MASSACHUSETTS MUNICIPAL ASSOCIATION
Connect 351

LABOR LAW UPDATE

January 2025

PRESENTED BY
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MASSACHUSETTS MUNICIPAL ASSOCIATION
CONNECT 351

January 24, 2024

Presented By:

D. M. Moschos, Esquire[1]

UPDATE ON LABOR COURT CASES AND LEGISLATION[2],[3]

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3 Remarks and handouts are for informational and training purposes only and do not constitute legal advice. You should contact Labor Counsel concerning any specific legal questions you may have.

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I. LEGISLATION

1. Massachusetts Civil Service Reform Legislation

On November 20, 2024, Governor Healey signed into law an economic development bill, titled *An Act Relative to Strengthening Massachusetts' Economic Leadership*, or the Mass Leads Act (Chapter 238 of the Acts of 2024).

a. The Act includes substantial reforms to the Commonwealth's civil service laws that are intended to provide more hiring flexibility for key civil service positions in police and fire departments.
b. Among these changes is the creation of a new "hybrid" hiring pathway that allows participating municipalities to fill up to 50% of entry-level police and fire department positions without going through the traditional civil service exam process.
c. This reform will permit departments to consider prospective hires from the pool of "hybrid" candidates immediately, regardless of whether they have completed a civil service examination at that time.
d. Once the candidate satisfies all requisite background and medical checks, the state's Human Resources Division would authorize that individual's employment, subject to completion of studies at an approved police or fire academy.

2. Massachusetts Pay Transparency Act

On July 31, 2024, Governor Healey signed a new law providing for pay transparency, denominated as Chapter 141 of the Acts of 2024. This Act has two key provisions: (1) the posting of a disclosure of salary ranges for employees' job classifications; and (2) the filing of equal employment opportunity reports sent to the federal government, to also be filed with the Secretary of State on February 1.

i. The Posting of Salary Ranges

For employers of 25 or more employees, the law requires for each job posting it, shall include the annual salary or hourly wage range that the employer "reasonably and in good faith expects to pay for the position." It appears that the salary range is the base wage for the position and does not include stipends and other pay benefits. This section of the law is effective on October 29, 2025.

The posting requirement applies to the following activities:

a. Any advertisement of a job posting for the recruitment of a specific position, whether completed directly by the Employer or by a third party for the Employer.
b. In any offer of promotion, the employer shall provide the pay range for that position.
c. For a transfer to a new position with different job responsibilities, the employer shall provide the pay range for the new position.
d. The release of the pay range for a specific position to an employee holding the position or to an applicant for such position upon their request to the employer.

ii. Filing of EEO Reports with the Secretary of State

All employers meeting the threshold will have to file EEO reports also with the Secretary of State as outlined below:

a. Private employers of more than 100 employees have to annually file their EEO-1 reports with the Secretary of State by February 1, 2025, and thereafter annually.
b. State and local government information report EEO-4 needs to be filed with the Secretary of State by the public employer every other year by February 1. Public employers subject to the EEO-4 filing are not required to do so until February 1, 2026.
c. Elementary and secondary schools subject to the EEO-5 data report need to also file their reports with the Secretary of State every other year on February 1.

The law specifically provides that such filing will not be subject to the Public Records Law. The Secretary will organize the documents for transmittal to the State Secretary of Labor and Workforce Development, who shall publish on its website the aggregate wage data reports. The Secretary of Labor will have to publish such reports by July 1, annually.

iii. Enforcement of the Pay Transparency Act

The statute provides exclusive jurisdiction for the enforcement of the law with the Attorney General and does not provide an employee with a private right of a lawsuit against the employer.

Violation of this Act is subject to fines, with the first offense being a warning and subsequent offenses subject to monetary penalties. The Act does not authorize triple damages like the Wage Act.

iv. No Retaliation or Discrimination

The Act contains new retaliation and discrimination provisions protecting an employee who exercises their rights under the posting provisions of this Act.

3. New FLSA Overtime Regulations for Exempt Employees

The United States Department of Labor has adopted new regulations as of July 1st, 2024, regarding the salary weekly requirements for exempt employees. To be exempt from FLSA overtime rules, exempt employees must meet a salary and duties test. The new salary requirements are as follows:

a. The salary requirement before July 1, 2024, was $684 per week, which is equal to $35,568 per year.
b. Effective as of July 1, 2024, the minimum salary payment per week will be increased to $844, or if annualized, will be equal to $43,088.
c. On January 1, 2025, the $844 will be increased to $1,128 per week or if annualized, will increase to $58,656.
d. In addition, the highly compensated employee duties exemption, which limits the number of duties requirements, has been increased from $107,432 per year to $132,964 per year, as of July 1, 2024, and will be increased to $151,164 per year, effective January 1, 2025.
e. Finally, the Department of Labor rules provide that the annual salary exemption will be reviewed in 2027, and every three years thereafter, in order to keep the figures updated for inflation.
f. The Federal District Court of Texas has enjoined the enforcement of the Regulations pending the suit challenging the legally of the Regulations.

4. Expansion of Massachusetts Earned Sick Time Law

As of November 21, 2024, amendments to the Massachusetts Earned Sick Time statute now permit workers to use their earned sick time to "address the employee's own physical and mental health needs, and those of their spouse, if the employee or the employee's spouse experiences pregnancy loss or a failed assisted reproduction, adoption or surrogacy."

a. The amendment does not define "pregnancy loss" or "failed assisted reproduction, adoption or surrogacy" (presumably meaning miscarriage, stillbirth, etc.)
b. "Assisted reproduction" – potentially includes in vitro fertilization (IVF), intracytoplasmic sperm injection (ICSI), intrauterine insemination (IUI), etc.

5. Social Security Fairness Act

On January 6, 2025, President Biden signed the Social Security Fairness Act into law, officially repealing two tax provisions that had previously operated to reduce benefit payments for some public servants.

a. The Windfall Protection Provision (WEP) reduced the Social Security benefits available to retirees who spent a portion of their career in the private sector in addition to a government job where Social Security was not intended as an element of their retirement income, such as the civil service retirement system.
b. The Government Pension Offset (GPO) reduced spousal and survivor Social Security benefits in families with retired government workers.
c. This reform will effectively increase Social Security benefits for millions of pensioners, some of whom could see their monthly benefits increase by up to $500.

6. Violent Assault Disability Benefits for First Responders[3]

On July 31, 2024, Governor Healey signed Chapter 149 of the Acts of 2024, *An Act Relative to Disability Pensions and Critical Incident Stress Management for Violent Crimes* ("Violent Assault Disability"). This Act creates an enhanced new type of G. L. c. 32, § 7 accidental disability retirement benefit for firefighters, emergency medical technicians, licensed health care professionals, and certain police officers who become permanently physically disabled with a catastrophic, life-threatening or life-altering bodily injury disability as the result of a Violent Act Injury by means of a dangerous weapon.

a. The effective date of this Act is October 29, 2024, and the Violent Act Injury disability will be available to any member who qualifies and has not been approved for disability as of that date.
b. Anyone who has previously been approved for disability is not eligible to have the provisions of this act apply to their retirement allowance and their benefit cannot be recalculated.

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[3] See Attachment A, PERAC Memo #28: Violet Assault Disability: Chapter 149 of Acts of 2024, Page 1 of Memo, with link to full article.

i. Definition of "Violent Act Injury"

"Violent Act Injury" is defined in G.L. c. 32, § 1 as: "A catastrophic, life-threatening or life-altering and permanent bodily injury sustained as a direct and proximate result of a violent attack upon a person by means of a dangerous weapon, which is designed for the purpose of causing serious injury or death, including, but not limited to, a firearm, knife, automobile or explosive device."

In order to qualify for a disability under the Violent Act Injury provision a member must demonstrate, and the retirement board must determine that all three of the following elements are established:

a. That they suffered a catastrophic, life-threatening or life-altering permanent bodily injury;
b. That the injury was the direct and proximate result of a violent attack upon a person, which means the injury must result from an intentional physical act, and not result from an accident or from negligence; and
c. That the attack was by means of a dangerous weapon as defined in this statute – i.e., "designed for the purpose of causing serious injury or death."

As the definition of a "Violent Act Injury" makes clear, this enhanced disability benefit is not for every instance in which a member suffers a disability in the line of duty. The definition clarifies that the permanent bodily injury must be of a catastrophic, life-threatening or life-altering nature. The definition states that the injury must be a permanent bodily injury and Section 2 of the Act amends paragraph (1) of Section 7 to make clear that the member must be physically unable to perform their essential duties. These two provisions mean that only physical injuries qualify a member for the Violent Act Injury disability. Therefore, psychological and emotional disabilities do not and will not qualify.

A catastrophic, life-threatening or life-altering injury must be something that goes beyond preventing a member from being physically able to perform the essential duties of their position (the current disability standard and still available to all). The Massachusetts Public Employee Retirement Administration Commission (PERAC) intends to initiate a regulatory process that will define these terms. Until that time, as an illustration, PERAC highlights the following example of the United States Department of Labor Office of Workers' Compensation Programs definition of "catastrophic:"

> …those in which the injured worker (IW) has sustained life-threatening injuries or the injury has resulted in extensive functional deficits where the medical recovery is expected to extend over a long or indefinite period of time (traumatic head or spinal cord injuries, severe burns, strokes, multiple fractures, amputations, etc.). Catastrophic cases are primarily those cases involving multiple and/or complex medical conditions and involve multiple and various medical specialists and other health care professionals.

By no means are these the only examples of "catastrophic," but this definition is included to illustrate the nature of injuries rising to this level.

In addition to requiring that the member suffer a catastrophic, life-threatening or life-altering permanent bodily injury that injury must be the result of a violent attack upon the member by the means of a dangerous weapon. A dangerous weapon in this statute is defined as a weapon "which is designed for the purpose of causing serious injury or death, including, but not limited to, a firearm, knife, automobile or explosive device." Thus, an assault or violent attack on a member must be perpetrated by the use of a weapon which is designed to injure or kill, not simply an everyday item that is used in the attack. A member who is punched or kicked and sustains serious injury would not qualify for the enhanced disability under this provision because such an assault does not involve a dangerous weapon that was designed for the purpose of causing serious injury or death.

While an automobile is not designed for the purpose of causing serious injury or death, it is specifically listed in the statute. In order for an injury from an automobile accident to qualify under this statute, it must be demonstrated that the automobile was intentionally used in a violent attack upon the member. A typical automobile accident, or one lacking a violent intent, will not qualify for the enhanced benefit.

ii. Who Qualifies for The Violent Act Injury Disability?

Section 3 of Chapter 149 of the Acts of 2024 inserts a new clause (iv) into Section 7(2) of Chapter 32 that details the benefit amount and specifies the limited group of members who may qualify for consideration under the Violent Act Injury provision. That clause limits the potential candidates to the following:

Notwithstanding clauses (i) to (iii), inclusive, a yearly amount of pension for any firefighter, any call, volunteer, auxiliary, intermittent or reserve firefighter, any call, volunteer, auxiliary, intermittent or reserve emergency medical services provider who is a member of a police or fire department and who is not subject to chapter 152, any police officer, any auxiliary, intermittent, special, part-time or reserve police officer or any municipal or public emergency medical technician or licensed health care professional…

Accordingly, the Violent Act Injury is NOT available to all public employees. Indeed, the Violent Act Injury benefit is potentially available only to police officers, firefighters, EMTs and other licensed health care professionals. State Police do not qualify for the Violent Act Injury benefit because they do not retire under Section 7 of Chapter 32. State Police benefits are determined under Section 26 and no reference to the Violent Act Injury benefit was inserted into Section 26.

iii. Benefits

A member found to be disabled under Section 7 receives an accidental disability retirement benefit that provides for a pension of 72% plus an annuity. Under the new Violent Act Injury provision, however, a member receives a benefit equal to 100% of the regular rate of

compensation which would have been paid to the member had they continued in service at the grade held by the member at the time of their retirement. This 100% benefit includes all compensation, including stipends, that were being paid to the member on the date of injury and which were included as pensionable earnings. This 100% benefit is adjusted in the same manner as a Section 100 benefit and is payable to the member until their death or until they reach mandatory retirement age.

Upon retirement the member receives a lump sum payment from the retirement board equal to the member's total accumulated retirement deductions.

The statute further provides that, upon reaching the mandatory retirement age for the position, if applicable, the member's benefit must be reduced to 80% of the average annual rate of compensation paid to the member in the previous 12 months. This 80% amount will be adjusted annually by any cost-of-living increases ("COLAs") that a retirement board approves. This benefit level will continue until the member's death. If there is no mandatory retirement age then the benefit does not get reduced from the 100% level but continues unchanged.

If the member predeceases their spouse, prior to the mandatory retirement age, then the spouse is entitled to 75% of what the member would have received had they not died. The spouse's benefit, upon the date the member would have reached mandatory retirement, becomes 75% of the benefit the member would have received at the time they reached mandatory retirement (75% of the 80% benefit). This amount would then be increased by any COLAs that a retirement board approves. If the member was in a position that was not subject to a mandatory retirement age then the benefit for the spouse will be 75% of the amount that the member would have received had they not died.

Upon the death of the member the spouse shall be eligible for the 75% specified in Section 7. The Violent Act Injury disability specifies which benefits a surviving spouse is eligible to receive and thus a surviving spouse is not eligible for a Section 9 benefit. Under Chapter 32 a member or beneficiary is not eligible to receive two benefits on account of one member.

If the member and their spouse predecease their children and any of the member's children are unmarried, under the age of 18 or under age 22 and full-time students, or are over age 18 but physically or mentally incapacitated from earning income on the date of the member's retirement, such children shall be entitled to a benefit equal to 75% of the amount of the pension payable to the member at the time of their death. This benefit would be split equally between all eligible children. When a child is no longer eligible for their portion of the benefit it shall cease and the other children will continue to receive their original portion. The benefit of the remaining children is not increased when one of their number is no longer eligible.

Upon retirement under the Violent Act Injury provision the member's benefit will be paid as an Option A allowance. The member's accumulated total accumulated deductions are returned to the member and therefore there can be no Option B beneficiary. Likewise, the Violent Act

Injury provision specifies benefits that are available to beneficiaries such as the spouse and children, and, therefore, precludes the naming of an Option C beneficiary.

iv. Post-Retirement Earnings

Members retired under the Violent Act Injury clause have different earnings limitations than those established by Chapter 32 Sections 91(b) and 91A. A member retired under the Violent Act Injury may earn up to ½ of the amount of their retirement allowance if they work in the public sector. They are prohibited from doing any work in a position classified in Group 3 or Group 4. Members may be employed in the private sector or by a private entity without any earnings or hours restrictions, provided that service is not devoted to the Commonwealth, or a city, town, district or authority, therein.

v. Critical Incident Stress Management

A new subdivision (7) has been added to Section 7 by Chapter 149 of the Acts of 2024 which requires that those members eligible for the Violent Act Injury disability shall be provided with notice of critical incident stress management debriefing programs, including the location and times for the programs and contact information. This is the responsibility of the employer and does not require any action by the retirement board.

vi. How Should Boards Handle Applications for a Violent Act Injury Disability?

The Member's Application for Disability Form and the Employer's Involuntary Disability Application will be updated to provide for the option of a member or the employer to apply for an accidental disability with a Violent Act Injury. Once the Board receives an application in which the member or the employer has selected this option, the Board will process it like any other disability, by gathering the same information and any forms that are required for a Section 7 ADR application.

If a Board receives an application for voluntary or involuntary ADR that does not check off the Violent Act Injury provision, but the Board determines that the situation would merit consideration of the application under that provision, then the Board should discuss it with the member or employer and amend the application if warranted.

Likewise, if a Board receives an application for ADR in which the member or employer checks off the Violent Act Injury provision, but the Board has reason to believe that the member may not be eligible due to the above-listed restrictions of the provision, then the Board should notify the member or the employer of those restrictions and the member or employer will have the opportunity to adjust the application accordingly.

Unlike the majority of G.L. c. 32, Section 7 applications, Violent Act Injury applications MUST include Board Findings of Fact, which must be submitted to PERAC for its 30-day disability review process. Findings of Fact for a Violent Act Injury application are essential to ensure that the injury sustained qualifies for the enhanced benefits of this provision. The Findings of Fact should detail the injury sustained and how it was catastrophic,

life-threatening or life altering, the dangerous weapon that was used in the assault and the circumstances of such assault, and any other information the Board relied upon in determining that the member qualified for the Violent Act Injury provision.

II. CASE LAW

1. **Massachusetts Appeals Court held that surreptitious audio-visual recording of a drug transaction in a public place violated the Massachusetts Wiretap statute and that the proper remedy to this violation is suppressing both the audio and visual components of the recording.**

Commonwealth v. Du, 103 Mass. App. Ct. 469 (2023), review granted, 493 Mass. 1106 (2024)

Background

An undercover Boston police officer made surreptitious audio-visual recordings where he purchased drugs from the defendant. The police officer neither obtained a warrant nor the defendant's consent before making the recordings. The drug transactions all occurred in public places. The defendant was charged with multiple counts of distributing class A and B substances. The defendant moved to suppress the recordings under the allegation that they violated the Massachusetts Wiretap Statute, M.G.L. c. 272 § 99. The Commonwealth argued that the recordings should enter the record because the "organized crime" exemption to the wiretap statute should apply and because the defendant had no expectation of privacy in public. After an evidentiary hearing, the Trial Court judge decided to suppress the audio portion but not the visual portion of the recording. The judge reasoned that the defendant's motion failed to move to suppress the visual portion of the recording, but the defendant did have a reasonable expectation of privacy regarding his low-volume conversation with the undercover police officer. The trial court further determined that the Commonwealth had not proven its burden to show that there was reasonable suspicion that the defendant was working with anyone else, much less within a highly organized criminal organization, meaning the organized crime exemption to the wiretap statute. The Commonwealth appealed the determinations that the “organized crime” exemption did not apply, that there was an expectation of privacy in public, and that the proper remedy was to suppress the audio portion of the recording.

Appeals Court Reasoning

As a threshold issue, the Appeals Court found that the Defendant’s motion to suppress the evidence did encompass both the audio and visual aspects of the recording.

The Wiretap Statute prohibits the “interception” of “any wire or oral communication” unless the interception falls within an exception. The statute defines an “interception” as secretly hearing or recording wire or oral communications, and these “secret” interceptions may occur

even where an individual would not have a reasonable expectation of privacy. The Appeals Court found that the officers "intercepted" the communication at multiple points, including the original cop using the phone to capture the interaction, the officers remotely observing and listening to the interaction, the interaction being uploaded to the cloud, and the interaction being downloaded from the cloud, as the defendant was not aware that any of the aforementioned actions were taken, nor did he provide his consent. Therefore, the interceptions violated the Wiretap Statute unless there was a valid exemption.

There is an "organized crime" exception that permits the interception of wire or oral communications where there is a reasonable suspicion of a "continuing conspiracy among highly organized and disciplined groups to supply illegal goods and services." This goes beyond actions leading to the inference that the defendant may have worked with others at some point, but the Commonwealth must show that there was a suspicion that the Defendant was involved in an ongoing, structured, organized conspiracy to distribute illegal goods to advance a criminal business operation. Though the Commonwealth showed evidence that the Defendant was involved with distributing an illegal good, the Commonwealth failed to show that the Defendant "was acting in concert with others as part of an organized criminal enterprise." Thus, the recording violated the Wiretap Statute as it did not fall within an exemption.

The Superior Court found that nothing in the Wiretap Statute indicated that audio and visual data recorded together should be considered separately but found that both audio and visual data were encompassed by the statute because the visual recording was "information concerning the identity of the parties to such a communication." Therefore, the Superior Court found that both the audio and visual aspects of the recording should be suppressed.

Further Developments

The Supreme Judicial Court affirmed the Appeals Court holding under substantially similar reasoning in November of 2024.

2. **The United States Supreme Court held a government official may be liable under 42 U.S.C. § 1983 for violating another social media user's 1st amendment rights by blocking the user or deleting the user's comments if the official had actual authority to speak for the State on the issue in the relevant posts and exercised that authority in the relevant posts.**

Lindke v. Freed, 601 U.S. 187, 144 S. Ct. 756 (2024)

Background

James Freed had a private Facebook profile, and when he became City Manager of Port Huron, Michigan, he added his position to his Facebook profile bio. Freed posted info related to his job, solicited feedback, responded to comments, and deleted comments he found

"derogatory" or "stupid". Freed posted a mix of personal and work-related content. Lindke started to comment on Freed's posts during the COVID-19 pandemic, criticizing Port Huron's approach to the pandemic. Freed deleted Lindke's comments and ultimately blocked him. Lindke sued Freed under the private cause of action created by 42 U.S.C. § 1983, alleging Freed violated his First Amendment rights. The Federal District Court found that Freed did not violate Lindke's First Amendment rights because as Freed managed his Facebook page in his private capacity, there was no state action and therefore no liability under 42 U.S.C. § 1983. The Sixth Circuit affirmed the Federal District Court's holding.

U.S. Supreme Court Reasoning

The U.S. Supreme Court found social media user must show that the government official "(1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts" to establish liability under 42 U.S.C. § 1983 for social media activity. Status as a state employee is not determinative. State employees have a First Amendment right to exercise editorial control over speech on their platforms so long as they are not exercising state power. When an official has a mixed-use social media page containing personal and work-related posts, whether the posts are personal or work-related is a fact-specific inquiry. The opinion mused that a disclaimer indicating that a government official's page is personal would entitle the official to a presumption that the posts are personal. The opinion further explained that a post making a state announcement not available anywhere else would be an official act, but if a post contains information already publicly available through other means would not be an official act.

The Supreme Court did not come to a final determination as to whether Freed violated Lindke's First Amendment rights but remanded the case to be evaluated under the new rule.

3. **The Massachusetts Appeals Court, reversing the Commonwealth Employment Relations Board (CERB), held that the City of Everett could promote the Fire Chief without bargaining to impasse or resolution with the Everett Firefighters as managerial positions are not within the scope of the Collective Bargaining Agreement.**

City of Everett v. Commonwealth Employment Relations Board, Mass. App. Ct. (2022)

Background:

On August 27, 2021, the Commonwealth Employment Relations Board (CERB) issued a final decision and order holding that the City of Everett violated Section 10(a)(5) and Section 10(a)(1) of G.L. c. 150E by using an Assessment Center as the sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief without bargaining to impasse or resolution with the Everett Firefighters (the Union). The Board held that all of the potential promotes were bargaining unit members and that their participation outweighed the City's interest in maintaining it "managerial prerogatives". The Board claimed that promotions are an

important condition for employees who aspire to the promotional position due to the relationship of increased pay, benefits and prestige and movement on a career ladder. The Appeals Court reversed the Board's decision.

Appeals Court Analysis:

The Appeals Court reviewed the question of whether the Board erred in ruling that the City had to bargain over aspects of the promotional process for fire chief as it would not interfere with core managerial prerogatives. However, a public employer's duty to bargain is only applicable to mandatory subjects of bargaining, such as "terms and conditions" of employment of bargaining unit employees. The Board's own precedents as set in Newton v. Commonwealth Employment Relations Board, 100 Mass. App. Ct. 574, states that the process for choosing managerial employees such as fire chiefs are not subject to mandatory bargaining as a managerial employee is outside of the bargaining unit.

The concern that the processes for selecting a fire chief will impact the "terms and conditions" of employment of the deputy chiefs or other bargaining unit employees is not accurate. It does not alter, change, or impose upon these other positions, rather, being promoted to fire chief would make one leave the bargaining unit and become part of the City's managerial team. The argument that the fire chief position is part of the "promotional ladder" for deputy chiefs in incorrect as fire chief would be a fundamentally different job, not just a promotional ladder step.

Overall, the proposed subject of bargaining for this position under the provision that it would impact employment terms and conditions of bargaining unit members, does not apply.

4. **The Supreme Judicial Court of Massachusetts held that a municipal civility code requiring "respectful and courteous" remarks at public meetings violated the First Amendment and articles of the Massachusetts Declaration of Rights and that board members were not entitled to qualified immunity.**

Barron v. Kolenda, 203 N.E.3dd 1125 (2023)

Background:

Louise Barron is a Southborough resident who attended a public meeting of the Southborough Town Board. Board meetings are subject to G.L.C. 30A §§ 18 which requires that the meetings, including deliberations, be public. In 2018, the Attorney General determined that the Board had violated the open meeting law and ordered the individual Board members to attend an open meeting law training. On December 4, 2018, the Board held a public meeting and discussed raising real estate taxes, the open meeting law violations, and other matters. Before opening the meeting for public comment, the chair Daniel Kolenda informed the attendees of the town's public comment policy, which includes that "remarks must be respectful and courteous, free of rude, personal or slanderous remarks". Barron criticized the Board for "spending like drunken sailors" and for the open meeting law violations. In response, Kolenda accused Barron

of slandering the board for bringing up the open meeting law violations, and closed the public comment session. Barron called Kolenda "a Hitler" twice. Kolenda announced a recess, turned off his microphone, and yelled "You're disgusting!" at Barron. Kolenda threatened to have Barron "escorted out" and Barron left before that could happen.

Later, Barron, her husband, and another town resident filed a complaint in Superior Court alleging federal and state causes of action. The defendants removed the case to Federal court, but it was remanded to Superior Court after the plaintiffs withdrew the Federal claims. The defendants filed a motion for a judgement on the pleadings, and the motion was allowed as to all counts. The plaintiffs appealed and the Supreme Judicial Court transferred the appeal to itself.

Supreme Judicial Court Analysis:

The Supreme Judicial Court held that the town civility code violated Articles 19 and 16 of the Massachusetts Constitution which protects the right of Massachusetts citizens to assemble and right to free speech respectively. The Supreme Judicial Court looked to the history of the Massachusetts constitution to interpret Article 19, including the writings and philosophies of Samuel and John Adams which spoke passionately about the freedom of assembly and the importance of citizens bringing their grievances to their representatives, including at town assemblies. The Supreme Judicial Court found that Barron bringing her grievances top the town board was firmly within what the drafters of the Massachusetts Constitution intended to protect with Article 19, and that the town civility code infringed on Barron's rights. On Article 19, the Supreme Judicial Court applied strict scrutiny and found that there was not a narrow, compelling state interest in enforcing the broad civility code to political speech, and that the town civility code "appears to cross the line into viewpoint discrimination." Further, the Supreme Judicial Court found that the town civility code was so overbroad and vague that the constitutional and unconstitutional aspects were not severable or salvageable.

The Supreme Judicial Court held that Kolenda was not protected by qualified immunity in this case, and that the Superior Court erred in dismissing the Massachusetts Civil Rights Act (MRCA) claim. A state actor is protected by qualified immunity unless the actor clearly interferes with a constitutional right. The Supreme Judicial court found that Kolenda used threats to interfere with Barron's clearly established rights under Articles 16 and 19 of the Massachusetts constitution and therefore was not eligible for qualified immunity. The test for determining a claim under the MCRA is that "(1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with or attempted to be interfered with; and (3) such interference was by threats, intimidation and coercion." Currier v. National Bd. Of Med Examiners, 462 Mass. 1, 12 (2012). The Supreme Judicial Court found that the video evidence was sufficient basis to establish a prima facia MCRA claim, and the Superior Court erred in dismissing the claim under a theory of qualified immunity.

5. **Massachusetts Appeals Court reversed Superior Court decision and held that an insurer that refuses to take action in defense of insured without a reservation of rights when the insurer knew or should have known that the claim was covered can be found to have breached its duty to the insured.**

John Moriarty & Associates, Inc. v. Zurich American Insurance Co., 102 Mass. App. Ct. 474 (2023)

Background:

John Moriarty & Associates, Inc. (JMA) was a general contractor on a construction project, and they hired PJ Spillane Company, Inc. (PJ) as a subcontractor under the condition that PJ maintain a general liability insurance policy and include JMA as an additional insured on that Policy. PJ obtained the necessary insurance coverage from Zurich American Insurance Co. (Zurich). On May 15, 2020, a PJ foreman brought a negligence action against JMA and Triple G Scaffold Services Corp. (Triple G) after he was injured on the worksite. JMA requested that PJ take action to ensure that Zurich defended and indemnified JMA. On July 24, 2020, Zurich agreed to defend and indemnify JMA without a reservation of rights and assigned counsel to JMA's defense. JMA then requested that Zurich reimburse JMA for defense costs already incurred, which JMA did not do at that time. On August 11, Triple G demanded that JMA defend and indemnify them, and JMA requested that Zurich defend and indemnify JMA against Triple G's claim. In response, Zurich rescinded its acceptance of coverage, refused to defend and indemnify JMA against Triple G's claim, and refused to continue tendering defense of JMA in the underlying claim with the foreman without a reservation of rights. On October 15, 2020, Triple G rescinded its claim against JMA. JMA requested that Zurich withdraw its reservation of rights since Triple G rescinded its claim, but Zurich doubled down on the reservation of rights instead, including expressly reserving the right to recover defense expenses for liability not potentially covered, if allowed by law. Zurich claimed that there was a factual uncertainty as to whether the claim was covered, because if Triple G created the dangerous condition, then there would be no liability for PJ Spillane. JMA responded on December 18, 2020 by informing Zurich that JMA's defense counsel would continue to defend them and would continue to send invoices to Zurich for payment. Zurich did not respond further.

On February 24, 2021, JMA sued Zurich for breach of contract, and requested declaratory relief regarding Zurich's contractual obligations to JMA, and violations of G.L. cc. 93A and 176D. On May 11, 2021, Zurich moved to dismiss the complaint, and cross-moved for judgement on the pleadings. Further, on October 19, 2021, Zirich paid the invoice for the defense costs JMA incurred before Zurich agreed to defend and indemnify JMA on July 24, 2020, excluding costs related to the coverage litigation between JMA and Zurich, and paid the August 2020 through July2021 invoices on November 9, 2021, again excluding costs relate to the coverage litigation between JMA and Zurich. After the hearing on the motions, and receiving supplemental pleadings from the parties, including an affidavit detailing the partial invoice payments that Zurich made, a Superior Court judge decided on the motions. The judge allowed

the motion to dismiss, relying on the partial payments Zurich made after the initiation of the suit and Zurich's acknowledgement of a duty to defend subject to a reservation of rights, finding that there was no actual controversy because the reservation of rights was limited to what the law allows and Zurich made no attempt to recoup costs, even though it is an open question in Massachusetts whether an insurer can recoup defense costs. The judge also held that any request regarding duty to indemnify was premature because liability had not been determined. Finding no breach, the judge also dismissed the claim for violation of G.L. cc. 93A and 176D. JMA appealed this decision to the Appeals Court.

Massachusetts Appeals Court Analysis:

The Appeals Court considered first whether there was a breach of contract. In Massachusetts, the duty to defend is broader than the duty to indemnify, and the duty to indemnify is triggered if the third party's allegations against the insured are "reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms." Billings v. Commerce Ins. Co., 458 Mass. 194, 200 (2010). It was previously established in Herbert A. Sullivan Inc. v. Utica Mut. Ins. Co., 439 Mass. 387 (2003) that an insurer cannot refuse to defend the insured without a reservation of rights, and "the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs." Therefore, since Zurich refused to relinquish its reservation of rights, JMA had the right to retain the defense counsel of its choosing and seek reimbursement from Zurich, and Zurich was required to reimburse reasonable attorney's fees. Since Zurich failed to reimburse JMA despite the duty to reimburse, prompting JMA to file a breach of contract claim, the Appeals Court held JMA adequately plead a breach of contract claim.

The Appeals Court also held that JMA adequately pled a violation of G.L. cc. 93A and 176D. According to 176D § 3 (9) (g), "[c]ompelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds" is an unfair claim settlement practice, and JMA has alleged facts sufficient to support such a claim. Further, insurance claim settlements are conduct in trade or commerce, which means that JMA has adequately stated a claim under G.L. c. 93A § 11, which protects consumers from "unfair or deceptive acts or practices in the conduct of any trade or commerce".

6. **Town of Brookline dismisses appeal of an award of a 4% Stipend for holding a certification from the POST Commission.**

Town of Brookline v. Brookline Police Union, Norfolk Superior Court Docket No. 2382CV00594 (June 30, 2023)

The Town and the Union bargained unsuccessfully for a successor agreement to the collective bargaining agreement that expired on June 30, 2020. On April 28, 2022, the JLMC exercised its jurisdiction to resolve the labor dispute. The JLMC ordered the parties to binding arbitration. The JLMC included the matter of annual certification stipends among the issues to be

arbitrated. The annual certification stipend was a percentage of base pay paid to the officers so long as they retained certification from the Police Training and Standards Commission (POST Commission).

The arbitration panel awarded cost of living increases, shortened the twenty-year senior step to a ten-year senior step, and extending educational incentive benefits to all employees. The Town does not object to those portions of the award. The award also grated a 4% of base pay POST Certification stipend amount and required payments earlier than the Union proposed. The arbitration board reasoned that the POST Commission would significantly impact the officers and that the POST Commission "weakened the job protections gained by police officers." The dissenting member of the board argued that the POST stipend should be left to the parties to negotiate, and that the Chair wrongfully permitted the matter to be negotiated under G.L. c 150E §4A(3)(a), as the stipend was a "new benefit."

Update

The Town filed an appeal of the award, with its arguments mirroring those of the dissent. However, the Town has since voluntarily dismissed the appeal.

7. **Massachusetts District Court held that Plaintiff did not need to identify a specific false statement for a defamation claim to survive a motion to dismiss, and that question of malice as related to a Tortious Interference Claim was not to be resolved at the motion to dismiss stage**

Wood vs. City of Haverhill, D. Mass., No. 1:23-CV-12377-JEK (Sept. 13, 2024)

Background:

A former City police officer, Scott Wood, alleges that the City of Haverhill and the Town of Wrentham police departments improperly terminated him following a faulty background investigation and report from 2013. Former Deputy Chief of the Haverhill Police Department Donald Thompson performed the 2013 investigation and wrote the report as part of the hiring process. Thompson reported that Wood had "used inappropriate words" in messages with a former classmate and engaged in "misconduct" at previous places of employment and in one of his Police training classes. Wood denies the findings of Thompson's report and claims they lack evidentiary support. The City of Haverhill and Wood entered into a Memorandum of Understanding (MOU) on May 31, 2013, where Wood agreed to voluntarily withdraw his application and the City of Haverhill would dispose of all copies of the report within one year, among other promises. In May of 2023, Wood was hired by the Wrenham Police department as a reserve officer. In 2019, while Wood was working with the Methuen Police Department, Wood once again applied to the Haverhill Police department. In 2020, following another background investigation, Wood was hired to the Haverhill Police Department and he resigned his position at the Methuen Police Department. Shortly before Wood was to begin full time work, Wood was informed that he would not be employed full time and would need to attend a full-time police academy. Two weeks later, Wood was told to return his badge and gun. The next day, Wood was informed by Mayor Fiorentini that Wood was not starting work because the Acting Chief Anthony Haugh had found Wood's previous background investigation report from 2013 that was

supposed to have been destroyed. In December of 2021, Wood discussed the 2013 MOU and the 2013 report with Town of Haverhill Police Chief Robert Pistone. Pistone agreed to speak with Wood's legal counsel. Wood's Attorney informed the Town of Haverhill's counsel that the Town of Haverhill was violating the 2013 MOU and tortiously interfering with Wood's ability to work as a police officer. Wood was subsequently terminated without ever having worked a shift with the Town of Haverhill police department. Throughout this period, Wood was still a reserve officer for the Town of Wenham. In December of 2022, Wenham Police Department placed Wood on administrative leave because of the 2013 background report. Wenham Police Department informed Wood's attorney that Wood would be terminated. Wenham Police Department put Wood under a formal investigation in January 2023, and in June 2023 Wood's contract was not renewed. Further, details of the 2013 background report were leaked to the Boston Globe, and Wood was placed on the "Brady List."

Wood filed suit alleging intentional interference, and defamation, among other counts. Defendants moved separately to dismiss the claims against them.

Massachusetts District Court Analysis:

Regarding the intentional interference claim against Acting Chief Haugh and Chief Pistone, the Defendants alleged that Wood had not met his burden to prove that the Defendants had acted with actual malice as he had not alleged any specific facts supporting a plausible inference of malice. The Massachusetts District Court found that Wood has alleged facts supporting a plausible inference of malice, such as allegations that the Defendants knew of the obligations of the MOU and disregarded those obligations. Further, the Court reasoned that the factual issue of malice should not be resolved prematurely on a motion to dismiss.

Haugh and Pistone also claimed common-law immunity. The court noted that while the complaint was not clear as to whether Haugh and Pistone were sued in their official or professional capacities, by failing to assert the statutory immunity from intentional tort claims for defendants sued in their official capacity under M.G.L. c. 258 §10c and only asserting common-law immunity, the defendabts functionally conceded that they were being sued in their individual capacity.

As for the defamation count, the Defendants claimed that the Plaintiff failed to identify any specific false statements. The Court found that the allegation in the complaint that the Defendants "distributed the false information contained in the 2013 background report was sufficient to identify specific false statements, as the complaint identifies allegedly false statements within the 2013 background report elsewhere in the complaint. The Court admitted that "the question is close" but that for the motion to dismiss stage of the proceedings, the allegations were sufficient to state a claim of defamation.

The Defendants did that the defamation claim implicated their professional and not personal capacity, and therefore claimed the conditional qualified privilege. However, the Court found that the Plaintiff had alleged sufficient facts to overcome the conditional privilege at the motion to dismiss stage as the plaintiff alleged that the defendants were aware of the falsity of

the statements in the 2013 background report, and publishing false statements with knowledge of their falsity is one of the exceptions to the conditional qualified privilege.

8. **Massachusetts District Court held that informing the public about a current investigation is not defamation if the investigation is truthfully occurring, even if releasing the information is "mean spirited."**

   Devine vs. Town of Hull, D. Mass., No. 21-CV-11230-PBS (Jan. 17, 2024)

Background:

Michael Devine was introduced to Ryan Hauter in while Devine was principle of Hull Hight School and Hauter was a student thereof. Due to an unstable family life and other challenges, Hauter was assigned to work with the Hull High School's Student Assistant Team. As part of the program, Hauter was assigned to an internship in Devine's office, a position that existed before and after Hauter occupied it. There are no allegations that Devine spoke with Hauter outside of school hours or acted inappropriately toward him while Hauter was a student. Hauter and Devine stayed in touch after Hauter graduated in 2017 and Devine was promoted to superintendent. In 2019, Devine learned that Hauter had moved to Florida and they began exchanging text messages. Devine learned that Hauter attempted suicide while living in Florida. After Hauter received treatment for his suicide attempt, he reached out to Devine. They had various conversations, including one in which Devine mentioned having a boyfriend, which was the first time Devine had referenced being gay in his conversations with Hauter. In September 2019, when Hauter was 21, Devine expressed romantic or sexual interest in Hauter over text. Not all of the text messages were recovered, but in known text messages Devine said that he "crossed the line" and that he "shouldn't have gone there." After that exchange, on September 18, 2019, Hauter contacted Andrea Centerrino, a school social worker who worked with Hauter while he was a student and maintained contact with Hauter after Hauter's graduation. Hauter communicated to Centerrino that Devine had sent him sexual messages that confused and upset him. Centerrino contacted Nicole Nosek, the then Principal of Hull High School, to relay the information. Nosek asked Centerrino to meet with Devine, and at that meeting Devine admitted that he "crossed a line." No one reported the incident to the School Committee at that time. Hauter in January 2020 confronted Devine, and functionally told Devine to resign or Hauter would go public. On January 20, 2020, Hauter reached out to a School Committee Member via Facebook and told her about his communications with Devine. On January 27, 2020, Devine was called to a meeting and advised to retain counsel and take the next few days off. At the meeting Devine's conduct was discussed. Devine claimed that he would have been treated differently if he was not gay, to which a School Committee member responded that Devine was "giving the gay cause a bad name." After the meeting, Devine through counsel offered to tender his resignation. Several days later, the School Committee learned of another possible allegation about Devine's conduct from another former student, and Devine was placed on administrative leave. The School Committee issued press releases truthfully stating that Devine was being investigated for allegations of personal misconduct and that the Hull Police Department had been notified.

Devine filed a civil suit, and the Defendants filed for summary judgement.

Massachusetts District Court Analysis:

Devine alleged that the press release announcing that he was being investigated and that the Hull Police Department had been notified was defamatory. The Massachusetts District Court found that the press releases were not defamatory because they truthfully reflected what was being investigated, and truth is an absolute defense to defamation.

Ultimately, the Court dismissed the freedom of speech, freedom of association, procedural due process, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and interference with advantageous economic relations counts. Only the breach of contract, breach of the covenant of good faith and fair dealings, and discrimination on the basis of sexual orientation claims survived.

Update:

In July of 2024, the Town of Hull settled the case for $700,000.

9. **Massachusetts Appeals Court finds retention bonuses are not wages for the purposes of the Massachusetts Wage Act.**

Nunez v. Syncsort Incorporated NO. 23-ADCV-63NO

Background:

The plaintiff, Carlos Nunez, filed suit alleging that Syncsort Incorporated, formerly Precisely, failed to pay him in a timely manner in violation of the Massachusetts Wage Act. In May of 2020, Nunez was hired at Precisely, and in September of 2020, the parties executed a retention bonus agreement. Under the agreement, Nunes could receive a $15,000 bonus if he (1) remained employed at the company at his regular work schedule; and (2) remained in good standing through and by the designated retention dates. Should Nunez fulfil those requirements, he would receive the bonus in two payments, one on November 18, 2020 and the second on February 18, 2020. Nunez received the first payment, and in January of 2021, Nunez learned he would be laid off. Nunez was terminated on February 18, 2021, and up until that time he remained in good standing with his employer and his work schedule was not reduced. Syncsort did not pay the second installment of the retention bonus on the date of Nunez's termination. On February 25, 2021, Nunez filed a complaint alleging the failure to pay him the second installment of the bonus violated the wage act. On February 26, 2021, Nunez received the second retention bonus payment.

Nunez filed for summary judgement, and Syncsort filed a cross motion for summary judgement. The trial court denied Nunez's motion and granted Syncsort's motion for summary judgement, finding that a conditional retention bonus is not a wage for the purposes of the Massachusetts Wage Act. Nunez appealed.

Appeals Court Analysis:

The Court found that the statute did not directly address whether conditional bonuses were wages under the act, and instead relied on the holding in *Mui v. Massachusetts Port Auth.*, 487 Mass. 710 (2018). In *Mui*, the employer had a policy of paying out unused sick time to departing employees when the employee (1) had worked for the company for two or more years; and (2) was not terminated for cause. The Court in *Mui* found that commissions were the only class of conditional compensation recognized by the Massachusetts wage act and that the case law had not construed wages to include any other kind of conditional compensation, and therefore the unpaid sick time was not a "wage." Applying similar reasoning, the Appeals Court found that the conditional bonus was not a wage for the purposes of the Massachusetts Wage Act.

10. **1st Circuit Appeals Court held that the dismissal stage was not the appropriate time to resolve issues of sincerity of religious belief in a COVID-19 vaccine objection case as sincerity and hardship are factual issues.**

Bazinet v. Beth Israel Lahey Health, Inc., 113 F.4th 9 (1st Cir. 2024)

Background:

Plaintiff Amanda J. Bazinet, executive office manager at Beth Israel Deaconess Hospital in Milton, Maine timely asserted a religious objection to taking the COVID-19 vaccine when the Hospital adopted a mandatory vaccine policy. Bazinet asserted that since fetal cell lines from aborted fetuses were used in the development of the vaccine, that taking the vaccine would be in violation of her Christian faith. The Hospital rejected Bazinet's accommodation request and terminated her employment without engaging in an interactive process to identify potential accommodations. Bazinet filed a civil suit alleging religious discrimination under Title VII and M.G.L. c. 151B § 4. In her civil suit, she did not identify what religious belief would be violated if she took the vaccine. When the 1st Circuit District Court raised its issue with the lack of specificity, Bazinet attached a copy of her accommodation request form to her response.

The 1st Circuit District Court moved sua sponte to dismiss the religious discrimination claims for failing to state a claim. The 1st Circuit District Court reasoned that Bazinet failed to allege that she had a sincerely held religious belief that prevented her from taking the COVID-19 vaccine, and that as a matter of law it would be an undue hardship to require a hospital to grant an employee an exception the vaccine requirement. Bazinet appealed the sua sponte dismissal.

1st Circuit Appeals Court Analysis:

The 1st Circuit Court acknowledged that sua sponte dismissals are "strong medicine" and that while Federal District Courts have the discretion to move sua sponte to dismiss claims and that generally sua sponte dismissals are vacated on appeal unless the parties have been afforded notice and an opportunity to amend the complaint or respond. The court found that the parties had been afforded the required notice.

The Appeals Court rejected the idea that other Christians opting to take the vaccine or a mistaken factual basis for a religious belief would have any bearing on whether a religious belief is sincere. The Appeals Court also found that the fact that political beliefs were mixed in with religious beliefs in Bazinet's statement on the religious objection form did not mean that Bazinet could not claim Title VII protections as religious and political beliefs may overlap. Further, the Appeals Court held that the sincerity of Bazinet's belief was a proper subject for discovery, and therefore could not be resolved on a motion to dismiss.

The Appeals Court then considered whether the facts establishing the Hospital's defense of undue hardship "are clear on the face of the plaintiffs' pleadings and there is no doubt that the plaintiffs' claims are barred." The Appeals Court found that the pleadings made it clear that Basinet would only accept an accommodation that did not require her to take the vaccine, and therefore no other accommodations needed to be considered. When a hospital would risk serious penalties if they gave an employee a religious exemption to a vaccine mandate, that is sufficient to show a vaccine exemption would be an undue burden at law. However, as the Massachusetts law at issue in this case permits hospitals to grant religious exemptions to vaccine mandates, the Hospital could have granted Bazinet the accommodation without risking state penalties. Therefore, the Appeals Court held a factual analysis would be required to determine whether a religious exemption to the vaccine mandate and it would be inappropriate in this case, and that it would be inappropriate to resolve this issue at the motion to dismiss stage.

11. **The Massachusetts Supreme Judicial Court clarifies the scope of various exemptions to the Massachusetts public records law.**

Mack v. Dist. Attorney for Bristol Dist., 494 Mass. 1 (2024)

Background:

This case centers around a records request related to a fatal officer-involved shooting. The majority of the facts of the incident reported in the case come from the Bristol District Attorney's report. On November 22, 2021, two Fall River police officers responded to a domestic violence call. A woman reported that the man she was dating, Anthony Harden, had choked and struck her two days prior. After documenting the reporting woman's injuries, the police officers determined there was sufficient probable cause to arrest Harden. Harden was already confined to his home by court order as a result of previous charges of domestic violence and reckless endangerment of a child. Harden lived with his twin brother, Eric Mack, and his landlord. The officers arrived at Harden's residence and the landlord permitted the officers to enter the residence. One officer went to Harden's room door, announced his presence, and Harden refused to exit the room, at which point the officers informed Harden that he was under arrest. Harden reached for an object on his table and lunged repeatedly at one of the officer's head and neck. The other officer believed the item was a knife and shot Harden twice. The officers cuffed Harden and began administering first aid to him. One of the officers found a knife near Harden on the ground and placed it on the desk, out of reach of Harden. Harden was treated for his gunshot wounds and transported to the hospital, where he was pronounced dead. The District Attorney's office conducted an investigation in coordination with the Massachusetts

State police, a process that produced videotaped interviews of first responders involved in the incident, the decedent's autopsy and medical records, officer personnel records, crime scene reports, surveillance camera footage, crime scene photographs, and written documents. At the end of the investigation, the District Attorney's office released a public report with some of the findings.

Mack had several questions about the account, particularly about whether Harden actually possessed a knife as different officers who saw the scene gave different answers regarding the presence of a knife. Mack submitted a public records request requesting documents, video recordings, audio recordings, and photographs related to the incident. The District Attorney's office responded to the request with a link to the public report and a statement that the office believed that all other records were exempt.

The Plaintiff, Mack, filed a lawsuit in Superior court seeking declaratory relief. A Massachusetts Superior Court judge granted Mack summary judgement, mandating disclosure of the documents with a few minor exceptions. The District Attorney for the Bristol District appealed the Superior Court's decision, alleging that each of the requested records was exempt from the public records statute under one or more of the following exemptions: the privacy exemption, the policy deliberation exemption and the investigatory exemption.

Massachusetts Supreme Judicial Court Reasoning:

The Massachusetts Supreme Judicial Court analyzed whether any exceptions to the public records law applied to the documents in question. The Court found that:

- The investigatory exemption because that exemption only applies to interviews of private individuals, not public officials acting in their professional capacity, and remanded the issue of whether the first responders in the video interviews were acting in their professional or individual capacity to the Superior Court.
- Whether the policy deliberation exemption applies uses the same test as the work product doctrine. Opinion work product is generally protected and fact work product is generally not. Using that analysis, the primarily factual homicide report and room summary were not protected. The draft District Attorney's Office Report's "Applicable Laws" and "Conclusion" sections were protected, as they included opinion and legal analysis not included in the final public report

The Defense argued that the Peace Officer Standards and Training Commission had the exclusive authority to release publicly the names of police officers in connection with investigations, thereby exempting this information from the public records law. The Court was not persuaded, and found that the enabling statute of the POST commission did not grant such exclusive authority, and therefore found that the names of the police officers involved in the investigation were subject to disclosure through the public records law.

12. **Massachusetts Appeals Court held that a police union did not have to prove a sergeant had a generally good work record to establish a prima facie case of retaliation.**

Newton v. Commonwealth Employment Relations Bd., 104 Mass. App. Ct. 203 (2024), review granted, 494 Mass. 1106 (2024)

Background:

John Babcock had been hired to the Newton police department in 1987, and in 2009 he was promoted to the rank of sergeant in the traffic bureau. He had worked different shift schedules through the years, but from 2016-2018 he worked from 7am to 3pm on weekdays with weekends off. In 2018, an officer Babcock supervised, Dorothy Crowley, spoke to Babcock about vandalization of her bicycle and her car, which she believed had been vandalized by her coworkers. Both Babcock and Crowley raised their voices during the interaction. Crowley left in tears and was put on administrative leave, and she never returned to her position. Lieutenant George McMains investigated the incident. McMains concluded that Babcock had violated the department's code on courtesy during the interaction. On March 30, 2018, Babcock was formally reprimanded in writing. On April 23, 2018, Babcock was transferred from the day shift in the traffic bureau to a nigh shift in the patrol division. The shift resulted in Babcock receiving an eight percent pay increase.

Babcock has historically been very involved in the police union, including participating in union investigations and filing grievances. In 2016, Babcock objected to a police chief's orders that another officer submit to a psychological test and testified at a union hearing o the matter. The police chief accused Babcock of being an "obstructionist" for participating in the hearing. In 2017, Babcock filed to grievances on behalf of the bargaining unit. On March 30, 2018, less than a month before his transfer to the night shift, Babcock filed a grievance alleging the police chief violated the overtime, special leave, and hours of work articles of the collective bargaining agreement.

The union filed a prohibited practice charge in response to Babcock's transfer. The hearing officer found that Babcock had been transferred due to his behavior with Crowley and not due to his union activities. The Union appealed to CERB, and CERB reversed the hearing officer's decision based on the finding that the city failed to meet its burden of production because city had not provided direct evidence of the reason why Babcock was transferred to the night shift.

Massachusetts Appeals Court Analysis:

The Defense alleged that failure to show that Babcock had a generally good work record defeated the retaliation claim. The Court was not persuaded, as the employee's work record is not an element of a prima facie case for retaliation.

The Court found that a transfer that resulted in an increase of pay was not an adverse employment action. While any material difference between conditions in a lateral transfer may

be evidence that a lateral transfer could be an adverse employment action, Babcock specifically plead that he was disadvantaged by the transfer because he could no longer work the special event details that he worked on the day shift at the traffic bureau. However, there was no evidence that Babcock had been financially disadvantaged by the transfer. Babcock also alleged that the change in shift disrupted his life. Given that the collective bargaining agreement compensates night shift officers with extra compensation and the police chief's inherent authority to determine officers' duties and schedules, the Court found the lateral transfer had no objective material effect on the terms or conditions of Babcock's employment. In dicta, the Court mentioned that deviations from the collective bargaining agreement could be evidence that a lateral transfer was an adverse employment action.

The Court found that while there was not direct evidence of the reason for Babcock's lateral transfer, there was sufficient credible evidence that supports a finding that Babcock was transferred in response to the Crowley incident.

Update: The Supreme Judicial Court has granted review of this case, so further developments are possible.

ATTACHMENT A

PERAC Memo #28: Violent Assault Disability: Chapter 149 of Acts of 2024

Page 1, with Link to Full Article

Violent Assault Disability Benefits for First Responders

MEMORANDUM

TO: All Retirement Boards

FROM: Bill Keefe, Executive Director

RE: Violent Assault Disability: Chapter 149 of Acts of 2024

Date: October 29, 2024

On July 31, 2024, Governor Healey signed Chapter 149 of the Acts of 2024, *An Act Relative to Disability Pensions and Critical Incident Stress Management for Violent Crimes* ("Violent Assault Disability"). This Act creates an enhanced new type of G. L. c. 32, § 7 accidental disability retirement benefit for firefighters, emergency medical technicians, licensed health care professionals, and certain police officers who become permanently physically disabled with a catastrophic, life-threatening or life-altering bodily injury disability as the result of a Violent Act Injury by means of a dangerous weapon.

a. The effective date of this Act is October 29, 2024, and the Violent Act Injury disability will be available to any member who qualifies and has not been approved for disability as of that date.

b. Anyone who has previously been approved for disability is not eligible to have the provisions of this act apply to their retirement allowance and their benefit cannot be recalculated.

The Massachusetts Public Employee Retirement Administration Commission (PERAC) has issued a detailed memorandum on the Violent Assault Disability Act which can be found at the following link: https://www.mass.gov/memorandum/perac-memo-28-violent-assault-disability-chapter-149-of-the-acts-of-2024 (Cut and paste link into browser.)