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Shift In Disability Law Key To $800K Verdict

Cop's Bias Case Cements Earlier SJC Ruling

VERDICT Spotlight

A recent $847,000 discrimination award to a police officer with a hearing aid underscores the importance of an earlier ruling in the case — where the Supreme Judicial Court found that Massachusetts law rejects consideration of corrective devices in the determination of whether a disability affects a "major life activity."

Last year the SJC made that determination in *Dahill v. Police Department of Boston* after being asked to answer a certified question on the matter. The ruling, which rejected a defense motion for summary judgment, was considered a significant broadening of disability-bias liability.

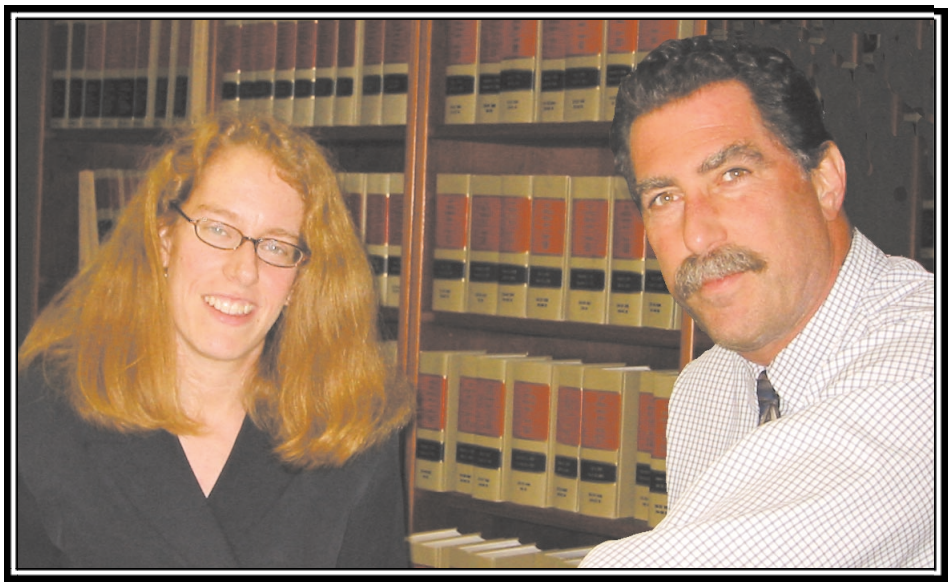
At trial, Shannon E. Liss-Riordan and Harold L. Lichten of Boston, co-counsel for the plaintiff, Richard Dahill, demonstrated that police officials and experts made erroneous conclusions about Dahill's hearing capacity and ability to perform his job.

Liss-Riordan said the expert witness for the police department basically testified: "Nobody with hearing aids can be a police officer."

But the plaintiff's team produced two weeks of testimony against that conclusion, sending to the stand three audio experts, a highly decorated officer from Illinois, three classmates from the plaintiff's police academy training and the plaintiff himself.

Liss-Riordan said the team also called Boston Police Commissioner Paul F. Evans and Dr. L. Kristian Arnold of the police department to establish elements of the plaintiff's case.

In addition, she said that independent discovery and investigation also produced other police officers who had a record of solid job performance with use of hearing aids.



SHANNON E. LISS-RIORDAN and HAROLD L. LICHTEN
Co-counsel for plaintiff in 'Dahill'

Liss-Riordan added that this was a classic case of "the defense throwing up a lot of things to see what will stick," and said the trial was a good demonstration of a successful counter-attack on multiple fronts.

A Failure To Communicate

The plaintiff was born with a severe hearing impairment, and uses hearing aids to attain a normal range of hearing.

He has otherwise lived a normal life, graduated from college and law school, and worked as a lifeguard and a teacher.

In 1996, he applied for a position as a Boston police officer, and he received a conditional offer of employment in early 1997, subject to a medical exam.

Arnold, the department physician, determined that the plaintiff's condition might or might not present a safety risk to the plaintiff and others.

The plaintiff subsequently entered a 26-week training program for all new officers.

During the program, he did not respond to certain oral communications in training exercises and did not respond to a command to retrieve water bottles, but otherwise performed satisfactorily.

The department concluded that the failures to respond were a result of his hearing, and terminated his employment shortly after pulling him out of line at the swearing-in ceremony of the police academy.

In 1998, the plaintiff filed suit for discrimination under federal and state law in U.S. District Court.

Prior to trial, the Supreme Judicial Court, acting on a certified question of law, determined that Massachusetts law rejects consideration of corrective devices

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in the determination of whether a disability affects a "major life activity."

This ruling defeated a summary judgment motion by the defense, and paved the way for a groundbreaking courtroom battle.

Experts And Impeachment

Liss-Riordan demonstrated to the jury that police expert Dr. Sigfried Soli had been retained by employers in nine other cases to testify that people with severe hearing damage can't do their jobs safely.

The $500-per-hour expert examined an audiogram test, and concluded that the individual with that test result could not be a police officer. The expert also said that hearing aids could be ruined by moisture or shaken loose by contact during duty.

But Liss-Riordan shattered the expert's testimony by producing the person who took the audiogram in question.

"He was an Illinois state trooper with 12 years of experience who was promoted to sergeant. He had a whole book of awards and recognitions for his accomplishments," she said.

"He also testified that the hearing aids never gave him problems even while making arrests and getting attacked in the crack houses of East St. Louis," she added.

Liss-Riordan also noted that the defense was surprised to see a number of local officers with hearing aids on the witness list.

"We could not find any of those officers in discovery, so we did our own investigation through our own contacts," she said.

Liss-Riordan conceded it was possible the police department was not even aware that some officers used the devices on the job, perhaps after being hired without them.

The defendant's expert also testified that the plaintiff had trouble "localizing" sound amidst background noises and interference, but the plaintiff's team produced three experts to refute that.

Liss-Riordan explained that her team deliberately chose experts who were not professional witnesses and persuaded them to testify.

The first expert, Dr. Edward Reardon, specialized in treatment of the eyes, ears, nose and throat. He was an expert on audiograms and testified that the plaintiff could hear barely audible whispers with his aids, as well as a wide range of tones.

The second expert was Dr. Mead Killion, an audiologist and founder of a research clinic in Illinois, who has been called, "the grandfather of the modern hearing aid." Killion was a reluctant witness, but decided to testify when he heard about the opposing expert's position.

Killion explained that inner ear hair cells were the key to localizing sound and isolating background noise. He saw no problem with the plaintiff's physiology.

He also explained that speech discrimination tests were essential to assessment of hearing problems, but the defendant never performed those tests.

Finally, Dr. David Citron testified as an audiologist that modern hearing aids perform well in moisture and sweat, and can be dehumidified and cleaned.

He also noted that ear molds for holding aids in place utilized technology from the National Football League for radio communication with quarterbacks.

Credibility

The plaintiff's team purposely decided not to call experts for proof of damages, as they wanted the plaintiff to tell his own story without embellishment.

The award covered lost pay, overtime and detail, plus emotional distress. Liss-Riordan said the verdict was not itemized, but the proof showed that the plaintiff earned $88,000 less in base pay at other jobs, and that the average officer would have earned over $100,000 in detail pay during that time.

Lichten concluded that "the jury understood how emotionally devastating it must have been for Dahill to be pulled out of his swearing-in ceremony while his Academy classmates were allowed to graduate, and then to be excluded from the police department for more than four years."

He said the plaintiff "will never get those years of experience back."

Lichten and Liss-Riordan also made multiple attacks on the defendant's contentions that the plaintiff failed to hear communications in training exercises.

In one instance, the plaintiff did not respond to a radio communication during a simulated foot chase.

Liss-Riordan said the plaintiff was supposed to acknowledge a communication before going into action, but simply did not.

"The instructor assumed it was because his hearing failed, but many recruits make the wrong response and get the opportunity to do exercises over again. Dahill got it right the second time," she added.

On another occasion, an instructor asked the plaintiff to retrieve certain water bottles, but he failed to respond simply because he had taken out his hearing aids without knowing he would be getting commands at the time.

He testified at trial that he would have purchased spare hearing aids to use during cleaning or maintenance if he passed the academy, a practice followed by other hearing-impaired officers.

The defendant also contended that the plaintiff did not hear a gunshot in the middle of background noise in a firearms training simulator known as FAST.

According to Liss-Riordan, "The instructor again assumed he did not hear the shot, and asked him to repeat by word every event in the simulator, but other recruits who made mistakes were not asked to do that."

She showed the jury that the plaintiff had a reason for not making an immediate response, and that he also passed 11 video scenarios on FAST where other recruits handled five or less.

She also noted that reports showed only one officer present during the exercises, yet three officers were scheduled to testify, so they moved to sequester the witnesses.

"One testified he was the only one at the exercise, and the three were all inconsistent as to which scenario Dahill did not hear properly," she recalled.

Liss-Riordan also called Arnold to testify for the plaintiff.

"He testified that Dahill went left to exit his office when he was told to go right. Many people could have done that and it was not a function of hearing," she said.

Arnold also testified that he relied on a report by an independent doctor in concluding that the plaintiff had hearing problems even with corrective devices.

"Then I noticed that the fax report from [the outside doctor] to Arnold was dated Aug. 29 in the fine print at the top of the page, and Arnold had testified he made the decision Aug. 28," recalled Liss-Riordan.

"I could see three jurors laughing when I put this on a screen," she said.

Liss-Riordan suggested the incident illustrated "how important it is to pay attention to the unfolding drama in the courtroom, and not get stuck on a script."

But she conducted a tight and narrow examination of Evans.

"We did not want to make him look bad or attack him," she said.

Still, Evans was a critical witness because he officially made the termination decision and testified that he relied upon Arnold's medical assessment. Liss-Riordan wanted to show how the decision was made within the department.

"He also testified that he was friendly with Dahill's family, as they were neighbors, and this was a tough decision for him," recalled Liss-Riordan.

She did not subject him to a stern examination, but simply called Dahill's father to testify that the families did not socialize and basically did little more than exchange greetings in the driveway.

She also called three officers who graduated from the academy with the plaintiff, and they testified that they would "be proud to be his partner."

Liss-Riordan concluded, "It was a thrill to get my first big win in this case," and she added that Dahill would now return to the force nearly four and a half years after he officially left the department on Sept. 11, 1997. MLW

— JOHN O. CUNNINGHAM

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