whether the company discriminated against Everett in "January 1999."[17] As to the 1996-1997 claims, the jury found that the company "terminate[d]" Everett in 1996 "due to a reasonable probability of substantial harm to the employee or others" (question 3A), i.e., the termination was lawful. They

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[17] The verdict form presented the following questions:

"1. Do you find that Mr. Everett proved by a preponderance of the evidence that [the company] terminated [Everett] or failed to rehire him as a commercial truck driver at any time from July 1996 to January 1999, because they regarded him as a disabled or handicapped person who was not qualified to drive a commercial motor vehicle because of that disability or handicap?" The jury answered, "Yes."

"2. Do you find that Mr. Everett proved by a preponderance of the evidence that when he applied to be rehired by [the company] in January 1999, he was qualified to be a commercial truck driver?" The jury answered, "Yes."

"3A. Do you find that [the company] proved by the preponderance of the evidence that their decision <u>to terminate</u> Mr. Everett in July 1996 was due to a reasonable probability of substantial harm to the employee or others?" (Emphasis added.) The jury answered, "Yes."

"3B. Do you find that [the company] proved by the preponderance of the evidence that their failure to rehire Mr. Everett in January 1999 was due to a reasonable belief that he posed a significant risk of substantial harm to the health and safety of himself and others." The jury answered, "No."

"4. How much money would compensate Mr. Everett for his loss in wages, health insurance costs and lost pension resulting from the refusal of [the company] to allow [Everett] to return to work as a truck driver as of January 12, 1999?" The jury answered "$757,701."

found that Everett was "qualified to be a commercial truck driver" in 1999 (question 2), and that the company's "failure to rehire" him in 1999 was not for valid reasons (question 3B). The jury awarded Everett $757,701 for lost wages, insurance costs, and lost pension for the company's failure to allow him to return to work as a truck driver "as of January 12, 1999" (question 4). Stated differently, the jury found the company liable for its "failure to rehire" Everett "as of January 12, 1999" only, and awarded damages to Everett on that basis alone. After the jury returned their verdict, the judge allowed Everett's motion to amend the complaint, to which the company again objected.

The following day, the company made good on its promise to move for judgment notwithstanding the verdict or for a new trial.[18] As one of the grounds for its motion, the company asserted that Everett could not pursue claims in the Superior Court based on events occurring in 1999 because Everett had neither filed a separate complaint with the MCAD pertaining to any 1999 conduct nor amended his earlier MCAD complaint to include allegations pertaining to 1999 events.[19] On June 1,

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[18] At the close of Everett's evidence, the company had moved for a directed verdict, which was denied. At the close of all of the evidence, The 357 Corp. had renewed its motion for a directed verdict, which was again denied.

[19] The company's motion for judgment notwithstanding the verdict asserted, in part, that "[t]he court erred in allowing the plaintiff to introduce a claim sounding in discrimination relating to purported conduct occurring in 1999, without having first filed the action before the MCAD, and that "[s]ince such a filing is a prerequisite to any such 1999 allegations, any trial reference to the same as either a point of fact or as a basis for the [p]laintiff's damages is incorrect."

2005, the judge denied the company's motion. He subsequently allowed Everett's motions for fees and costs in an amount of $370,678.58 and for entry of final judgment.

Against this factual and procedural background, we proceed to the issues for decision.

3. Discussion. The denial of a motion for judgment notwithstanding the verdict presents questions of law that we review under the same standard used by the trial judge. This requires us to construe the evidence in its light most favorable to the nonmoving party, here Everett, and to disregard that favorable to the moving party, here the company. O'Brien v. Pearson, 449 Mass. 377, 383 (2007), and cases cited.

a. Statutory scheme. We begin with a brief summary of the statutory scheme governing the scope of discrimination claims filed in the Superior Court pursuant to G. L. c. 151B and the ADA.[20]

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The company had not included this ground in its motion for a directed verdict. See note 18, supra. It likely could not have done so because the judge had not at the time ruled on Everett's motion to amend the complaint. In any event, in his opposition to the company's motion for judgment notwithstanding the verdict Everett made no argument that the company had waived the point. "The general rule is that 'no grounds for the motion for judgment notwithstanding the verdict may be raised which are not asserted in the directed verdict motion.' . . . However, if the nonmoving party fails to object to the consideration of new grounds in deciding whether to grant the motion, then the nonmoving party is said to have waived the right to object on appeal." Fox v. F & J Gattozzi Corp., 41 Mass. App. Ct. 581, 583 (1996), quoting Bonofiglio v. Commercial Union Ins. Co., 411 Mass. 31, 34 (1991), S.C., 412 Mass. 612 (1992).

[20] See Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 451 n.6 (2002) ("We look to the Federal cases decided under the ADA as a guide to the interpretation of G. L. c. 151B");

The MCAD has been charged by the Legislature with addressing certain types of discrimination in the Commonwealth, including handicap discrimination. See Lynn Teachers Union, Local 1037 v. Massachusetts Comm'n Against Discrimination, 406 Mass. 515, 523 (1990). See also 42 U.S.C. § 2000e-5 (same for EEOC). To effectuate the statute's broad remedial purpose, G. L. c. 151B provides that, before a complaint may be filed in the Superior Court, a plaintiff must first file with the MCAD "a verified complaint in writing," which shall "set forth the particulars thereof and contain such other information as may be required by the commission." G. L. c. 151B, § 5. See G. L. c. 151, § 9; 42 U.S.C. § 2000e-5(e) (same for ADA claims). The purpose of the administrative filing is "(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." Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 531 (2001). See Galambos v. Fairbanks Scales, 144 F. Supp. 2d 1112, 1124-1125 (E.D. Mo. 2000) (to exhaust administrative remedies entitling claimant to bring action under ADA, claimant must give notice of claims of discrimination in administrative complaint).

The predicate of administrative filing is mandatory to

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Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 126 n.3 (1st Cir. 2009), quoting Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 20 n.5 (1st Cir. 2005) ("Chapter 151B 'tracks the ADA in virtually all respects'").

filing a civil suit. It may not be waived.[21] Without the predicate filing in MCAD, the Superior Court has no jurisdiction to entertain the claim of discrimination. See Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 531 n.11 (2001) ("A claim cannot be brought alleging discrimination under G. L. c. 151B, unless it is preceded by the filing of a complaint of unlawful discrimination with the MCAD within six months of the alleged act or acts of discrimination"); Charland v. Muzi Motors, Inc., 417 Mass. 580, 585 (1994) (Legislature intended "to subject all discrimination claims [under G. L. c. 151B] to some administrative scrutiny"); Fant v. New England Power Serv. Co., 239 F.3d 8, 11 (1st Cir. 2001) ("A party who wants to file a civil action charging discrimination in employment under Chapter

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[21] Failure to file a timely charge is subject to waiver, estoppel, and equitable tolling. See National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002); Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 817 (1988). Where the issue is the absolute failure to file a charge, the defect precludes a court from exercising jurisdiction over any subsequent lawsuit alleging discrimination under G. L. c. 151B or the Americans with Disabilities Act (ADA). See National R.R. Passenger Corp. v. Morgan, supra; Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 531 n.11 (2001). Everett presses no estoppel or equitable tolling argument that would excuse his failure to file a charge regarding his 1999 allegations. His waiver argument is not persuasive because it is not supported by the record. See note 19, supra.

Similarly unconvincing is Everett's argument that filing a complaint in the MCAD for the 1999 events would have been futile. Everett contends that because the company would never rehire Everett in any circumstances due to its belief that he was mentally unstable, resort to the MCAD would merely increase costs, and delay the inevitable court proceedings. We will not speculate on how the MCAD investigation might have proceeded in the face of Everett's filing charges based on events occurring in 1999, or the company's response to such an investigation had it been initiated. See note 24, infra.

151B must first file the charge with the MCAD"). See also Green v. Wyman-Gordon Co., 422 Mass. 551, 557-558 (1996) (procedural requirements of G. L. c. 151B may not be evaded by attempting to recast c. 151B claims under other statutory provisions; court will not create new common-law remedies to evade c. 151B procedural requirements). Cf. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002) (pursuant to 42 U.S.C. § 2000e-5, party must file a charge "or lose the ability to recover for it").

The mandatory administrative filing does not require a plaintiff to await a determination by the MCAD prior to filing a civil suit. General Laws c. 151B, § 9, permits a plaintiff to remove the case to the Superior Court on "the expiration of ninety days after the filing of a complaint with the [MCAD], or sooner if a commissioner assents in writing." This requirement permits the MCAD to determine whether the public interest in enforcing antidiscrimination laws would be served by bringing a civil administrative proceeding under G. L. c. 151B, § 5. See Cuddyer v. Stop & Shop Supermarket Co., supra at 531; EEOC v. Waffle House, Inc., 534 U.S. 279, 292 (2002) (same for EEOC).

Where, as here, an MCAD investigation is completed, the plaintiff's administrative complaint establishes the nature of the specific charges of discrimination and the alleged factual underpinnings of those charges. The complainant may bring additional charges within the scope of the investigation by amending his MCAD complaint to "allege[] additional acts constituting unlawful discriminatory practices related to or