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Mass. At-Will Termination Gets Complex For Employers

By Chris Pardo and Elizabeth Sherwood
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Depending on the circumstances, Massachusetts now protects at-will employees from termination when they respond to legitimate performance critiques from supervisors in an intemperate and contentious manner.

But what does that actually mean? Let's set the scene — one that many employers will find eerily familiar:

You supervise an at-will employee who has been performing poorly. You decide that, rather than firing him on the spot, you are going to meet with him, explain exactly what the problems with his performance are, and give him a chance to change course — together with a performance improvement plan, or PIP, which provides the employee an opportunity to respond.

You hope the meeting made a positive impact and look forward to seeing improvement in your valued colleague, but two weeks later, the employee sends a hot-headed email complaining about every aspect of the performance review, calling you names, making factual misstatements about his performance and challenging your basic competence as a manager, which you know is not warranted. You read the email and are disgusted.

You convene a meeting with company leadership to discuss the email. The decision is made to fire him. He's an at-will employee, after all, and he's obviously not learning anything from your helpful feedback. No problem, right?

While individual circumstances matter and will impact the analysis, the general answer in much of the country is that firing an at-will employee for sending a nasty email to his boss, complaining about a performance review and in the process making it clear he will not improve his performance, is a no-brainer.

But the Massachusetts Supreme Judicial Court's recent interpretation of the Commonwealth's Personnel Records Law, Massachusetts General Law Chapter 149, Section 52C, changes that analysis for employers operating in Massachusetts.

The Personnel Records Law provides employees with a legal right to submit written rebuttals to any negative information contained in a personnel file if the employee disagrees with the content of the information. Once submitted to the employer, the written rebuttal becomes a permanent feature of the employee's personnel file and exists to provide context surrounding the negative review for future reviewers and employers.

Loosely tracking the above hypothetical, the Meehan v. Medical Information Technology Inc. case concerned a Meditech employee, Terrence Meehan, who was placed on a PIP following a negative

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performance review. Two weeks later, he submitted a lengthy written rebuttal to the PIP. Though the record does not reflect the actual contents of the rebuttal, they were clearly unacceptable to Meditech. Meditech's management team met to discuss the written rebuttal and decided to fire Meehan.

Meehan acknowledged he was an at-will employee, such that under Massachusetts law he could be "fired for any reason or no reason." Nonetheless, he advanced the novel legal argument that the Personnel Records Law provided a public policy exception to the law of at-will employment, such that retaliation for exercising his right to submit a written rebuttal amounted to wrongful termination.

Meditech filed a motion to dismiss, arguing that no such public policy existed — and even if it did, Meehan was also fired for making a disparaging comment to a colleague. Though the latter argument was not considered at the motion to dismiss stage given the court's obligation to take all well pleaded facts as true, Meditech was successful at the trial court stage and again at the appellate court level.

The lower courts acknowledged that the right to submit a rebuttal was codified in the Personnel Records Law but reasoned that the right to rebuttal was "neither sufficiently important nor clearly defined" as would be required to qualify for the public policy exception to at-will employment.[1]

Further, the appellate court noted the risk of the courts becoming "super personnel departments," in contravention of decades of Massachusetts precedent, if the right of rebuttal was elevated to public policy exception status because it concerned the "internal administration, policy, functioning and other matters of an organization" prohibited from qualifying as public policy.[2]

On Dec. 17, 2021, the Supreme Judicial Court for the Commonwealth of Massachusetts reversed both lower courts and allowed Meehan's lawsuit to proceed.[3] The court explained that allowing employers to terminate employees in retaliation for submitting written rebuttals amounted to "sticking a finger in the eye of the legislature."[4]

This embrace of a statutorily undefined public policy exception to at-will employment based on the Personnel Records Law left two open questions:

- Will performance review rebuttals insulate employees against legitimate terminations for poor performance?
- How will courts determine whether a termination is for exercising the right to rebuttal, versus a legitimate termination due to offensive or inaccurate contents of the rebuttal?

The court's open-ended responses to both questions should give Massachusetts employers pause.

As to the first question, the court said that rebuttals would not insulate employees from legitimate terminations.[5] The court analogized that an employee given a negative review for poor attendance could still be fired if poor attendance continued regardless of whether a rebuttal was submitted.[6]

Conversely, the court said that if the poor attendance did not continue, but the employee was terminated after submitting a rebuttal, then the termination may not be lawful.[7]

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This formulation may give rise to new pretext and retaliation claims in Massachusetts. Employers should be prepared to meet these allegations head-on before firing any employee who has recently rebutted a performance review. Continued performance problems or new misconduct shortly following a rebuttal should be clearly documented in order to safeguard against these sorts of claims if the employee is ultimately fired.

What about threatening emails fired off to an employee's supervisor at 2 a.m., which are recharacterized by the employee as protected rebuttals in the light of day?

For these, an employer can terminate an employee for offensive materials in a purported rebuttal, but must exercise caution in doing so. The court concerningly explained that "where emotions inevitably run high, the exercise and expression of the right of rebuttal should not be grounds for termination when it is directed at 'explaining the employee's position' ... no matter how intemperate and contentious the expression in the rebuttal."[8]

The court drew the line only at "threats of personal violence, abuse or similarly egregious responses if they are included in the rebuttal."[9] As a result, employers now must carefully parse the line between "intemperate and contentious," and abusive if they expect to take disciplinary action on the basis of a personnel record rebuttal.[10]

Moving forward, Massachusetts employers are advised to use caution before terminating employees who have submitted written rebuttals, or who have submitted written materials which could be characterized as rebuttals, in connection with the Personnel Records Law.

Notes

1. Meehan v. Med. Info. Tech., Inc.,99 Mass. App. Ct. 95 (Jan. 20, 2021) (rev'd)

2. Id.

3. Meehan v. Med. Info. Tech., Inc.,SJC-13117, 2021 WL 5990887 (Dec. 17, 2021).

4. Id. at *5.

5. Id. at *5.

6. Id.

7. Id.at n.8.

8. Id.at *6 (emphasis added).

9. Id.

10. See id.

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Christopher Pardo *is a partner in the firm's Labor and Employment group in the firm's Boston office. A recognized problem-solver, Chris represents businesses and their executives across a broad spectrum of industries, focusing his practice on the defense of complex employment litigation, high-stakes commercial lawsuits and providing timely and thoughtful preventative advice to his clients.. He can be reached at +1 (617) 648-2759 or cpardo@HuntonAK.com.*

Elizabeth Sherwood *is an associate in the firm's Labor and Employment group in the firm's Boston office. An experienced litigator and problem-solver, Beth's practice encompasses all aspects of labor and employment litigation, advice and counseling. She can be reached at +1 (617) 648-2753 or esherwood@HuntonAK.com.*