

COMMONWEALTH OF MASSACHUSETTS

MASSACHUSETTS APPEALS COURT
No. 2024-P-0036

KENNETH BRESLER

v.

LYNN MUSTER & Others

Appeal from Judgment of Suffolk Superior Court

**APPLICATION FOR DIRECT APPELLATE REVIEW
OF PLAINTIFF-APPELLANT**

Kenneth Bresler, Esq.

Pro se

BBO No. 544416

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Newton, MA 02465

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COMMONWEALTH OF MASSACHUSETTS

MASSACHUSETTS APPEALS COURT
No. 2024-P-0036

KENNETH BRESLER

v.

LYNN MUSTER & Others

APPLICATION FOR DIRECT APPELLATE REVIEW

Request for Direct Appellate Review

Under Rule 11 of the Massachusetts Rules of Appellate Procedure, Kenneth Bresler requests direct appellate review of both the appeal in which he is the plaintiff-appellant and Mary Bowe and Gina DeRossi are the defendant-appellees, and the appeal in which he is the plaintiff-appellee and Muster is the defendant-appellant, Muster's appeal having been designated as a cross-appeal.

Statement of Prior Proceedings in the Case

On January 19, 2023 Kenneth Bresler filed a complaint in Suffolk Superior Court. (Docket No. 2384CV00141-C) Bresler, a former Staff Attorney at the Massachusetts Appeals Court, alleged in the complaint that the defendants – Lynn Muster, Deputy Chief Staff Attorney at all relevant times; Mary Bowe, Chief Staff Attorney at all relevant times; and Gina DeRossi, Court Administrator

at all relevant times – had abused their positions as supervisors in the Appeals Court to intentionally interfere with his advantageous relationship with the court.

On March 10, 2023, the defendants moved to dismiss the complaint. On September 25, 2023 the Honorable Debra A. Squires-Lee granted the motion to dismiss as to Defendants Bowe and DeRossi, and denied it as to Defendant Muster.

On November 22, 2013 Defendant Muster filed a notice of appeal of the denial of the motion to dismiss as to her, relying on the doctrine of present execution for her right to file a notice for an interlocutory appeal.

Also on November 22, 2023 the plaintiff moved for final judgment regarding claims against Defendants Bowe and DeRossi. He did so under Rule 54(b) of the Massachusetts Rules of Civil Procedure and with the assent of the defendants. On November 28, 2023 the Honorable Squires-Lee granted the motion under Rule 54(b). On December 6, 2023 the Superior Court entered final judgment and dismissed the complaint against Defendants Bowe and DeRossi.

On December 12, 2023 the plaintiff filed a notice of appeal of the final judgment regarding claims against Defendants Bowe and DeRossi.

On January 11, 2024, Plaintiff-Appellant Bresler filed his Civil Appeal Entry Form with the Appeals Court. On January 18, 2024, Defendant-Appellant Muster did so.

Statement of Facts Relevant to the Appeal

See first paragraph of Statement of Prior Proceedings in the Case.

Statement of the Issues of Law Raised by the Appeal and Statement of Whether the Issues Were Raised and Properly Preserved in the Lower Court

The issues of law raised by the appeal are:

Did the complaint sufficiently allege that the defendants, who at relevant times were public employees, committed the tort of intentional interference with advantageous relations with bad faith and malice such as to lose their common-law immunity?

Did the complaint sufficiently allege that the defendants, who were the plaintiff's supervisors, intentionally interfered with advantageous relations with actual malice, which is an element of the tort when committed by a supervisor?

These issues were raised and properly preserved in the lower court.

Brief Argument

Of the 25 justices who currently sit on the Appeals Court, the complaint alleges that four of them played roles, witting or unwitting, directly or indirectly, in the plaintiff's termination from employment at the court: Justice Kathryn Hand (Complaint ¶¶ 39, 79-83, 134, 171); Justice Amy Lyn Blake (Complaint ¶¶ 40, 41, 124-26, 151, 169-70); Justice Vickie Henry (Complaint ¶¶ 91, 92, 109, 111, 135-36, 144, 147); and Chief Justice Mark Green (Complaint ¶¶ 100, 101, 116,

118). The complaint alleges that a former justice, then-Justice Diana Maldonado, played an unwitting and indirect role in the plaintiff's termination. (Complaint ¶¶ 97, 99-101, 103-04, 141, 169)

As of this writing, the plaintiff is in the process of moving to depose these five current and former Appeals Court justices under Rule IX, Rule 1 of the Massachusetts Trial Court Rules. (Affidavit)

The complaint also refers to Defendant-Appellant Muster being friends with two of the above-named justices. (Complaint ¶¶ 39-40) It refers to approximately 10 current and former Appeals Court justices' complimenting the plaintiff's work. (Complaint ¶¶ 143, 166)

Of the 25 current Appeals Court justices, 16 sat on the bench when Defendant-Appellee Bowe was Chief Staff Attorney. In that role she made or approved all writing assignments for the justices. Defendant-Appellee Bowe is now a rank-and-file Staff Attorney, who is about to retire or has retired; it is unknown how many of the 25 Appeals Court justices have worked with her in that capacity. (Affidavit)

Defendant-Appellee DeRossi, as Court Administrator, presumably works with each of the Appeals Court justices. In addition, her office is in the same hall as the court's most senior justices. (Affidavit)

The complaint does not name the Appeals Court as a party, but it is the Appeals Court with whom the plaintiff had an advantageous relationship, a relationship that the defendants allegedly interfered with. (Complaint, ¶ 176) The complaint alleges that the defendants' acts damaged the Appeals Court and were contrary to its best interests. (Complaint ¶¶ 177-81)

Aside from being mentioned in the complaint, the Appeals Court is involved in the Superior Court litigation in at least four ways. One, the Appeals Court joined the parties' motion for a protective order as "an interested non-party." Two, the Appeals Court was a recipient of a subpoena from the plaintiff. Three, the Appeals Court has produced privilege logs for the plaintiff, who, four, plans to move the Superior Court to compel the Appeals Court to produce documents under the subpoena.

Two related principles motivate this application. Judges must be impartial. And no person should be the judge of their own cause. *See e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 * (2007) (concurrence, Scalia, J.) (asterisk is to unnumbered footnote) (referring to "the wisdom of the ancient maxim '*aliquis non debet esse Judex in propria causa*'—no man [*sic*] ought to be a judge of his own cause") (citing *Dr. Bonham's Case*, 8 Co.Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 646, 652 (C.P. 1610)).

The Massachusetts Constitution provides:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit....

Mass. Const., pt. 1, art. XXIX.

See Supreme Judicial Court Rule 3:09, Code of Judicial Conduct, Rule 2.2 (“A judge...shall perform all duties of judicial office fairly and impartially”); Rule 2.11(A) (“A judge shall disqualify himself or herself in any proceeding in which the judge cannot be impartial or the judge’s impartiality might reasonably be questioned....”); Rule 2.11(A)(1) (requiring judicial disqualification when the “judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding”); Rule 2.11(2)(d) (requiring judicial disqualification when the “judge knows that the judge [is] likely to be a material witness in the proceeding”); Rule 2.11(5)(c) (requiring judicial disqualification when the judge “was a material witness concerning the matter”). *See also* Rule 2.4(B) (“A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment”).

If it hears these appeals, the Appeals Court will be deciding litigation

- by a former employee against current and former employees;

- that involves five current and former justices, including the Chief Justice, who played roles in the plaintiff's termination;

- whose complaint refers to approximately 10 current and former justices who complimented the plaintiff's work; and

- that involves the Appeals Court as an institution and as a quasi-party.

Because the Chief Justice, the Court Administrator (Defendant-Appellee DeRossi), and the Appeals Court as an employer are involved in the litigation, the way to guarantee an impartial appellate decision is not by a handful of Appeals Court justices' recusing themselves. If justices rule for the defendants, they will leave themselves open to accusations of partiality and favoritism.

Statement of Reasons Why Direct Appellate Review is Appropriate

Direct appellate review is appropriate because it "is in the public interest." Mass. R. App. P. 11(f). Review by the Supreme Judicial Court and not the Appeals Court will serve the public interest by maintaining the public's confidence in the impartiality of its courts and appellate process. The public interest will also be served by not having Appeals Court justices put in untenable positions where their "impartiality might reasonably be questioned." S.J.C. Rule 3:09, Code of Jud. Conduct, Rule 2.11(A).

Respectfully submitted,



Kenneth Bresler, Esq.

Pro se

BBO No. 544416

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Date: January 24, 2024

COMMONWEALTH OF MASSACHUSETTS

MASSACHUSETTS APPEALS COURT
No. 2024-P-0036

KENNETH BRESLER

v.

LYNN MUSTER & Others

**AFFIDAVIT OF KENNETH BRESLER
TO ACCOMPANY APPLICATION FOR DIRECT APPELLATE REVIEW**

I, Kenneth Bresler, depose and state:

1. Defendant-Appellee Mary Bowe was Chief Staff Attorney at all times relevant to my complaint. She made or approved all writing assignments for the justices of the Appeals Court

2. Defendant-Appellee Bowe is no longer the Chief Staff Attorney, but became a rank-and-file Staff Attorney, according to news reports. Defendant-Appellant Muster no longer works at the Appeals Court, also according to news reports. Upon information and belief, Defendant-Appellee Bowe has retired or is about to retire.

3. When I last worked in the John Adams Courthouse, before the COVID-19 pandemic struck in March 2020, Defendant-Appellee Gina DeRossi's office was

in the same hall in the John Adams Courthouse as the offices of the most senior justices, including the Chief Justice.

4. I have begun the process of moving to depose five current and former Appeals Court justices under Rule IX, Rule 1 of the Massachusetts Trial Court Rules.

5. I have begun the process of moving the Superior Court to compel the Appeals Court to fully comply with my subpoena to the Appeals Court for documents.

Signed under the penalties of perjury
on January 24, 2024,


Kenneth Bresler

LOWER COURT DOCKET

2384CV00141 Bresler, Kenneth vs. Muster, Lynn et al

- Case Type:
- Torts
- Case Status:
- Open
- File Date
- 01/19/2023
- DCM Track:
- F - Fast Track
- Initiating Action:
- Other Tortious Action
- Status Date:
- 01/19/2023
- Case Judge:
-
- Next Event:
- 02/29/2024

[All Information](#) [Party](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

Party Information

Bresler, Kenneth
- Plaintiff

Alias

Party Attorney

- Attorney
- Pro Se
- Bar Code
- PROPER
- Address
- Phone Number
-

[More Party Information](#)

Muster, Lynn
- Defendant

Alias

Party Attorney

- Attorney
- Dirks, Esq., Katherine B
- Bar Code
- 673674
- Address
- Office of the Attorney General
One Ashburton Place
Trial Division 18th floor
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- Phone Number
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- Attorney
- Potapchuk, Esq., John L
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Bowe, Mary

- Defendant

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[More Party Information](#)

Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
09/07/2023 02:00 PM	Civil C	BOS-3rd FL, CR 313 (SC)	Rule 12 Hearing	Squires-Lee, Hon. Debra A	Held as Scheduled
12/18/2023 02:00 PM	Civil C	BOS-3rd FL, CR 313 (SC)	Conference to Review Status	Squires-Lee, Hon. Debra A	Held via Video/ Phone
02/01/2024 02:00 PM	Civil C	BOS-3rd FL, CR 313 (SC)	Conference to Review Status	Gordon, Hon. Robert B	Rescheduled
02/29/2024 02:00 PM	Civil C	BOS-3rd FL, CR 313 (SC)	Conference to Review Status	Gordon, Hon. Robert B	

Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Service	01/19/2023	04/19/2023	90	
Answer	01/19/2023	05/19/2023	120	
Rule 12/19/20 Served By	01/19/2023	05/19/2023	120	09/07/2023
Rule 12/19/20 Filed By	01/19/2023	06/20/2023	152	09/07/2023
Rule 12/19/20 Heard By	01/19/2023	07/18/2023	180	09/07/2023
Rule 15 Served By	01/19/2023	05/19/2023	120	
Rule 15 Filed By	01/19/2023	06/20/2023	152	
Rule 15 Heard By	01/19/2023	07/18/2023	180	
Discovery	01/19/2023	11/15/2023	300	
Rule 56 Served By	01/19/2023	12/15/2023	330	
Rule 56 Filed By	01/19/2023	01/15/2024	361	
Final Pre-Trial Conference	01/19/2023	05/13/2024	480	
Judgment	01/19/2023	01/20/2025	732	

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
01/19/2023	Attorney appearance On this date Kenneth L Bresler, Esq. added for Plaintiff Kenneth Bresler		
01/19/2023	Case assigned to: DCM Track F - Fast Track was added on 01/19/2023		
01/19/2023	Original civil complaint filed.	1	
01/19/2023	Civil action cover sheet filed.	2	
01/19/2023	Demand for jury trial entered.		
01/19/2023	Attorney appearance On this date Kenneth L Bresler, Esq. dismissed/withdrawn for Plaintiff Kenneth Bresler		
01/19/2023	Attorney appearance On this date Pro Se added for Plaintiff Kenneth Bresler		
01/25/2023	Attorney appearance electronically filed.		
01/25/2023	Attorney appearance electronically filed.		
01/26/2023	Service Returned for Defendants Lynn Muster, Mary Bowe, and Gina DeRossi	3	
02/15/2023	Attorney appearance electronically filed.		
03/10/2023	Defendant Lynn Muster, Mary Bowe, Gina DeRossi's Notice of Motion to Dismiss the complaint Pursuant to Superior Court Rule 9E		
07/06/2023	Defendant Lynn Muster, Mary Bowe, Gina DeRossi's Motion to dismiss	4	
07/06/2023	Lynn Muster, Mary Bowe, Gina DeRossi's Memorandum in support of Motion to dismiss	5	
07/06/2023	Opposition to Defendants' Motion to dismiss filed by Kenneth Bresler	6	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
07/06/2023	Reply/Sur-reply Defendants' Reply in Support of the Motion to Dismiss	7	 Image
07/06/2023	Notice of Filing Pursuant to Superior Court Rule 9A		 Image
07/06/2023	Defendant(s) Gina DeRossi Assented to motion filed for protective order (Jointly with Non-Party Appeals Court)	8	 Image
07/06/2023	Rule 9A Notice of Filing of Assented-to Motion for Protective Order		 Image
07/11/2023	Endorsement on Motion for Protective Order (#9.0): ALLOWED Order to issue. (dated 7/10/23) notice sent 7/11/23		 Image
07/11/2023	ORDER: Protective Order for the Disclosure, Protection and Designation of confidential material (dated 7/10/23) notice sent 7/11/23	9	 Image
08/23/2023	Plaintiff Kenneth Bresler's Motion to strike parts of Defendants' Reply in support of the Motion to Dismiss	10	 Image
08/23/2023	Kenneth Bresler's Memorandum in support of Motion to strike parts of Defendants' Reply in support of the Motion to Dismiss	11	 Image
08/23/2023	Opposition to Motion to strike Reply filed by Lynn Muster, Mary Bowe, Gina DeRossi	12	 Image
08/23/2023	Reply/Sur-reply Reply to Defendants' Opposition to Motion to Strike Reply Applies To: Bresler, Kenneth (Plaintiff)	13	 Image
08/23/2023	Plaintiff Kenneth Bresler's Notice of Filing under Superior Court Rule 9A		 Image
09/07/2023	Event Result:: Rule 12 Hearing scheduled on: 09/07/2023 02:00 PM Has been: Held as Scheduled Hon. Debra A Squires-Lee, Presiding Staff: Michael O'Loughlin, Assistant Clerk Magistrate		
09/26/2023	Endorsement on Motion to dismiss (#4.0): Other action taken After hearing and review, ALLOWED-in-part and DENIED-in-part. Claims against Mary Bowe and Gina DeRossi are dismissed. Motion to Dismiss claims against Lynn Muster DENIED. See Memo of Decision and Order of todays date. (Dated 9/25/2023) Notice sent 9/27/23		 Image
09/26/2023	Endorsement on Motion to strike parts of Defendants' Reply in support of the Motion to Dismiss (#10.0): DENIED (Dated 9/25/2023) Notice sent 9/27/23		 Image
09/26/2023	MEMORANDUM & ORDER: Memorandum of Decision and Order on Defendant's Motion to Dismiss See page #14 Because the facts as pleaded would not establish that Bowe or DeRossi acted in bad faith or with actual malice, they are protected by common-law immunity, and Bresler has failed to state a claim of intentional interference with advantageous relations against them. The Motion to dismiss is therefor ALLOWED as to Defendant's Mary Bowe and Gina DeRossi. Because the factual allegations regarding Muster's specific conduct could lead to the reasonable inference that she acted out of personal ill will and jealousy and not in the Appeals Court's interest, the Motion to Dismiss is DENIED as to Lynn Muster. (Dated 9/25/2023) Judge: Squires-Lee, Hon. Debra A	14	 Image

<u>Docket</u> <u>Date</u>	<u>Docket Text</u>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<u>Image</u> <u>Avail.</u>
	Notice sent 9/27/23		
10/02/2023	Plaintiff Kenneth Bresler's Notice of Appeal	15	 Image
10/02/2023	Notice of appeal filed. (See p#15)		
	Notice sent 10/4/23		
	Applies To: Bresler, Kenneth (Plaintiff)		
10/05/2023	Plaintiff Kenneth Bresler's Statement in Regards to Transcript	16	 Image
11/22/2023	Answer to original complaint	17	 Image
	Applies To: Muster, Lynn (Defendant)		
11/22/2023	Defendant Lynn Muster's Notice of Appeal	18	 Image
11/22/2023	Notice of appeal filed. (See p#18)		
	Notice sent 11/22/23		
	Applies To: Muster, Lynn (Defendant)		
11/22/2023	Plaintiff Kenneth Bresler's Assented to Motion for Final Judgment Regarding Claims Against Defendants Bowe and DeRossi	19	 Image
11/30/2023	Endorsement on Motion for Final Judgment Regarding Claims Against Defendants Bowe and DeRossi (#19.0): ALLOWED No just reason exists for delay in entering judgment in favor of Mary Bowe and Gina DeRossi. Clerk shall enter partial final Judgment. Clerk shall also schedule a Rule 16 conference to discuss discovery and other matters, including any stay if a request to stay is forthcoming, with respect to the claims against the remaining defendant, Lynn Muster. (Dated 11/28/2023) Notice Sent 12/1/23		 Image
12/06/2023	JUDGMENT pursuant to MRCP 54(b), the Court ORDERED separate and final Judgment. Therefore, it is ORDERED and ADJUDGED that the Complaint of the Plaintiff(s), Kenneth Bresler be and hereby is dismissed against Defendant(s), Mary Bowe, Gina DeRossi without statutory costs, entered on parties pursuant to Mass. R. Civ. P. 58(a) and notice sent to parties pursuant to Mass. R. Civ. P. 77(d). (dated 11/29/23) notice sent 12/06/23	20	 Image
12/12/2023	Plaintiff Kenneth Bresler's Notice of Appeal	21	 Image
12/12/2023	Plaintiff Kenneth Bresler's Submission of Statement Regarding Transcripts	22	 Image
	No Transcript Ordered		
12/12/2023	Plaintiff Kenneth Bresler's Submission of Withdrawal of October 2, 2023 Appeal	23	 Image
12/12/2023	Notice of appeal filed. (see p#21)		
	Notice sent 12/15/23		
	Applies To: Bresler, Kenneth (Plaintiff)		
12/18/2023	Event Result:: Conference to Review Status scheduled on: 12/18/2023 02:00 PM Has been: Held via Video/Phone Hon. Debra A Squires-Lee, Presiding Staff: Michael O'Loughlin, Assistant Clerk Magistrate		

<u>Docket</u> <u>Date</u>	<u>Docket Text</u>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<u>Image</u> <u>Avail.</u>
01/03/2024	Event Result:: Conference to Review Status scheduled on: 02/01/2024 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Robert B Gordon, Presiding Staff: Michael O'Loughlin, Assistant Clerk Magistrate		
01/04/2024	Notice of assembly of record sent to Counsel		
01/04/2024	Notice to Clerk of the Appeals Court of Assembly of Record		
01/11/2024	Plaintiff Kenneth Bresler's Submission of Motion under Rule IX, Rule 1 of Massachusetts Trial Court Rules	24	 Image
01/11/2024	Affidavit to accompany Motion under Rule IX, Rule 1 of Massachusetts Trial Court Rules Applies To: Bresler, Kenneth (Plaintiff)	25	 Image
01/11/2024	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2024-P-0036) was entered in this Court on January 11, 2024.	26	 Image
01/16/2024	Endorsement on Submission of Motion under Rule IX, Rule 1 of Massachusetts Trial Court Rules (#24.0): DENIED without prejudice to re-filing in accordance with Superior Court Rule 9A. (dated 1/12/24) Notice Sent 1/17/24		 Image
01/19/2024	Defendant Lynn Muster's EMERGENCY Motion to Stay Proceedings Pending Appearance of Successor Counsel	27	 Image
01/22/2024	Opposition to Defendant's Emergency Motion to Stay Proceedings Pending Appearance of Successor Counsel filed by Kenneth Bresler	28	 Image
01/22/2024	Affidavit of Kenneth Bresler to Accompany Opposition to Defendant's Emergency Motion to Stay Proceedings Pending Appearance of Successor Counsel	29	 Image

Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Pending		

LOWER COURT ORDER

BC

0 1.10

See Memo of Decision and Order of today's date.

NOTIFY⁴

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. 2384CV00141

KENNETH BRESLER,

Plaintiff,

v.

LYNN MUSTER, MARY BOWE, and GINA
DeROSSI,

Defendants.

✓ 9/26

*9/27/23
Notice sent
BA (2)*

DEFENDANTS' MOTION TO DISMISS

Defendants Mary Bowe, Gina DeRossi and Lynn Muster move to dismiss plaintiff Kenneth Bresler's Complaint under Mass. R. Civ. P. 12(b)(6). This action arises from Bresler's disagreement with the Massachusetts Appeals Court's decision to terminate his at-will employment as a probationary staff attorney. Bresler alleges that he is a skilled writer and editor, yet over the course of his probationary term, the Defendants—three current or former managers at the Appeals Court—found fault with Bresler's work. Bresler asserts in conclusory fashion that any such critiques were necessarily motivated by spite, jealousy and personal hostility, and seeks to hold Defendants individually liable for the emotional distress caused by these critiques.

Bresler's claim, for intentional interference with an advantageous relationship, fails for three independently sufficient reasons. First, his claim is barred by common law immunity, which protects public officials from intentional tort suits for discretionary conduct, absent allegations of bad faith, malice or corruption. Bresler's claim challenges such discretionary actions, and the Complaint makes no allegations supporting an inference that Defendants

After hearing and review, Allowed in-part and DENIED in-part. Claims against Mary Bowe and Gina DeRossi are dismissed. Motion to Dismiss claims against Lynn Muster

9/26

NOTIFY

14

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2384CV0141

KENNETH BRESLER

9/27/23
notice sent
BA(2)

vs.

LYNN MUSTER & others¹

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION TO DISMISS

Kenneth Bresler (Bresler) filed suit alleging that Lynn Muster (Muster), Mary Bowe (Bowe), and Gina DeRossi (DeRossi) (together Defendants), each sued in their individual capacities, intentionally interfered with his employment as a Staff Attorney at the Massachusetts Appeals Court (Appeals Court). Bresler alleges that the Defendants "knowingly and intentionally induced a breaking of [his employment] relationship, with improper motive, including personal hostility, or improper means, including false statements" The Defendants move to dismiss. After hearing and argument, and for the following reasons, Defendants' Motion to Dismiss (Motion) is ALLOWED-in-part and DENIED-in-part.

BACKGROUND

I recite the relevant facts asserted in the Complaint, "taking them as true for purposes of evaluating the motion to dismiss." Edwards v. Commonwealth, 477 Mass. 254, 255 (2017). To the extent Bresler characterizes certain conduct as spiteful or as evidencing spite, I have not included his conclusory characterizations, only the conduct as alleged. Further, I do not include factual allegations not relevant to the arguments

¹ Mary Bowe and Gina DeRossi

made in support of the Motion, for example, allegations about Bresler's mental and emotional distress.

Parties

Bresler is a former trial and appellate prosecutor, a state administrative law judge, the author of a textbook about criminal procedure, two books about writing, and law review and non-academic articles. He also has experience teaching legal writing. Bresler began working as a Staff Attorney at the Appeals Court on January 28, 2019. During his employment, Muster became the Deputy Chief Staff Attorney, Bowe was the Chief Staff Attorney, and DeRossi was the Court Administrator.

Staff Attorneys

When Bresler was hired at the Appeals Court, Staff Attorneys were designated as writers, editors, or screeners. Writers ghost wrote decisions in their areas of legal specialty. Editors edited decisions for release and publication and made sure the decisions complied with the Appeals Court's style manual. The single designated screener recommended which cases would receive oral arguments and which would be decided on the briefs without oral argument. The screener wrote screening memoranda that could be as short as one page.

Bresler was hired as a writer with expertise in criminal and administrative law. A few months after he was hired, Staff Attorney duties merged, and all Staff Attorneys were assigned all three tasks.

During the editing process, editors corrected mistakes in decisions submitted by Justices. Then, experienced editors, called list editors, reviewed the decisions a second time and corrected additional mistakes. Editing could be subjective. In December 2019, Bresler was told by an experienced editor to change "proven" to "proved" and use commas instead of semicolons. After her review, Muster changed "proved" back to "proven" and the commas back to semicolons.

With respect to screening memoranda, by June 2020, Bowe instructed Staff

Attorneys to spend no more than half a day on each one, not make them "pretty," and limit them to one page at most. Bowe also told the Staff Attorneys that screening memoranda were not crucial to the Appeals Court's operations.

Muster

After Bresler began working at the Appeals Court, Muster "became personally hostile towards him." Staff Attorneys considered Muster to be vindictive, petty, a bully, and jealous of Bresler's achievements as a legal writer and teacher. In June 2019, Bresler taught a legal writing seminar for the Social Law Library. Forty of the one hundred participants attending the seminar were Staff Attorneys, judicial clerks, and law school interns working at the Appeals Court. Muster accused Bresler of "trying to take over."

In July 2019, the Appeals Court created the position of Deputy Chief Staff Attorney and appointed Muster to the position. Bresler asked Bowe to be protected against Muster's hostility. Bowe assured him that Muster would not be involved in Bresler's performance evaluations.

Muster attended law school with one Appeals Court Justice and was friends with another Appeals Court Justice. Muster solicited the two Justices for criticisms of Bresler and to contact Bowe with their criticisms of Bresler. At a gathering of Appeals Court personnel in 2020, Muster stood with an Appeals Court Justice and disparaged Bresler to that Justice and in front of another Staff Attorney although Bresler had never ghost written a decision for that Justice. On another occasion, Muster disparaged Bresler to another Staff Attorney.

Bresler continued to teach legal writing. On one occasion, Muster tried to limit Staff Attorney attendance at his seminars and, on another occasion, Muster publicized legal education opportunities to Staff Attorneys but did not mention Bresler's seminar.

Bresler's Evaluations

All Appeals Court employees were on probation for the first nine months after they were hired. In June 2019, approximately five months after Bresler was hired, Bowe

gave Bresler a written evaluation. She wrote that he "performed his duties (limited to writing at this time) very well" and that Justices had commented that his writing is "'excellent' and his analysis 'thorough.'" Bowe further wrote that Bresler brought energy and enthusiasm to the office and was "a positive influence on staff attorney morale." Finally, Bowe wrote that Bresler "generates a professional image for the Appeals Court" and was "plan[ning] a writing seminar for the Social Law Library's continuing legal education program."

Four months later, on October 13, 2019, and four days before Bresler's nine-month probationary period was set to expire, Bowe and Muster met with Bresler. Bowe said Bresler's writing was deficient and stated that a Justice found one of his ghost-written drafts unusable. Bresler alleges the statement about the Justice was false. Bowe assigned Muster to supervise Bresler's editing and extended Bresler's probationary period for six months. Bowe and DeRossi had previously routinely and without detailed scrutiny granted permanent employment to Staff Attorneys after nine months and Bresler was the first Staff Attorney denied permanent employment. Bowe and DeRossi, "under the influence" of Muster, ultimately never granted Bresler permanent employment.

Soon after that meeting, the Staff Attorney serving as union steward told Bowe that Muster was bullying Bresler, was brutal in her review of his editing, and that no one could survive her unfair scrutiny. Bowe took no action.

In December 2019, Bowe told Bresler that whether he survived probation would not depend on his editing. On January 23, 2020, Bowe sent a memorandum to Bresler that indicated the Appeals Court would not pay his annual step increase during his probation. On February 14, 2020, Bowe gave Bresler an unfavorable oral evaluation with Muster present. Bowe told Bresler that he was unlikely to continue to be employed as a Staff Attorney.

Bresler received a June 2020 evaluation which "disparaged" his ability to write opinions, informed him that he would not receive any more assignments, and told him to stop teaching legal writing at the Social Law Library. Thereafter, Bowe assigned criminal law opinions to a Staff Attorney with less writing and criminal law experience than Bowe.

Bresler's Termination

On November 24 2020, DeRossi informed Bresler in writing that he was being placed on administrative leave. On November 30, 2020, DeRossi informed Bresler in writing that he "would be the subject of a meeting about his continued employment" and detailed thirteen allegations concerning Bresler. On December 4, 2020, Bresler asked for additional information about those thirteen allegations and access to his files. DeRossi denied the request for his files.

On December 10, 2020, DeRossi provided some additional information to Bresler about the allegations but did not answer all Bresler's questions. Bresler attributes the delay to DeRossi's need to consult with Bowe and Muster. Bresler wrote DeRossi on December 11, 2020, refuting the allegations. DeRossi did not investigate the truth of the allegations before she issued her letter or after Bresler refuted the allegations. DeRossi terminated Bresler's employment on December 17, 2020, effective December 30, 2020.

After Bresler's termination, Bowe told a Staff Attorney who was serving as union steward that the "campaign against" Bresler had "taken on a life of its own"

Bresler's Evidence of Satisfactory Work

Most of the rest of the Complaint focuses on Bresler's disagreement with and challenges to the thirteen allegations made against him in DeRossi's November 30, 2020 letter. The Complaint alleges that the allegations were false as a factual matter. For example, Bresler alleges that he did not misstate the standard of review in a draft decision or fail to include the correct number of indictments in another draft opinion. He also disputed that a Justice had reassigned an opinion because of his writing.

Bresler essentially provided factual allegations challenging each of his alleged failures and deficiencies contained in the November 30, 2020 letter, explanations for the alleged conduct, evidence that the Justice involved was not upset or displeased with his work product or, in some circumstances, was pleased with his work. Bresler further alleged that Muster and / or Bowe provided the false information to DeRossi for inclusion in her November 30, 2020 letter and on which she relied in making her employment decisions. I assume the facts to be true, as I must, and, therefore, assume that the allegations in DeRossi's letter were incorrect, pretextual, or false, or overstated minor and common mistakes made by other Staff Attorneys.

Several Justices praised Bresler's editing and forwarded their praise to Bowe who did not include them in Bresler's written or oral evaluations. Bresler was held to a higher standard than other Staff Attorneys. The Complaint includes numerous allegations of poor writing and editing by Staff Attorneys and others at the Appeals Court.

DISCUSSION

In evaluating a motion to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6), I accept "the facts alleged in the complaint as true and draw[] all reasonable inferences in the plaintiff's favor." Edwards, 477 Mass. at 260. However, I "do not regard as true legal conclusions cast in the form of factual allegations." Id. (internal quotations and citations omitted). To survive a motion to dismiss, Bresler must allege facts plausibly suggesting an entitlement to relief beyond a speculative level. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Bresler has asserted a single claim of intentional interference with advantageous relations. The Defendants argue that the claim must be dismissed for three reasons. First, the Defendants, public officials, are protected by the doctrine of common-law immunity from intentional torts for discretionary conduct unless they acted with bad

faith, malice, or corruption. Second, the Complaint fails to state a claim of intentional interference with advantageous relations against officials of Bresler's former employer because it lacks the requisite allegations of actual malice. And third, the claim is barred by the exclusivity provisions of the workers' compensation act. I address each in turn.

I. Common-Law Immunity

Each Defendant is sued in her individual capacity for alleged intentional conduct undertaken in their official supervisory and administrative roles at the Appeals Court. As an initial matter, the Massachusetts Torts Claims Act does not apply to intentional tort claims against the Defendants in their individual capacity. See Nelson v. Salem State Coll., 446 Mass. 525, 537-538 (2006). However, "[a]t common law, a public official . . . would not have been liable 'for negligence or other error in the making of [an official] decision' if the official acted 'in good faith, without malice and without corruption.'" South Boston Betterment Trust Corp. v. Boston Redevelopment Auth., 438 Mass. 57, 69 (2002)(second alteration in original), quoting Gildea v. Ellershaw, 363 Mass. 800, 820 (1973). That is because "[t]here is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare." Id., quoting Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 294 (1980). The application of the doctrine of common-law immunity, therefore, requires that the official's conduct was discretionary, and the official acted in good faith. Nelson, 446 Mass. at 538 (2006).

Bad faith, for purposes of the application of common-law immunity, "is not simply bad judgment" or "negligence." Ramos v. Board of Selectmen of Nantucket, 16 Mass. App. Ct. 308, 314 (1983). It requires "a breach of a known duty through some motive of interest or ill will." Id. Malice refers to a wrongful act done intentionally without cause or justification. Nasir v. Foxborough, 2020 WL 1027780 at *9 (D. Mass. Mar. 3, 2020). "Malice may be shown by the proof of facts from which a reasonable inference of malice may be drawn." Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 664

(1981) (considering malice in the context of claim of intentional interference with advantageous relations by employee against supervisors). "The line between a proper inference and unwarranted conjecture is not easily drawn. The answer depends on the evidence in each case and on what the trier of fact may reasonably infer from that evidence." Id.

The Complaint makes clear that the Defendants acted in their official capacities in connection with their supervision, review, and management of Bresler and ultimate determination to end his employment with the Appeals Court. Bresler does not dispute that conclusion. The issue, then, is whether the Complaint alleges sufficient facts which would establish a lack of good faith or malice.

With respect to Muster, I cannot conclude that the Complaint does not state facts from which a jury could find, directly or indirectly, that she acted with personal animus and hostility and gave false information to DeRossi and to Bowe. Bresler alleges that Muster (i) accused him of trying to take over; (ii) solicited criticisms of Bresler from two Justices and encouraged those Justices to provide the criticisms to Bowe; (iii) disparaged Bresler to a Justice in front of another Staff Attorney; (iv) disparaged Bresler to another Staff Attorney; (v) discouraged Staff Attorney attendance at his seminars; and (vi) failed to publicize Bresler's seminars. Bresler alleges as well that other Staff Attorneys observed and reported to Bowe that Muster was bullying Bresler, and was "brutal" in her review of his editing. On those facts, I cannot conclude that Bresler has failed to allege facts which give rise to bad faith and / or malice. See O'Brien v. New Eng. Tel. & Tel. Co., 422 Mass. 686, 690 (1996) (upholding intentional interference verdict, where "jury were warranted in finding that [supervisor's] conduct exceeded his rightful role . . . and was prompted by his resentment of [Plaintiff's] successful challenges to his decisions and her refusal to transfer out of his department"); Brothers v. Millbury, 2014 WL 4102436 at *9 (D. Mass. Aug. 14, 2014) (Supervisors "conducted a 'twisted investigation,' made false charges, and . . . [one] destroyed evidence").

The factual allegations against Bowe and DeRossi differ significantly. First, with respect to DeRossi, most of the allegations amount to the assertion that DeRossi inappropriately relied on her subordinates and acted upon and repeated information provided to her concerning Bresler without sufficient investigation. (E.g., Compl. ¶ 72 (“DeRossi did not investigate the truth of the 13 allegations before she issued her November 30, 2020 letter”)).²

With respect to Bowe, Bresler disagrees with conclusions she reached and conveyed about his job performance and calls her conclusions “false.” Other than conclusory assertions regarding Bowe’s “spitefulness,” however, Bresler asserts no facts regarding Bowe’s *conduct* that would support a finding of bad faith or malice. The only conduct he alleges is that Bowe promised Bresler that Muster would not be involved in Bresler’s evaluations and went back on that promise, and that Bowe failed to heed others’ warnings regarding Muster’s misconduct. That conduct does not plausibly suggest Bowe’s bad faith or malice. Moreover, Bowe’s statement, that the campaign against Bresler “had taken on a life of its own” does not indicate that Bowe lacked good faith or was acting with malice. Indeed, Bresler alleges that Bowe and DeRossi were “under the influence of . . . Muster” indicating that Muster used her role to persuade or convince Bowe and DeRossi to take certain employment actions.

Put otherwise, Bresler does not allege facts that, if true, would establish that Bowe or DeRossi had a dishonest purpose or acted with some personal animus or ill will. Allegations of a failure to investigate, or the inappropriate reliance on information provided by Muster are insufficient. Bresler has, therefore, not alleged facts which would plausibly rebut the presumption that Bowe and DeRossi acted with honest and sufficient motives. See South Boston Betterment Trust Corp., 438 Mass. at 69. I

² Bresler alleges as well that DeRossi did not permit him to access his files. That conduct alone does not plausibly suggest bad faith or malice.

conclude that, on this record, Bowe and DeRossi are protected by common-law immunity.

On the other hand, Bresler has alleged sufficient facts to rebut the presumption as to Muster and she is not, on this record and at this juncture of the case, entitled to common-law immunity.³

II. Intentional Interference with Advantageous Relations⁴

To state a claim for intentional interference against an official of an employer, an employee must show that the “controlling factor” in the official’s interference with the employment relationship was actual malice. Gram, 384 Mass. at 664. The Supreme Judicial Court has defined “the requisite ‘malice’ in this context as ‘a spiteful, malignant purpose, unrelated to the legitimate corporate interest’ of the employer.” Weber v. Community Teamwork, Inc., 434 Mass. 761, 782 (2001), quoting Boothby v. Texon, Inc., 414 Mass. 468, 487 (1993). “The actual malice requirement provides a measure of protection to corporate supervisors, who must necessarily make adverse employment decisions from time to time and who otherwise would be unduly exposed to the tortious interference claims of disgruntled former employees.” Kelleher v. Lowell Gen. Hosp., 98 Mass. App. Ct. 49, 54–55 (2020).

³ It is true that Bresler does not allege facts from which one could discern the reason for Muster’s apparent jealousy or ill will. That is not necessary. From the facts alleged as to Muster’s conduct, it is sufficient that a juror could reasonably infer those motives.

⁴ The court notes that the Defendants cite to a number of cases that arose in the context of summary judgment motions, see, e.g., Alba v. Sampson, 44 Mass. App. Ct. 311 (1998), after trial, see, e.g., Blackstone v. Cashman, 448 Mass. 255 (2007); Boothby v. Texon, Inc., 414 Mass. 468, 487 (1993), or are otherwise not binding on this court, see, e.g., Eissa v. Ledvance LLC, 626 F. Supp. 3d 209 (2022); Gregg v. Northeastern Univ., 599 F. Supp. 3d 9 (2022); Lashgari v. Zoll Med., 84 Mass. App. Ct. 1106, 2013 WL 4029211 (2013) (Rule 1:28 decision).

Bresler has alleged facts which, if true, would be sufficient to establish that Muster had a spiteful, malignant purpose – namely, personal animosity and jealousy. He has alleged as well that, in the month before Muster became the Deputy Chief Staff Attorney, Bresler received a very favorable performance evaluation. After Muster was promoted and began her disparagement and solicitation of criticism of Bresler from Justices of the Appeals Court with whom she had a prior relationship, Bresler received very negative reviews and ultimately was terminated. On this record, and applying the Motion to Dismiss standard, Bresler has alleged sufficient facts to survive dismissal as to Muster.

Kelleher is not to the contrary. There, “the specific allegations in the complaint” showed actions “animated (at least in material part) by a corporate interest — that is, concerns about the quality or usefulness of the plaintiff’s work.” Kelleher, 98 Mass. App. Ct. at 55-56. Here, while Bowe’s and DeRossi’s specific actions evince a corporate interest, Muster’s do not. Further, because Bresler was given a positive evaluation prior to Muster’s promotion to Deputy Chief Staff Attorney, and his evaluations shortly thereafter were markedly different, a finder of fact could reasonably infer Muster’s conduct was not animated by a corporate interest but only personal ill will.

Bresler has alleged facts that are sufficient to survive dismissal as to Muster’s actual malice. For the reasons stated above in connection with the discussion of common law immunity, Bresler has not alleged facts that would establish that Bowe or DeRossi acted with the necessary actual malice to state a claim of intentional interference with advantageous relations.

III. Workers’ Compensation Act

The workers’ compensation act (Act), G.L. c. 152, was “enacted as a humanitarian measure in July, 1911 . . . in response to public sentiment that previous remedies under common law and the employers’ liability act did not sufficiently protect against injuries or provide relief for workplace accidents.” Molina v. State Garden, Inc., 88 Mass. App.

Ct. 173, 178 (2015). Under the Act, employees get a "'guaranteed right of recovery,' but they are in turn barred from 'recovering against their employers for injuries received on the job.'" Id., quoting Barrett v. Rodgers, 408 Mass. 614, 616 (1990).

"Claims for negligence, gross negligence, and even wilful misconduct by the employer, whatever the genesis, are all covered under the exclusive remedy provision of the [A]ct." Estate of Moulton v. Puopolo, 467 Mass. 478, 490 (2014). But "an employee is not barred from bringing an action against a fellow employee who commits an intentional tort which 'was in no way within the scope of employment furthering the interests of the employer.'" Anzalone v. Massachusetts Bay Transp. Auth., 403 Mass. 119, 124 (1988), quoting O'Connell v. Chasdi, 400 Mass. 686, 690 (1987). Thus, co-employees, or supervisors, "may be sued for tortious acts committed outside the course of employment and for reasons 'unrelated to the interest of the employer.'" Fredette v. Simpson, 440 Mass. 263, 266 (2003), quoting Brown v. Nutter, McClennen & Fish, 45 Mass. App. Ct. 212, 216 (1998) (citations omitted).

For the same reasons Bresler has alleged facts from which a finder of fact could infer that Muster's conduct was unrelated to a corporate interest, Bresler has alleged facts from which a reasonable person could infer that Muster's conduct was not for job-related purposes, but for wholly personal spiteful and jealous purposes. Similarly, for the same reasons Bresler has not alleged sufficient facts to assert a claim of interference with advantageous relations against Bowe and Muster, he has not alleged facts which would take Bowe's and DeRossi's conduct outside the exclusive remedy provisions of the Act. All of Bowe's and DeRossi's conduct related to their roles as Bresler's supervisors and constituted conduct they undertook in exercising their duties.

Gichuhi v. Alternative Supports, Inc., 90 Mass. App. Ct. 1104, 2016 WL 4577479 (2016) (Rule 1:28 decision) is not to the contrary. There, the wrongful conduct, although shocking, stemmed from a desire to protect the employer from Plaintiff's allegations about the employer's wrongdoing, and whistleblowing and, thus, "related wholly to

[the defendant's] position . . . and to the manner in which [he] exercised his supervisory duties." *Id.* at *3 (second alteration in original). Here, as noted, Bresler has alleged facts to support the conclusion that Muster acted out of personal jealousy and ill will.

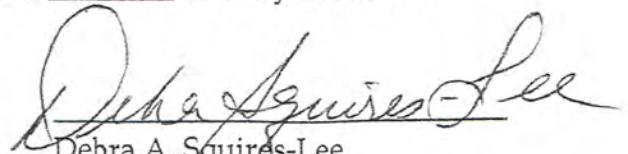
Moreover, the Defendants' argument rests on the premise that Bresler seeks only emotional distress damages for the interference with his employment at the Appeals Court. That is not the case. Bresler seeks monetary damages for the loss of his position and claims that he was harmed "financially." A suit to recover financial harm resulting from the interference with his advantageous relations is not barred by the Act as the loss of income is not a "personal injury" as defined in the Act. See G.L. c. 152, § 1(7A) (setting forth definition of "personal injury"); *Niemi v. GenRad, Inc.*, 20 Mass. App. Ct. 948, 948 (1985) (rescript) ("The loss of income and benefits flowing from the [employer's misconduct] may be recovered in an action at law. However, any emotional distress occasioned by the [misconduct] is a 'personal injury' within the meaning of the Act.").

ORDER

Because the facts as pleaded would not establish that Bowe or DeRossi acted in bad faith or with actual malice, they are protected by common-law immunity, and Bresler has failed to state a claim of intentional interference with advantageous relations against them. The Motion to Dismiss is therefore ALLOWED as to Defendants Mary Bowe and Gina DeRossi.

Because the factual allegations regarding Muster's specific conduct could lead to the reasonable inference that she acted out of personal ill will and jealousy and not in the Appeals Court's interest, the Motion to Dismiss is DENIED as to Lynn Muster.

September 25 2023


Debra A. Squires-Lee
Justice of the Superior Court

**CERTIFICATION OF COMPLIANCE WITH RULE 20(a)
OF THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I, Kenneth Bresler, certify that this Application for Direct Appellate Review complies with Rule 20(a) of the Massachusetts Rules of Appellate Procedure.

This application uses the proportionately spaced font Times New Roman in 14 points. I ascertained that the brief argument section of the application is 840 words, shorter than 2,000 words in proportional font, as Rule 11(b)(5) requires, by using the word count function in Microsoft Word in Windows 10.



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CERTIFICATE OF SERVICE

I, Kenneth Bresler, certify that I served this Application for Direct Appellate Review on January 24, 2024, by email to Katherine B. Dirks, Assistant Attorney General, katherine.dirks@state.ma.us; and John Potapchuk, Assistant Attorney General, john.potapchuk@state.ma.us.



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