COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2025-P-0188

KEVIN C. ROBINSON,
Appellee/Cross-Appellant,

v.

TOWN OF MARSHFIELD,
Appellant/Cross-Appellee.

On Appeal From Judgments And Orders Of The Plymouth County Superior Court

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PRINCIPAL BRIEF OF APPELLANT/CROSS-APPELLEE TOWN OF MARSHFIELD

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STATEMENT OF THE ISSUES

A. Whether the Town is Entitled to a New Trial Where the Trial Judge Admittedly Instructed the Jury Erroneously on Both Pre-Text and Mixed Motive and, in any Event, Instructed the Jury Erroneously on Pre-Text.

B. Whether the Town is Entitled to Judgment Notwithstanding the Verdict Where Chief Robinson Himself Did Not Testify that His Niece was Subjected to Gender-Based Discrimination, Chief Robinson Did Not Engage in Protected Activity, and No Causal Connection Existed Between the Purported Protective Activity and any Adverse Action.

C. Whether the Trial Court Erred by Submitting Punitive Damages to the Jury Where the Evidence Did Not, in Any Way, Support an Award of Punitive Damages.

PRELIMINARY STATEMENT

After being alerted to the possibility that the Marshfield Fire Chief, Kevin Robinson, was violating state ethics laws with respect to preferential treatment towards his family members, the Town of Marshfield hired an outside investigator. That outside investigation concluded that Chief Robinson likely violated numerous provisions of the state ethics laws because he gave preferential treatment to his brother, Captain Shaun Robinson, and his niece, probationary firefighter/paramedic Shauna Patten (formerly Robinson). This preferential treatment included interfering with disciplinary proceedings against Captain Robinson and pushing Shauna through training as a probationary firefighter notwithstanding that every training officer informed Chief Robinson that she was unqualified and was a danger to herself, the Department, and the public. The Marshfield Board of Selectmen thereafter placed Chief Robinson on paid administrative leave and issued a Notice

of Intent to Terminate his employment. Rather than appear at a hearing, Chief Robinson voluntarily resigned from his position.

In an effort to change the narrative, Chief Robinson claimed *post hoc* that he was pushed out of the Department not because of his conflicts and preferential treatment toward family members, but instead in retaliation for his alleged reporting gender discrimination with respect to his niece Shauna.[1] But the trial evidence makes abundantly clear that Chief Robinson *never* reported that Shauna was being treated disparately or unfairly *based on her gender*, Chief Robinson himself did not know whether Shauna was being treated disparately or unfairly *based on her gender*, and the Selectboard members testified unequivocally and uncontroverted both that they never knew that Chief Robinson purportedly complained about gender discrimination and that their employment decisions were based solely on concerns that Chief Robinson violated state ethics laws and was running the Department poorly.

The jury verdict should be vacated and the trial judge's denial of the Town's postjudgment motions should be reversed. The trial judge laudably concluded that he instructed the jury improperly on a key element of Chief Robinson's retaliation

[1] As noted below, Chief Robinson also claimed he was pushed out of the Department due to his age, in an attempt to throw everything at the wall in hopes that something might stick. That claim was dismissed in federal court and the dismissal was affirmed by the First Circuit Court of Appeals.

claim, which entitles the Town to a new trial. Furthermore, judgment for the Town was warranted because the verdict is contrary to the law where Chief Robinson himself could not testify that Shauna was subjected to gender-based discrimination, Chief Robinson did not engage in protected activity, and no causal connection existed between the purported protective activity and any adverse action. Finally, the trial court erred by submitting punitive damages to the jury because punitive damages were not warranted by any reasonable view of the evidence, thus entitling the Town to vacatur of the punitive damages award.

STATEMENT OF THE CASE

This action stems from an employment dispute between Chief Robinson and the Town of Marshfield, the former and now deceased Marshfield Town Administrator Rocco Longo, and a former member of the Marshfield Board of Selectmen John E. Hall. The Complaint, initially filed in federal court, alleged six counts: Count I: violation of Age Discrimination under M.G.L. c. 151B, § 4(1C), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a); Count II: Retaliation under M.G.L. c. 151B, § 4(4) and the ADEA, 29 U.S.C. § 623(d); Count III: Failure to Investigate and Remedy under M.G.L. c. 151B and the ADEA, 29 U.S.C. § 621, *et seq*.; Count IV: Breach of Contract; Count V: Defamation; and, Count VI: Intentional Interference with Contractual Relations. In a thorough and well-reasoned decision, the federal court granted the Town summary

judgment on all claims brought against it. See Robinson v. Town of Marshfield, 2019 WL 186658, at *1 (D. Mass. Jan. 11, 2019). On appeal, the First Circuit affirmed as to Count 1 in its entirety and Counts 2-3 to the extent they brought claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a). See Robinson v. Town of Marshfield, 950 F.3d 21, 26 (1st Cir. 2020). The First Circuit reversed and remanded Counts 2-3 to the extent they were predicated on state law and Counts 4-6, not on the merits but because the federal court should not have exercised supplemental jurisdiction after entering summary judgment on all the federal claims. Id. at 32–33. The federal district court thereafter entered an order dismissing the remaining claims without prejudice to be refiled in state court. [RA. vol. I, 56].[2]

The case was re-filed in the Plymouth Superior Court on March 13, 2020, asserting claims for: retaliation based on reporting suspected gender discrimination against the Town, the then Town Administrator Michael Maresco in his official capacity only,[3] and Hall (Count I); breach of contract against the Town (Count II); tortious interference with contractual relations against Hall (Count III); and defamation against Hall (Count IV). [RA. vol. I, 23–56]. On September 22, 2020,

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[2] References to the record appendix are cited as [RA. vol.(number), (page)]. References to transcripts within the record appendix are cited as [RA. vol.(number) (page:line)]. References to the Town's Addendum are cited as [Add. (page)].

[3] Notably, Michael Moresco was not the Town Administrator at any of the relevant times.

the Town filed a substantially similar motion for summary judgment, which was heard during a telephonic hearing on February 4, 2021. On February 18, 2021, the Superior Court (Buckley, J.) granted summary judgment on a portion of Count II (breach of contract), and denied summary judgment on Counts I, III, and IV.[4] [RA. vol. I, 86–114]. In Judge Buckley's words, "the evidence of probable ethics violations by [Chief] Robinson is strong and the evidence of pretext is weak." [RA. vol. I, 106].

Just prior to trial, Chief Robinson voluntarily dismissed with prejudice all claims alleged against Hall and Maresco and the breach of contract claim against the Town. [RA. vol. I, 117–118].[5] The only claim that proceeded to trial was retaliation against the Town on the theory that the Town retaliated against Chief Robinson's report of gender discrimination in the Department.

The case was tried to a jury from October 30 – November 13, 2023. Beginning in the afternoon on November 9 and continuing on the morning of November 10, 2023, the trial judge held a charge conference, at which the parties and the trial judge grappled with the precise language that should be submitted to the jury related to the retaliation claim. [RA. vol. V, 139–161, 286–344, 349–392]. Over the Town's

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[4] Chief Robinson's motion for reconsideration was denied on September 10, 2021. [RA. vol. I, 115–116].

[5] Thus, neither Hall nor Maresco were parties to the judgment below and are not parties to this appeal.

objection, the Court issued a jury instruction – as requested by Chief Robinson – that collapsed and combined the pre-text and mixed-motive instructions, and contained an incorrect instruction on pre-text that permitted a jury to return a verdict if Chief Robinson proved *either* that the Town's stated reasons for its actions were false *or* not the only reasons (whether permissible or impermissible). [RA. vol. V, 420:23 – 421:19, 440:12-18, 447:6-22]. The jury returned a verdict in favor of Chief Robinson. [RA. vol. I, 215–217]. Although the jury found that the Town met its burden to show that it would have made the same decision even had Chief Robinson not engaged in protected activity—thus entitling the Town to judgment under the mixed-motive instruction—the jury nonetheless found that the Town's reasons were pre-textual *either* because they were not true *or* not the only reasons. [RA. vol. I, 216 at Question 7]. Indeed, this turn of events seemed to surprise the trial judge, who inquired at sidebar:

> THE COURT: Now let me ask you this. The question number 6: Has the town of Marshfield proven by a preponderance of the evidence that it would have treated Mr. Robinson the same regardless of whether he engaged in protected activity?

[RA. vol. V, 481:13-16].

On January 9, 2024, the Town filed a motion for judgment notwithstanding the verdict and for a new trial. On August 1, 2024, the motion judge, who was also the trial judge, held a hearing. [RA. vol. V, 487–521]. On November 22, 2024, the trial judge denied the Town's Motion. [RA. vol. I, 220-256]. Notably, the trial judge

recognized that he instructed the jury erroneously because he, in essence, gave mutually exclusive instructions on both pretext and mixed-motive. [RA. vol. I, 251–252]. However, the trial judge concluded that the instructions *in toto* were sufficient to apprise the jury of the necessary elements. [Id.]

The Town filed a timely notice of appeal on December 6, 2024. Chief Robinson filed a timely cross-appeal on December 17, 2024. [RA. vol. I, 257–258]. The appeals were entered in this Court on February 19, 2025. [RA. vol. I, 259–260].

STATEMENT OF FACTS

Chief Robinson worked for the Marshfield Fire Department (the "Department") for approximately thirty-six years, starting as a call firefighter in 1978 and ending as Fire Chief. The Fire Chief is the appointing authority for the Department and makes all decisions with respect to discipline, promotions, and oversees training.

Chief Robinson voluntarily resigned from his position as Fire Chief on or about March 12, 2015 and stated that he was "looking forward to spending more time relaxing with [his] wife . . . and family including enjoying [his] three grandchildren." [RA. vol. VI, 155]. Chief Robinson's brother, Captain Robinson, and his son, Craig Robinson, were also members of the Department. [RA. vol. III, 93:10-16, 95:1-7].

Shauna Robinson's Candidacy and Probationary Period

In May 2013, the Department had two vacancies. [RA. vol. III, 114:8-10]. The top two candidates on the Civil Service Examination were Jodi Corrigan and Chief Robinson's niece, Shauna. [RA. vol. III, 113:20-24, 115:11-16]. When Shauna became a candidate for employment, Chief Robinson filed disclosures under M.G.L. c. 268A, §§ 19(b) and 23(b)(3) related to potential conflicts of interest, as he had done when both his brother and son were hired. [RA. vol. III, 118:8–119:20]. The disclosure required Chief Robinson to recuse himself from any involvement in the interviews, appointments, or promotions involving Shauna. [Id.]. Additionally, Chief Robinson was not to make any discretionary assignments involving Shauna that would result in her receiving additional wages, including overtime assignments, and he would refrain from involvement in any disciplinary actions involving Shauna. [Id.]. This included training and probationary/temporary appointments—like elevation to shift strength—if they would lead to some tangible benefit like increased pay or access to overtime. [RA. vol. IV, 222:17–223:2].

It cannot be overlooked that Shauna went through her training and probationary period at the same time as Corrigan, who is also a female. The theory that Chief Robinson reasonably believed and complained about gender discrimination against Shauna is non-sensical given the fact that Corrigan completed her training and probation without any problem during the same period of time.

During Shauna's probationary year, she was required to complete both EMS and firefighter training as well as attend a nine-week program at the Massachusetts Firefighter's Academy. [RA. vol. III, 117:9-14]. The Department utilized a preceptor program through which probationary firefighters were observed, trained, and evaluated by more experienced firefighters. [RA. vol. V, 40:12–41:2]. From the very beginning, Shauna struggled to the extent that her training officers and superiors were fearful for Shauna's safety, the safety of her fellow firefighters, and the safety of the community. [RA. vol. IV, 291:4-12, 403:20–404:22, 427–429; vol. V, 60:14-19, 61:4-6, 95–101, 172:13–175:5]. At trial, five different members of the Department (at all different levels in the command structure) testified extensively that Shauna was not fit to be a firefighter and that Chief Robinson was giving Shauna preferential treatment that no other probationary firefighter received. [Id.]. Shauna was evaluated by approximately six different evaluators. [RA. vol. IV, 285:8-12]. Indeed, Chief Robinson himself testified at trial that he wasn't surprised to learn that Shauna was struggling with the training because the work needed for the Department was different than the work she had been doing as an EMT for an ambulance company. [RA. vol. III, 127:3-19].

Deputy Chief William Hocking[6] testified that Shauna was not fit to be a firefighter and that Shauna was a danger to the community, the department, and herself. [RA. vol. IV, 291:4-12]. Hocking testified that in all his time working for the Department, he had never seen another probationary firefighter with the level of deficiencies or problems in training as Shauna had. [RA. vol. IV, 286:13-17]. He also testified that had Shauna not been related to Chief Robinson, then Chief Robinson would have terminated her during her probationary period. [RA. vol. IV, 288:19–289:1-7]. He testified that putting Shauna on shift strength was "dangerous and reckless." [RA. vol. IV, 289:19-25]. He also confirmed that at no time was he ever made aware that Chief Robinson believed that Shauna was being treated unfairly based on her gender, and that neither Chief Robinson nor his brother Shaun ever raised a gender issue during the times that Hocking met with them. [RA. vol. IV, 287:1-17]. Instead, at one meeting between Chief Robinson, his brother Shaun, and Hocking, Shaun complained that Shauna was not being treated "fairly"—however, at no point did either Shaun or Chief Robinson voice that Shauna was being treated unfairly based on her gender or that she was being treated differently than other male firefighters who struggled with some component of the training. [RA. vol. IV, 268-269, 287:1-13]. Finally, Hocking testified that Chief Robinson

[6] At the time of the relevant events, Hocking was the Deputy Chief. He served the Chief from 2015 until he retired in 2020.

treated his family—including his brother, son, and niece—more favorably than other members of the Department. [RA. vol. IV, 288:7-18].

Deputy Chief Louis Cipullo[7] testified extensively about all of Shauna's deficiencies on the fire side, how much work the Department put in to training her on a daily basis, and that he was constantly telling Chief Robinson how Shauna was not qualified. [RA. vol. V, 95–101]. He further testified that Chief Robinson told him to "make it work," which he took to mean find a way to push Shauna through training and toward a fulltime firefighter, even if she was not qualified. [RA. vol. V, 101:22–102:1-5]. He testified that Chief Robinson elevating Shauna to shift strength put the rest of her crew, her partner, and any outlining fire station in danger. [RA. vol. V, 102:14-21]. He testified that Chief Robinson had never gotten as involved in a trainee's training than he did with Shauna, his niece. [RA. vol. V, 102:22–103:3]. Finally, he testified that he never saw or was told anything that lead him to believe that Shauna was being treated differently because she was a woman, or that Chief Robinson believed this to be true. [RA. vol. V, 103:4-23].

Captain Anthony Boccuzzo testified about his general feeling that Chief Robinson had no wiggle room when it came to Shauna, and that he ran the Department poorly. Boccuzzo walked the jury through instances in which Chief Robinson showed preferential treatment toward his family members. [RA. vol. V,

[7] At the time of the relevant events, Deputy Chief Cipullo was a Captain.

176:21–177:24]. He also confirmed that Chief Robinson tried to get Shauna transferred to his (Boccuzzo's) group but asked him to keep the whole thing quiet, which Boccuzzo felt was inappropriate. [RA. vol. V, 175:6–176:16]. Boccuzzo testified that in his limited experience with Shauna, she was not qualified to be a firefighter. [RA. vol. V, 172:13–174:5].

Lieutenant Eric Morgan[8] was the Department's EMS training officer in charge of continuing education for the Department and for precepting new trainees on EMS related issues. [RA. vol. IV, 446:12-13; RA. vol. V, 38:16-21]. He was the EMS coordinator for the group that Shauna was assigned to and, therefore, he performed the majority of Shauna's preceptor evaluations. [RA. vol. V, 39:19–40:5]. He testified that a typical trainee would undergo two weeks of precepting, but Shauna's precepting period lasted for six months. [RA. vol. V, 41:3-10]. Morgan testified that Shauna never received a score of exceeding expectations from any of her evaluators. [RA. vol. V, 45:7-14]. He testified extensively about the deficiencies that Shauna had, that she was a danger to the department and community, and that Chief Robinson had never interfered with another trainee before they were made shift strength as he did for Shauna. [RA. vol. V, 60:14-19, 61:4-6]. Morgan walked the jury through Shauna's preceptor forms that unequivocally demonstrated that she was

[8] At the relevant time, Morgan was a firefighter/paramedic. [RA. vol. IV, 446:10-11].

not performing up to Department standards. [RA. vol. V, 44–56]. Furthermore, he testified that after every call he went over the preceptor forms with Shauna and discussed her deficiencies and how to rectify them. [RA. vol. V, 45:19–46:24].

Firefighter Matthew Cohen worked for both the Department and Brewster Ambulance Service as a firefighter/paramedic. [RA. vol. IV, 390:11-24]. He was also the president of the Union. [RA. vol. IV, 391:24–392:1-4]. Cohen also served as one of the evaluators working with Shauna. He testified that numerous members of the Department complained that Shauna was unsafe and that Chief Robinson was giving her preferential treatment. [RA. vol. IV, 385:5-24]. He eventually filed a grievance regarding the fact that it was unsafe for Chief Robinson to make her shift strength. [RA. vol. IV, 426:18-21, 432:7–433:2]. He testified, at length, of his own preceptor evaluations of Shauna and was unequivocal that not only could she not meet with the job requirements, but that she was a danger to other members of the Department and the public and that could have gotten someone, including herself, seriously injured. [RA. vol. IV, 427–429]. He testified that Shauna was given additional training for months to address any deficiencies identified by evaluators. [RA. vol. IV, 403:20–404:22]. Finally, he testified that he neither heard nor witnessed anything that made him believe that Shauna was being treated differently from anyone based on her gender, and that Chief Robinson never complained to him that Shauna was being treated differently based on her gender. [RA. vol. IV, 434:3-

21]. In fact, Cohen testified that had he known or believed that Shauna was being treated differently because of her gender, he as the union president would have filed a grievance or even a lawsuit on her behalf. [RA. vol. IV, 435:8-25].

Jody Corrigan testified that Shauna was struggling with the training, and that she was actually in the best group to address EMS deficiencies, with the best training officers, and in fact Jody wished she were in that group. [RA. vol. V, 186:10–189:21]. She testified about the training both she and Shauna received. [RA. vol. V, 186:10–189:21]. She testified that morale in the department was terrible, that Chief Robinson was not a supportive Chief, that a Chief makes or breaks a department, and Chief Robinson broke it. [RA. vol. V, 191:22–192:18]. Finally, Corrigan testified that Chief Robinson fired her after she put in her two weeks' notice, but never actually told her. [RA. vol. V, 195:5-20]. Instead, Corrigan showed up for work and found out that she had been fired and that the whole Department was told before her. [RA. vol. V, 195:21-25].

The Selectboard's Concerns of Ethics Violations

Before Shauna was hired as a probationary firefighter/paramedic, Chief Robinson met with the Selectboard to discuss potential conflicts of interest arising in connection with Shauna's employment. Prior to the meeting, Chief Robinson submitted two disclosure forms – one pursuant to Section 19(b) (disclosure of financial interest), and a second pursuant to Section 23(b)(3) (disclosure of

appearance of conflicts of interest). [RA. vol. III, 118:8–648:4]. Over and above the disclosure forms, Chief Robinson was bound by Massachusetts conflicts of interest laws, whether or not the disclosure forms addressed all possible situations that could arise. [RA. vol. IV, 227:5–1222814:8].

After concerns were raised about Chief Robinson interceding in Shauna's training in a way that he had not for any other probationary candidates and Chief Robinson improperly interceding in a disciplinary matter involving his brother Shaun, the Selectboard authorized the hiring of Laredo and Smith, LLP as an outside investigator on or about November 24, 2014. [RA. vol. VI, 113; vol. V, 234:17-21]. The Town also reported Chief Robinson's conduct to the State Ethics Commission.[9] [RA. vol. VI, 158–160, 163–164].

Independent Investigation by Attorney Mark Smith

Attorney Mark Smith and Edward Johnson[10] conducted a thorough investigation, including interviews with witnesses and review and analysis of documents provided by the Town. [RA. vol. VI, 112-113]. Attorney Smith practiced law for approximately 40 years, twelve of which was spent at the Attorney General's Office overseeing the corruption and public integrity division. [RA. vol. IV, 212:8-

[9] The State Ethics Commission investigator ended the investigation into Chief Robinson's conduct because he retired. [RA. vol. VI, 158–160].

[10] Mr. Johnson is a private investigator and former Detective Lieutenant of the Massachusetts State Police.

24]. The Town did not in any way limit which witnesses Attorney Smith could interview or suggest any witnesses he should or should not interview. [RA. vol. IV, 218:11-18]. The Town did not limit what documents Attorney Smith could review and he felt comfortable requesting additional documents that had not been provided to him. [RA. vol. IV, 218:17-25]. The Town did not recommend or place any limitations on questions that should or could be asked of any particular witness. [RA. vol. IV, 219:1-6]. At no point did Attorney Smith feel as if the Town pressured him to reach a particular outcome, and his conclusions were his alone. [RA. vol. IV, 241:2-11]. The fee that Attorney Smith charged was standard for a workplace investigation and was in no way contingent upon what his conclusions were. [RA. vol. IV, 244:3-24]. Other than when he was initially retained, Attorney Smith had no interactions with the Selectboard prior to issuing his final report. [RA. vol. IV, 225:15-21]. In other words, neither the Selectboard nor any other Town official had any input or influence over Attorney Smith's investigation or its ultimate conclusions. [RA. vol. V, 204:16–205:2, 240:10-16].

Attorney Smith determined that Chief Robinson likely violated M.G.L. c. 268A, § 19 by participating in particular matters with regard to Shauna Robinson's employment and overtime grievance involving Captain Robinson. [RA. vol. VI, 135–138]. Specifically, Chief Robinson:

- Conducted a meeting with Morgan and Hocking to discuss Shauna's performance evaluations;
- Twice approached Boccuzzo about transferring Shauna into his group, including a suggestion that a firefighter be transferred out of Boccuzzo's group to make room for her;
- Twice conducted initial investigations into complaints that Captain Robinson skipped other firefighters on the overtime list, concluding that there was insufficient evidence to uphold the grievance, even though a contrary conclusion might have resulted in financial loss to Captain Robinson;
- Rejected the Town Administrator's recommendation to terminate Shauna;
- Elevated Shauna to "shift strength";
- Objected to a Step 2 hearing on the Union's grievance concerning Shauna's employment, arguing that he, the Chief, was entitled to conduct a Step 1 hearing;
- Concealing Shauna's alleged workplace injury and withholding Shauna's resignation letter until the conclusion of the grievance hearing; and
- Investigating Captain Robinson's allegations that another captain failed to call him for an overtime shift;

[RA. vol. VI, 135–138]. Furthermore, Attorney Smith determined that evidence supported the conclusion that Chief Robinson violated M.G.L. c. 268A, § 23(b)(2) when he used his position as Fire Chief:

- To investigate firefighter grievances alleging that Captain Robinson violated overtime policy, ultimately dismissing the grievances;
- To reduce the Town Administrator's recommended discipline against Captain Robinson;
- To refuse to terminate Shauna at the Town Administrator's recommendation;
- To pressure Boccuzzo about transferring Shauna Robinson into his group;
- To elevate Shauna to "shift strength."

[RA. vol. VI, 140–142]. Finally, Attorney Smith determined that the evidence supported the conclusion that Chief Robinson violated M.G.L. c. 268A, § 17 by acting on behalf of Shauna, in connection with her employment, and on behalf of Captain Robinson, in connection with overtime grievances, in various interactions with Hocking, Boccuzzo, Longo, and the Selectboard. [RA. vol. VI, 143–145]. In the conclusion of his report, Attorney Smith wrote:

> The evidence supports the conclusion that Chief Kevin Robinson and Captain Shaun Robinson each violated one or more sections of the Massachusetts conflict of interest law. It would therefore be appropriate for the Town to refer this matter to the State Ethics Commission for further proceedings or any other action deemed appropriate by the Commission.

[RA. vol. VI, 147]. The alleged violations carried both civil and criminal penalties. [RA. vol. IV, 226:16-20; vol. VI, 147].

The Selectboard's Response to the Final Investigation Report

On February 27, 2015, the Selectboard met in executive session "[t]o investigate charges of criminal misconduct or to consider the filing of criminal complaints, including but not limited to violations of M.G.L. c. 268A, the Conflict of Interest Law." [RA. vol. VI, 149]. By letter dated March 2, 2015, the Selectboard placed Chief Robinson on paid administrative leave. [RA. vol. VI, 150-152]. By a Notice of Show Cause dated March 3, 2015, Chief Robinson was notified of his right to request a public hearing at which he could be represented by counsel, present evidence, call witnesses, and question any witnesses who might testify against him. [RA. vol. VI, 153–154]. Rather than appearing, Chief Robinson resigned. [RA. vol. VI, 155].

All three members of the Selectboard testified that the body's collective decision was based on two interrelated issues: (1) Attorney Smith's report that Chief Robinson likely violated state ethics laws; and (2) reports that Chief Robinson was running the Department poorly. [RA. vol. IV, 384:20–386:5; vol. V, 201:3-22, 203:16–204:9, 207:4-11, 229:7–230:9, 248:12-21]. All three members of the Selectboard testified that Chief Robinson *never* complained to them that Shauna was being treated unfairly based on her gender or being treated unfairly in comparison

to male firefighters in the Department. [RA. vol. IV, 390:13–393:15; vol. V, 205:13–206:4, 242:3-19, 243:6-21, 276:16–277:4]. And, more pointedly, all three members of the Selectboard testified that their votes with respect to Chief Robinson had nothing to do with any purported complaint by Chief Robinson that Shauna was discriminated against or treated unfairly based on her gender. [RA. vol. IV, 384:16-19; vol. V, 206:20–207:6, 222:11-15, 249:15–250:3, 114:4-10].

The Charge Conference

The trial judge held a charge conference beginning on November 8 and continuing into November 9th and 10th. [RA. vol. V, 141–161, 286–344, 349–389]. One of the most hotly contested issues was the precise language to be given with respect to the "same decision defense"—also called mixed-motive under Massachusetts law—and the pre-text language and the corresponding questions on the special verdict form. [RA. vol. V, 315–323:2, 339:21–343:8]. Chief Robinson proposed that at the third-stage of the burden shifting, he could prevail if he *either* showed that the Town's legitimate, non-retaliatory reasons for the employment action were false *or* not the only reasons. [RA. vol. V, 320:6–323:2]. The Town argued, instead, that the instruction on pretext should be framed as a singular: whether Chief Robinson proved by a preponderance of the evidence that the Town's articulated, nonretaliatory reasons were not true and instead a pretext for

discrimination. [RA. vol. V, 342:2-71 13-14, 343:4-8, 362:18–363:20, 365:21–366:3].

The Relevant Jury Instruction & Special Verdict Question

Over the Town's noted objection, the trial judge twice[11] instructed the jury as follows:

> THE COURT: Let's talk about nonretaliatory basis for employment decision. An employer may take adverse employment action against an employee for many nonretaliatory reasons. It will be up to you to decide whether the Plaintiff has proved by a preponderance of the evidence that the Defendant committed an adverse employment action in retaliation for his report or opposition to gender discrimination against his niece, Shauna Patton. If you find that the Defendant had other alleged legitimate reasons for its actions with respect to the Plaintiff **or that the other alleged legitimate reasons were the sole cause for the discrimination**, you must find for the Defendant unless the Plaintiff has adduced some significantly probative evidence that the Town's proffered reasons is pretextual. If you find the Defendant would -- and if you find that the Defendant would have acted the same even if the Plaintiff did not complain about or oppose about gender discrimination, then you must find for the Defendant.
>
> The Defendant has asserted that it had legitimate non retaliatory reasons for its actions. If the Plaintiff convinces you that the alleged nonretaliatory reasons put forth by the Defendant for the adverse actions are false, that fact may be used by you to infer that the reason for the adverse action was retaliation.

[11] This instruction was repeated to the jury because the trial judge's oral instructions varied from his written instructions. The Town objected at sidebar to the instruction being repeated to the jury. [RA. vol. V, 455:12-19].

[RA. vol. V, 420:23–421:14, 457:15–459:13].[12] With respect to the verdict form, the trial judge twice instructed the jury as follows:

> THE COURT: Question 7, has Mr. Robinson proven by a preponderance of the evidence that the Town's articulated nonretaliatory reasons were not true **or not the sole reason for the alleged adverse actions**? Yes or no? If you answered yes to question 7, go on to question 8. If you answered no to question 7, your deliberations are now complete. Please have the foreperson sign and date the verdict form the space provided below.

[RA. vol. V, 440:12-18, 461:15-25].[13]

SUMMARY OF THE ARGUMENT

The Town is entitled to a new trial because the jury was erroneously instructed on pretext, which the trial judge conceded, and such erroneous instruction likely affected the jury's verdict. (pp. 30–38).

The Town is entitled to judgment notwithstanding the verdict for three reasons. *First*, the evidence was insufficient to prove that Chief Robinson objectively or subjectively believed that Shauna was the victim of gender-based discrimination/gender-based disparate treatment. (pp. 38–41). *Second*, the evidence was insufficient to show that Chief Robinson engaged in protected activity because he never actually made a complaint to any relevant Town official that Shauna was being treated unfairly because of her gender. (pp. 41–44). *Third*, the evidence was

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[12] The Town emphasizes the portion of the instruction that it objected to and contends was erroneous.

[13] See note 12, supra.

insufficient establish a causal link between Chief Robinson's purported protected activity and any employment decision by the Selectboard where the Selectboard testified unequivocally and uncontroverted that its employment decisions were based solely on Chief Robinson's ethical violations and mismanagement of the Department. (pp. 44–47). Further, the causal connection between any retaliatory or discriminatory animus by Longo was broken because the employment decisions were made solely by the Selectboard and there was insufficient evidence that the Selectboard rubber stamped Longo's alleged retaliatory recommendations, that Longo duped the Selectboard into acting, or that Longo controlled the Selectboard. (pp. 44–47).

Finally, punitive damages were not warranted by the evidence and, therefore, this court should vacate the punitive damages award. (pp. 47–52).

ARGUMENT

I. Standards of Review.

This Court "review[s] objections to jury instructions to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party." Dos Santos v. Coleta, 465 Mass. 148, 153–154 (2013). When weighing prejudice, the Town bears the burden of making "made a *plausible* showing that the jury *might* have reached a different result absent the erroneous instruction." Main v. R.J. Reynolds Tobacco Co., 100 Mass. App. Ct. 827, 837 (2022) (emphasis added).

Although typically the denial of a motion for new trial is reviewed for an abuse of discretion, "a less deferential standard is applicable when a party on direct appeal seeks reversal and a new trial." Wahlstrom v. JPA IV Mgmt. Co., Inc., 95 Mass. App. Ct. 445, 448 (2019). This Court instead reviews for "prejudicial error[,]" determining whether "there has been an error" and, if so, whether this Court "can say with substantial confidence that the error would not have made a material difference." Id. In other words, the Town "can obtain a new trial unless the error is harmless." Id.

This Court reviews the trial judge's denial of directed verdict and denial of judgment notwithstanding the verdict to determine "whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the [nonmoving party].'" Goldberg v. Ne. Univ., 60 Mass. App. Ct. 707, 709 (2004) (alteration in original) (quoting Poirier v. Plymouth, 374 Mass. 206, 212 (1978)) (further quotation omitted).

II. The Trial Judge's Admittedly Erroneous Jury Instructions Likely Affected the Jury's Verdict.

To begin, the trial judge held that he improperly instructed the jury by including both a mixed-motive and pretext instruction on retaliation. [RA. vol. V, 420:23–421:14, 457:15–458:13]. This is undeniably an error of law. See Wynn & Wynn, P.C. v. Mass. Comm. Against Discrim., 431 Mass. 655, 670 n.32 (2000),

overruled in part on different grounds by Stonehill College v. Mass. Comm. Against Discrim., 441 Mass. 549 (2004). The Town objected to the jury instruction during the Charge Conference and again during the jury instructions when an issue arose about whether the oral instructions tracked the written instructions, thereby preserving this issue for appeal. See Mass.R.Civ.P. 51(b), 365 Mass. 816 (1974).

A. The Jury Instruction Was Erroneous, as Even the Trial Judge Recognized.

In Wynn & Wynn, P.C. the Supreme Judicial Court ("SJC") held that "[a] plaintiff in a discrimination case, pursuant to M.G.L. c. 151B, § 4, may proceed on one or both of the available analytic frameworks, namely the mixed-motive and or pretext frameworks, to establish her case against an employer, depending on the nature of the evidence." 431 Mass. at 670 n.32 "Once all the evidence is received," however:

> "[T]he judge should decide whether the mixed-motive or pretext framework properly applies to the evidence. If the plaintiff succeeded in satisfying the mixed-motive threshold, the case should be decided based on whether the defendant can prove that, even if it had not taken [the proscribed factor] into account, it would have come to the same decision regarding [the plaintiff]. If the plaintiff fails to satisfy the mixed-motive threshold, and a prima facie case is established, the case should be decided under the 'pretext' case principles."

Id. (internal quotations and citations omitted). In his postjudgment decision, the trial judge recognized that he did not follow this directive. [RA. vol. I, 252]. Instead, he charged the jury and sent them for deliberation on *both* the "mixed-motive" and the "pretext" frameworks, despite the Town's consistent insistence that the case be

submitted to the jury under the mixed-motive instruction, or at the very least under the correct pretext framework. [RA. vol. V, 420:23–421:14, 457:15–458:13]. This same error was compounded on the special verdict form, which combined elements of both the mixed-motive and the pretext frameworks in Questions 6 and 7 respectively. [RA. vol. V, 440:12-18, 461:15-25]. Thus, the Town has shown – and the trial judge agreed – that the jury was erroneously instructed.[14]

The next analytical step is to determine whether "the jury might have reached a different result absent the erroneous instruction." Main, 100 Mass. App. Ct. at 837. For two reasons, it is not only possible but very likely that the jury would have reached a different result absent the erroneous instruction.

First, the jury's answer to Question 6 bears out that a different verdict was all but assured had the jury been properly instructed on mixed-motive: the jury determined that the Town met its burden to establish that it would have acted in the same way even if Chief Robinson did not engage in protected activity. *Second*, even if a pretext instruction applied, the trial judge erroneously instructed the jury that Chief Robinson could rebut the Town's non-retaliatory reasons for its employment actions if *either* those reasons were false *or* if those reasons were not the sole

[14] Notably, Chief Robinson did not cross-appeal from the trial judge's determination that the jury instruction was erroneous. Therefore, Chief Robinson cannot now claim on appeal that the trial judge erred by holding the instruction was erroneous.

reasons. This is not the law. As cases from the SJC and this Court have repeatedly and consistently held, at the third-stage Chief Robinson must show that the Town's legitimate, non-discriminatory reasons for its employment decisions were false or not the true reasons; the law does not permit rebuttal because the articulated reasons were not the only reasons. See Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 408 (2016) (jury may infer pretext where "plaintiff's perceived performance deficiencies were merely a cover"); Abramian v. President & Fellows of Harvard Coll., 432 Mass. 107, 117 (2000) (pretext "may be accomplished by showing that the reasons advanced by the employer for making the adverse decision are not true."); Wheelock Coll. v. Massachusetts Commn. Against Discrimination, 371 Mass. 130, 139 (1976) (pretext may be show by "evidence that the respondent's facially proper reasons given for its action against him *were not the real reasons* for that action."); Downey v. Johnson, 104 Mass. App. Ct. 361, 381 n.38 (2024) ("'Massachusetts is a pretext only jurisdiction,' meaning that a 'plaintiff need only present evidence from which a reasonable jury could infer' that the reasons given for an employer's actions were not the real ones") (quoting Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 681 (2016); Quarterman v. City of Springfield, 91 Mass. App. Ct. 254, 259 (2017) (jury could properly infer pretext where city's state reasons to deny a permit "had been previously raised and, in large part, addressed by Quarterman"); O'Brien v. Mass. Inst. of Tech., 82 Mass. App. Ct. 905, 908–909

(2012) (denying summary judgment where evidence "raise[d] a jury question whether MIT's proffered reason is in fact why O'Brien was terminated or whether, instead, it is a pretext, and O'Brien was terminated either because of his handicap or in retaliation for engaging in protected conduct, namely, filing a complaint with the department.").

Here, it is impossible to know whether the jury determined that Chief Robinson met his burden on pretext by establishing the Town's stated reasons were false—which standard is supported by caselaw—or by establishing that the Town's stated reasons were not the sole reason—an improper standard unsupported by caselaw. Thus, a new trial was warranted. See, e.g., Seagrave v. Clark, 177 Mass. 93, 94 (1900) (new trial warranted because "it is impossible to say that the jury may not have been misled by what was said, and that in coming to the verdict which they did they may not have taken the views suggested by the instructions excepted to."); Hall v. Giusti Baking Co., 322 Mass. 317, 320 (1948) (new trial warranted "because of erroneous instructions in [the judge's] charge to the jury"); Governo L. Firm LLC v. Bergeron, 487 Mass. 188, 197 (2021) (new trial warranted where jury instruction erroneously limited the facts that the jury could consider in determining a violation of Chapter 93A); Kassis v. Lease & Rental Mgmt. Corp., 79 Mass. App. Ct. 784, 790 (2011) (affirming motion for new trial where trial court improperly instructed

jury on the scope of duty in negligent auto-repair case). This Court should reverse and remand for a new trial.

B. The Erroneous Instruction Was Not Cured By the Other Instructions.

Having determined that his instruction was erroneous, the trial judge nonetheless held that error was, effectively, harmless because the remainder of his instructions, taken as a whole, "adequately conveyed the applicable law because they directed the jury to find for [Chief] Robinson if he proved that the Town's proffered non-discriminatory reason was pretextual." [RA. vol. I, 252]. This reasoning, however, is untenable on at least three fronts.

First, even if the pretext instructions applied—which the Town disputes—as noted above the actual instruction given was erroneous because it included a disjunctive option for finding pretext: whether the legitimate non-discriminatory reasons were false *or* not the sole reasons. The inclusion of "not the sole reason" is erroneous and inconsistent with Massachusetts law for all the reasons stated above. In other words, the trial judge's other instructions do not cure the error because the trial judge erroneously instructed the jury on *how* Chief Robinson could show pretext. Thus, the trial judge's instructions did not "as a whole adequately convey the law. . . ." [RA. vol. I, 252]. Indeed, the manner in which the instruction was given would permit Chapter 151B liability if the Town's proffered reasons was one among

many entirely *permissible* reasons, as the instruction was not limited to other *impermissible* reasons.

Second, it presumes that the trial judge actually decided *at trial* that the pretext framework properly applied, which plainly is not the case. Rather, as set forth above, the trial judge incorporated the mixed-motive framework (by instructing the jury that it should find for the Town if it showed it would have made the same decision even if Chief Robinson had not engaged in protected activity) and the pretext framework (by instructing the jury that Chief Robinson could rebut the Town's nonretaliatory reasons by showing either they were false or not the sole reasons), which undoubtedly confused the jury. It is difficult to square the trial judge's determination that the error was harmless with the fact that the jury was instructed on mutually exclusive frameworks.

Third, it is not clear from the jury's responses to the special questions that it did, in fact, apply the pretextual analytical framework. It was entirely possible for the jury to answer "yes" to Question 6 and also answer "yes" to Question 7, which incorporated the alternative pretextual analytical framework, if the jury believed that the Town's permissible treatment of Chief Robinson was based, even minimally, on non-articulated grounds. Such an outcome would be consistent with a jury's application of a "mixed-motive" framework, but would contravene the SJC's holding in Wynn & Wynn that the Town was entitled to prevail if it "prove[d] that,

even if it had not taken [the proscribed factor] into account, it would have come to the same decision regarding [the plaintiff],” 431 Mass. at 670 n.32, which is precisely what the jury found in response to Question 6. See R.J. Reynolds Tobacco Co., 100 Mass. App. Ct. at 837.

In light of the admitted erroneous instruction and the likelihood that the jury would have reached a different result had it been properly instructed, this Court should reverse the trial judge’s decision and remand for a new trial.

III. The Town was Entitled to Judgment Notwithstanding the Verdict Because The Verdict is Contrary to the Law Where Chief Robinson Himself Could Not Testify that His Niece was Subjected to Gender-Based Discrimination, Chief Robinson Did Not Engage in Protected Activity, and No Causal Connection Existed Between the Purported Protective Activity and any Adverse Action.

Separate and apart from the erroneous jury instruction, the Town is entitled to judgment notwithstanding the verdict because the verdict was contrary to the law. In particular, the evidence was insufficient to show: (1) that Chief Robinson objectively or subjectively believed that Shauna was the victim of gender-based discrimination/gender-based disparate treatment; (2) that Chief Robinson engaged in protected activity; or (3) that the Town adversely acted against Chief Robinson because of his non-existent complaint that Shauna was the victim of gender-based discrimination/gender-based disparate treatment. Any one of these failures was sufficient for judgment notwithstanding the verdict. This Court should reverse.

A. The Evidence was Insufficient on the First Element Where Chief Robinson Testified on Cross-Examination That He "Wasn't Sure Whether it was Gender" and that he "I Did Not Know What the Issue Was."

The very first determination which needed to be made, even before determining whether Chief Robinson's "belief" was objectively and subjectively reasonable, is whether Chief Robinson *in fact believed* that Shauna was being subjected to *gender discrimination*. A jury cannot decide whether Chief Robinson's belief is either objectively or subjectively reasonable unless and until it is established that he actually holds such a belief; specifically that Shauna was being discriminated against or treated unfairly based upon her gender. According to the Cambridge Dictionary, the word "belief" means "the feeling of being certain that something exists or is true." Chief Robinson testified at trial, consistent with his sworn deposition testimony, that he "*wasn't sure whether it was gender*" and that "*I did not know what the issue was*." Taking his own testimony as true, per the requirements of M.G.L. c. 151B, Chief Robinson could not reasonably or in good faith, *believe* that his niece, Shauna, was the victim of gender-based discrimination if he testified that he "wasn't sure whether it was gender" and that "I did not know what the issue was." Specifically, the question went as follows:

> Q: I'm talking about in general, when you learned about these issues that Shauna was having, you did not believe that this was a gender discrimination issue because you were so far removed from the process?

> A. I wasn't sure whether it was gender, but I was sure that she was not getting the same treatment we had done for other paramedics – new paramedics who were struggling with skill levels.
>
> Q. Okay. So you -- and you admit you didn't know if this was a gender issue, correct?
>
> A. I did not know what the issue was. I know that she was being treated differently than male firefighters in the past.

[RA. vol. III, 343:11-19].

It would be unlawful under Chapter 151B to treat Shauna or any other female different than new (male) paramedics who were struggling with skill levels based on their respective genders. However, it would not be unlawful under Chapter 151B to treat Shauna differently for a host of reasons, including that her deficiencies were far greater than other paramedics who were struggling, because of her attitude or unwillingness to work hard or even because she was a "fourth Robinson" in the department.[15] To prevail, Chief Robinson had to show that he believed that Shauna was being treated differently from males *because of her gender*. By testifying that he "wasn't sure whether it was gender" and that he "did not know what the issue was," by the plain meaning of the word "belief" ("the feeling of being certain that something exists or is true") and the clear language of Chapter 151B his claim failed.

[15] In fact, the evidence presented at trial showed that Shauna was not only given every training opportunity available, she was given preferential treatment by Chief Robinson. [RA. vol. IV, 285:8-12, 385:5-24; vol. V, 176:21–177:24].

Chief Robinson's lack of both a subjective and objective reasonable belief is buttressed by the testimony of Hocking, Cohen, and Boccuzzo who unequivocally testified that Chief Robinson never told or indicated to them that he believed Shauna's purported disparate treatment had anything to do with her being a woman. [RA. vol. IV, 287:1-17, 434:3-21; RA. vol. V, 103:4-23]. It is further buttressed by Shauna's own testimony that she felt she "was being treated different than everybody," not specifically male firefighters based on her gender. [RA. vol. IV, 88:20-22]. Finally, it is buttressed by Shauna's father, Captain Robinson, who testified that he believed Shauna's problems related to personality clashes and the "rumor mill" that others in the Department didn't like Chief Robinson. [RA. vol. IV, 56:13-23].

In sum, the evidence was insufficient to show that Chief Robinson had either a reasonable subjective or reasonable objective belief that Shauna was subject to gender-based discrimination. The trial court should have granted a directed verdict or judgment notwithstanding the verdict. This Court should reverse.

B. The Evidence was Insufficient that Chief Robinson Engaged in Protected Conduct.

To establish liability for retaliation under M.G.L. c. 151B, there must be protected conduct. See generally Psy-Ed Corp. v. Klein, 459 Mass. 697, 707 (2011) (listing elements of retaliation claim). Chief Robinson did not engage in protected conduct as he never reported gender discrimination or disparate/unfair treatment

based on gender to any person within the Town with the authority to take corrective action. Thus, the Town was entitled to judgment notwithstanding the verdict.

There was no evidence at trial that Chief Robinson ever told the Selectboard (or anyone for that matter) that he believed Shauna was being treated unfairly *based on her gender*. Instead, the best that he could testify at trial was that during a meeting with the Selectboard regarding a union grievance on unrelated issues, Chief Robinson submitted proposed questions that should be asked of a union representative. [RA. vol. III, 345:18-20]. One of those questions identified firefighters by ID number—not by name or gender—who Chief Robinson believed were treated more favorably than Shauna (but again, not based on their gender). [RA. vol. VI, 51 at question 4]. Chief Robinson conceded at trial that the memo he wrote to the Selectboard and that he relied on at trial did not say in any way that Shauna was being treated differently based on her gender or because she was a woman. [RA. vol. III, 345:21–346:21].

The evidence clearly showed that Chief Robinson *never* made any complaints whatsoever that Shauna's alleged unfair treatment was *because of her gender*. What he did was complain broadly and generally that she was being treated unfairly. But there was no testimony from any witness linking the unfair treatment to Shauna's gender. Instead, every other witness in the case—including Shauna, Shauna's father, numerous firefighters of various rank, and every member of the Selectboard—

testified that Chief Robinson *never* told them or indicated to them that he believed Shauna's alleged unfair treatment was gender based or gender motivated. [RA. vol. IV, 56:13-23, 88:20-22, 287:1-17, 381:13–384:15, 1420:3-21, 434:13–435; RA. vol. V, 103:4-23, 242:3-19, 243:6-21, 276:16–277:4]. Similarly, all three members of the Selectboard—who are the ultimate decision makers for the Town—testified unequivocally that they were not aware that Chief Robinson made any report of gender discrimination and that their decisions were in no way based on Robinson reporting gender discrimination. [RA. vol. IV, 381:13–384:15; vol. V, 205:13–206:4, 242:3-19, 243:6-21, 276:16–277:4]. All three members of the Selectboard testified at trial that the body's collective decision was based on two interrelated issues: (1) Attorney Smith's report that Chief Robinson likely violated state ethics laws; and (2) reports that Chief Robinson was running the Department poorly. [RA. vol. IV, 384:20–386:5; vol. V, 201:3-22, 203:16–1645:9, 207:4-11, 229:7–230:9, 248:12-21]. And, more pointedly, all three members of the Selectboard testified that their votes with respect to Chief Robinson had nothing to do with any purported complaint by Chief Robinson that Shauna was discriminated against or treated unfairly based on her gender. [RA. vol. IV, 384:16-19; vol. V, 206:20–207:6, 222:11-15, 249:15–250:3, 277:4-10]. The evidence was insufficient to establish that Chief Robinson engaged in protected conduct.

Chief Robinson argued, and the trial judge agreed, that there was sufficient circumstantial evidence that when Chief Robinson complained about unfair treatment in Shauna's training, what he actually was complaining about was unfair treatment based on Shauna's gender. But this piling of inference on inference is not only unreasonable, it is defied by the trial testimony itself. Not a single witness testified that they understood Chief Robinson's complaints about Shauna's purported unfair treatment in comparison to unidentified firefighters was in actuality a report of gender discrimination. To hold otherwise would require employers to be mind readers. No principle of law supports such a requirement.

The trial court should have granted a directed verdict or judgment notwithstanding the verdict. This Court should reverse.

C. The Evidence was Insufficient to Create a Causal Connection between Robinson's Protected Conduct and his Voluntary Resignation.

As noted above, the evidence clearly established that the Selectboard—the actual decisionmaker in the Town—was neither aware that Chief Robinson had complained of gender discrimination nor did it base any of its decisions on such a report. [RA. vol. IV, 384:16-19; vol. V, 206:20 – 207:6, 222:11-15, 249:15–250:3, 277:4-10]. This should end the inquiry because, of course, "[w]here . . . adverse employment actions . . . predate any knowledge that the employee has engaged in protected activity, it is not permissible to draw the inference that subsequent adverse

actions, taken after the employer acquires such knowledge, are motivated by retaliation." Mole v. Univ. of Massachusetts, 442 Mass. 582, 594 (2004). Moreover, "a third person's independent decision to take adverse action breaks[, like the Selectboard here,] the causal connection between the supervisor's retaliatory or discriminatory animus and the adverse action." Id. at 598. The causal connection is not broken, however, "if that decision maker merely 'rubber stamps' the recommendation of the retaliating supervisor, or if the retaliating supervisor 'dupes' the decision maker into taking action, or otherwise controls the decision maker." Id. at 599. Moreover:

> When assessing the independence of the ultimate decision maker, courts place considerable emphasis on the decision maker's giving the employee the opportunity to address the allegations in question, and on the decision maker's awareness of the employee's view that the underlying recommendation is motivated by bias or a desire to retaliate. Where those factors are present, they indicate that the decision maker has not merely accepted the tainted recommendation at face value, but has in fact made a sufficiently independent determination as to whether discipline or adverse action is appropriate.

Id. at 600.

Chief Robinson argued that Attorney Smith's investigation was a sham influenced by Longo, the Town's labor counsel, and the Town's legal counsel; the Selectboard's later decisions should therefore be viewed as "tainted" by the alleged sham investigation. The evidence was clearly insufficient to support his theory. Attorney Smith himself testified that his investigation was free from any influence by the Town and that his conclusions were his and his alone. [RA. vol. IV, 241:2-

11; RA. vol. V, 204:16–205:2, 240:10-16]. Furthermore, the members of the Selectboard testified that they received information about Chief Robinson's mismanagement of the Department from independent sources beyond Attorney Smith's investigation, such as other firefighters. [RA. vol. V, 201:3-16, 202:5-17, 229:4-19, 235:5-24]. Thus, the evidence was simply insufficient to establish that the Selectboard rubber stamped Longo's alleged retaliatory recommendations, that Longo duped the Selectboard into acting, or that Longo controlled the Selectboard.[16] Finally, the Selectboard provided Chief Robinson with "the opportunity to address the allegations in question" at a show cause hearing at which Chief Robinson was entitled to counsel, the ability to call witnesses, and the ability to examine and cross-examine witnesses. Mole, 442 Mass. at 600; accord Kelley v. City Known as Town of Greenfield, 100 Mass. App. Ct. 1129, at * 3 (Rule 23.0 decision) (2022) ("chain of causation was broken by the mayor's independent decision to terminate the plaintiff" where "mayor was well aware of the long-standing controversy between the plaintiff and others in town government" and provided the plaintiff an opportunity to produce the requested documents).

In the absence of such evidence, there is no causal connection between the alleged protected conduct and the Selectboard's employment actions. The trial court

16 The same is true with respect to Labor Counsel and Town Counsel.

should have granted a directed verdict or judgment notwithstanding the verdict. This Court should reverse.

IV. Punitive Damages Were Not Warranted by the Evidence and, Therefore, This Court Should Vacate the Punitive Damages Award.

Under Massachusetts law:

> To sustain an award of punitive damages under G.L. c. 151B, § 4, a finding of intentional discrimination alone is not sufficient. An award of punitive damages requires a heightened finding beyond mere liability and also beyond a knowing violation of the statute. Punitive damages may be awarded only where the defendant's conduct is outrageous or egregious. Punitive damages are warranted where the conduct is so offensive that it justifies punishment and not merely compensation. In making an award of punitive damages, the fact finder should determine that the award is needed to deter such behavior toward the class of which plaintiff is a member, or that the defendant's behavior is so egregious that it warrants public condemnation and punishment.

Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 110–11 (2009). In short, punitive damages are only appropriate where conduct is extreme and outrageous. See id. Under the Model Jury Instructions, the jury were instructed in relevant part as follows:

> Punitive damages are different from compensatory damages. Unlike compensatory damages, which compensate the victim for the harm he has suffered, the purpose of punitive damages is to punish the defendant for conduct that is outrageous because of the defendant's evil motive or reckless indifference to the rights of others. To find that punitive damages should be awarded, you must find that more than intentional discrimination occurred. Punitive damages may be awarded only where the defendant's conduct is outrageous or egregious.

Coming to this determination requires the weighing of a number of nonexclusive factors, including: (1) "whether there was a conscious or purposeful effort to demean

or diminish the class of which the plaintiff is a part (or the plaintiff because he or she is a member of the class)"; (2) "whether the defendant was aware that the discriminatory conduct would likely cause serious harm, or recklessly disregarded the likelihood that serious harm would arise"; (3) "the actual harm to the plaintiff"; (4) "the defendant's conduct after learning that the initial conduct would likely cause harm"; and (5) "the duration of the wrongful conduct and any concealment of that conduct by the defendant." Id. at 111. None of these factors favored punitive damages here, and under no view of the evidence should punitive damages have been submitted to the jury.

Extreme or outrageous conduct under Massachusetts law is a high bar, and the trial evidence does not come close to clearing it. Cf. Foley v. Polaroid Corp., 400 Mass. 82, 97 (1987) (employer's conduct after he was acquitted of charges of sexual assault on another employee did not rise to the level of extreme and outrageous conduct where he was given a desk in a hallway area, he was given no meaningful work to do for four months, and his superiors would not talk to him); Casamasina v. Worcester Telegram and Gazette, Inc., 2 Mass. App. Ct. 801, 802 (1974) (newspaper reporting that plaintiff "had a long history of involvement with drugs" did not rise to level of extreme or outrageous conduct); Dean v. City of Worcester, 924 F.2d 364, 369 (1st Cir. 1991) (no extreme and outrageous conduct where officers caused

plaintiff to strike his face on sidewalk, placed a gun to his ear and a knee on his back, slightly kicked his feet and pushed him against a wall).

For example, this Court in Kiely v. Teradyne, Inc. affirmed a trial court's grant of a motion for j.n.o.v. on punitive damages in a retaliation case. 85 Mass. App. Ct. 431, 437 (2014). In Kiely, the trial evidence established that the plaintiff filed a gender discrimination charge with MCAD and, thereafter, the employer changed its usual hiring practice for a position that the plaintiff wanted to be considered for by: not offering any candidate (including plaintiff) an interview or even notifying them that they were considered for the position; the hiring process would be documented in writing; and the HR director not being familiar with the plaintiff's skills, while being familiar with the other two candidates' skills and who were ultimately hired. Id. at 432-433.

Here, there was insufficient evidence at trial to establish that the Town (or more specifically the Selectboard) engaged in "a conscious or purposeful effort to demean or diminish the class of which the plaintiff is a part (or the plaintiff because he or she is a member of the class). . . ." Indeed, all members of the Selectboard (and all the firefighters for that matter) testified unequivocally that they were not aware of any alleged gender discrimination with the Department and, if they had been aware of such, they would not have tolerated it. See Kiely, 85 Mass. App. Ct. at 437

(first Haddad factor not met, though may be less relevant in a retaliation case than a discrimination case).

Likewise, there was insufficient evidence at trial to establish that the Town knew, or recklessly disregarded the likelihood, that serious harm would arise based on its employment decisions with respect to Chief Robinson. The Town was precariously balancing the safety of the Department, the Marshfield community, and surrounding communities that would be put at risk should Chief Robinson be permitted to push Shauna through to become a shift-strength firefighter despite her clear deficiencies. The Town acted appropriately to keep Chief Robinson on paid administrative leave during the pendency of an outside investigation and provide Chief Robinson an opportunity to appear at a show-cause hearing to argue his case—an opportunity that Chief Robinson refused.

Similarly, the actual harm to Chief Robinson was marginal. He was notably able to find alternative employment as an interim Fire Chief in another Town, he sought no medical treatment or mental health assistance for his emotional distress, and his closing argument made clear that the amount of emotional distress damages were not based on any reasonable view of the evidence; rather, in closing Chief Robinson argued, improperly, that his emotional distress damages should be calculated by multiplying the amount of money the Town paid for its outside

investigation by the number of years that Chief Robinson planned to continue working.

Finally, as was true in Kiely, "[m]ost significant is the lack of evidence as to Haddad factors four and five in that there was no evidence at trial that the [Town] took any adverse action against [Chief Robinson] *beyond the retaliation itself*." 85 Mass. App. Ct. at 438 (emphasis added). There was no evidence at trial whatsoever related to either the Town's conduct after it learned that the initial conduct would likely cause harm or any attempt by the Town to conceal any of the conduct. Thus, these last two elements were "left to the realm of speculation as these issues were not addressed directly or indirectly by the evidence at trial." Id. at 440 (quotation omitted). Contrast Clifton v. Massachusetts Bay Transp. Authy., 445 Mass. 611, 613–614, 622, 624 (2005) (punitive damages appropriate "where the jury could have found that the African–American plaintiff was subject to a pattern of egregious racial harassment and retaliation by both his supervisor and coworkers, who 'shot bottle rockets at him, turned the lights off when he used the bathroom, sprayed water at him through fire hoses, dropped firecrackers near him, set water boobytraps that would fall on him when he opened his office door, and painted "fag bait" and "Sanford and Son" on his locker,' among other things."); Dalrymple v. Winthrop, 50 Mass. App. Ct. 611, 621 (2000) (punitive damages appropriate where defendant police chief who was "charged with the public duty to enforce the law equally [was]

shown to have deliberately violated it for reprehensible reasons"); Ciccarelli v. School Dept. of Lowell, 70 Mass. App. Ct. at 796–797 (2007) (punitive damages warranted where there was affirmative evidence of attempted concealment of wrongdoing).

In sum, the evidence provided to the jury was simply insufficient to meet Chief Robinson's extraordinarily high burden for punitive damages. See Kiely, 85 Mass. App. Ct. at 436-441; Smith v. Bell Atl., 63 Mass. App. Ct. 702, 721 (2005) (punitive damages were not warranted where plaintiff "repeatedly requested the same accommodations [given to others], they were endorsed by the company's doctors, and yet the company, through its supervisors, failed to support her work-at-home arrangement after nominally agreeing to it"). This Court should vacate the punitive damages award.

CONCLUSION

For the reasons set forth above, the defendant-appellant Town of Marshfield hereby requests that this Honorable Court **REVERSE** the trial court's order denying its Motion for a New Trial and its Motion for Judgment Notwithstanding the Verdict, and **REMAND** either for entry of judgment in the Town's favor or for a new trial.

Respectfully submitted,

The Defendant-Appellant,

TOWN OF MARSHFIELD

By its Attorneys,

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Dated: May 2, 2025

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JUDGMENT ON JURY VERDICT	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 2083CV00238	Robert S. Creedon, Jr., Clerk of Courts Plymouth County
CASE NAME Robinson, Kevin C vs. The Town of Marshfield et al	COURT NAME & ADDRESS Plymouth County Superior Court - Brockton 72 Belmont Street Brockton, MA 02301

JUDGMENT FOR THE FOLLOWING PLAINTIFF(S)

Kevin C Robinson

JUDGMENT AGAINST THE FOLLOWING DEFENDANT(S)

The Town of Marshfield
Michael A Maresco
John E Hall

This action came on for trial before the Court, Hon. Gregg J Pasquale, presiding, the issues having been duly tried and the jury having rendered its verdict,

After Jury Verdict, it is **ORDERED AND ADJUDGED**:

That the plaintiff(s) named above recover of the defendant(s) named above, Jointly & Severally the "Judgment Total" with interest thereon as outlined below as provided by law, and the statutory costs of action.

1. Date of Breach, Demand or Complaint		03/13/2020
2. Date Judgment Entered		11/17/2023
3. Number of Days of Prejudgment Interest *(line 2 - Line1)*		1344
4. Annual Interest Rate of 0.12/365.25 = Daily Interest rate		.000329
5. Single Damages		$300,000.00
6. Prejudgment Interest *(lines 3x4x5)*		$132,652.80
7. Double or Treble Damages Awarded by Court *(where authorized by law)*		$1,100,000.00
8. Statutory Costs		$.00
9. Attorney Fees Awarded by Court (where authorized by law)		$
10. **JUDGMENT TOTAL PAYABLE TO PLAINTIFF(S)** *(Lines 5+6+7+8+9)*		$1,532,652.80

DATE JUDGMENT ENTERED	CLERK OF COURT/ ASST. CLERK
11/17/2023	X

Date/Time Printed: 11-17-2023 10:05:15

SCV084: 04/2017

JUDGMENT ON JURY VERDICT	DOCKET NUMBER 2083CV00238	Trial Court of Massachusetts The Superior Court	

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
11/17/2023	X Chad A. Brown

Date/Time Printed: 11-17-2023 10:05:15 SCV084: 04/2017

Rec'd 11.22.24

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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
2083CV00238A

KEVIN C. ROBINSON

vs.

TOWN OF MARSHFIELD

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL OR FOR REMITTITUR OF THE VERDICT

Kevin Robinson ("Robinson") filed this action alleging that his former employer, the Town of Marshfield, retaliated against him for opposing gender discrimination in violation of General Laws Chapter 151B. Following a nine-day trial, on November 13, 2023, a jury awarded Robinson $300,000 in compensatory damages for emotional distress and $1,100,000 in punitive damages. For the reasons discussed below, Defendant Town of Marshfield's Motion for Judgment Notwithstanding the Verdict, Or, In the Alternative For a New Trial Or For Remittitur of the Verdict is **DENIED**.

BACKGROUND

Robinson filed this action against the Town of Marshfield ("the Town") on March 13, 2020, alleging in Count I of his complaint that the Town, Town Administrator Michael Maresco ("Maresco"),[1] and Board of Selectmen Chairperson John Hall ("Hall") retaliated against him for opposing gender discrimination in violation of Chapter 151B. On October 10, 2023, Robinson

[1]Robinson substituted the current Town Administrator, Maresco, as a defendant after the death of the previous administrator, Rocco Longo.

11/22/2024
c.c.: M.C., A.G., J.A., J.C.

stipulated to dismissal with prejudice of the claims against the individual defendants and Count II against the Town for breach of contract. The retaliation claim was tried to a jury from October 30, 2023 through November 13, 2023. Sixteen witnesses testified and the parties introduced sixty-two exhibits. The jury heard the following evidence.

Robinson worked for the Marshfield Fire Department ("the Department") for thirty-six years, rising through the ranks from a call firefighter to Fire Chief. In 2012, Town Administrator Rocco Longo ("Longo") gave Robinson a positive performance evaluation and called him an outstanding Fire Chief. Robinson's brother, Shaun, is a Captain in the Department. Robinson's son, Craig, also is a Captain in the Department. There were three other sets of father-son firefighters in the Department.

In February of 2013, there were two open firefighter positions. Jodi Corrigan ("Corrigan") was number one on the civil service list and Shauna Robinson ("Shauna"), Robinson's niece and Shaun's daughter, was number two. At that time, Shauna worked as a paramedic for EasCare Ambulance, which backs up the City of Boston EMS. About 80% of her calls were transports between hospitals and the other 20% were on scene calls.

As Fire Chief, Robinson is the appointing authority for the Department. Before Shauna's selection, Robinson met with the Board of Selectmen ("the Board") to discuss potential conflicts of interest in connection with her employment. Longo denied ever stating that he was opposed to hiring a fourth member of the Robinson family to serve in the Department. Robinson submitted a G.L. c. 268A, § 19(b) disclosure of financial interest form and a § 23(b)(3) disclosure of appearance of conflicts of interest form. He had done the same thing when his brother and his son were hired.

On October 1, 2013, the Board approved Robinson's § 23(b)(3) conflict of interest disclosure but attached the following conditions:

1. Chief Robinson shall remain the appointing authority, but will recuse himself from any involvement in the interview process for any appointment or promotion to any position for which his niece Shauna is a candidate.

2. If there are promotional opportunities or assignment to specialty positions for which Chief Robinson's niece is a candidate, they shall be addressed in the following manner:

    - A screening committee comprised of members of the command staff (Deputy Fire Chief, a captain or lieutenant) and the Town Administrator will review candidates for appointment or promotion. . . . The screening committee shall make a recommendation to the Fire Chief.
    - Chief Robinson, as appointing authority for the Fire Department, shall ratify the appointment or promotion as recommended by the screening Committee.

3. Chief Robinson may not make any discretional assignments that will result in extra wages for his niece. Overtime assignments will be distributed in the manner described in the collective bargaining agreement, which calls for a rotation of eligible employees.

4. If matters involving potential disciplinary action against Chief Robinson's niece are brought to Chief Robinson, he will notify the Town Administrator. The Town Administrator will review the situation and make recommendations as to the appropriate action.

The Board also approved the § 19(b) disclosure form, with the conditions that Robinson recuse himself from any appointment or promotion involving his brother Shaun, son Craig, or niece Shauna and not make any discretionary assignment that will result in additional wages for those relatives. The Board further required that Robinson notify the Town Administrator about potential disciplinary action against Shaun, Craig, or Shauna, with the Town Administrator responsible for investigating the allegation and making a disciplinary recommendation to Robinson.

In October of 2013, Robinson selected Shauna for a full-time firefighter position. She was required to serve a one-year probationary period before becoming a permanent member of the Department. During this period, she was required to complete EMS and firefighter training, then complete a nine-week program at the Massachusetts Fire Fighters' Academy. The training of a firefighter impacts whether she will remain employed at the end of the year-long probation.

Corrigan and Shauna started with the Department in November of 2013. Captain Louis Cipullo ("Cipullo") told Robinson that he was concerned with training two females together because the job requires a lot of physicality. Robinson told Captain Cipullo that the training would proceed as usual. The Department has an EMS Precepting Program that states that if a new employee does not show sufficient experience or competency, the employee shall continue the precept process and complete any suggested remedial training for up to one year. The Fire Chief is authorized to approve additional training time for recruits if needed and to send firefighters to Beth Israel Deaconess Hospital in Plymouth or South Shore Hospital for skills training.

Captain Cipullo oversaw Shauna's fire training as the leader of training group 3, while Corrigan was in a different group under Captain Anthony Boccuzzo. Captain Cipullo expressed concern that Shauna was too short for the job and would not be able to reach the trucks' side ladders. However, there are short male firefighters in the Department. Shauna participated in daily drills at the station to review the necessary firefighting skills. Captain Cipullo expressed concern to Robinson that Shauna would be unable to physically throw ground ladders. He did a ground ladder drill to assist her, but she was unable to raise a 24-foot ladder. She also had great difficulty opening a hydrant. Robinson advised Shauna to work on her upper body strength and

work with a personal trainer. Captain Cipullo allowed Shauna to take an Air Pak air tank home to practice. Corrigan helped Shauna practice knots during lunchtime.

Firefighter Eric Morgan ("Morgan"), who was the Department's EMS coordinator, oversaw Shauna's EMS training. Morgan has trained approximately thirty paramedics for the Department. He testified that the Department invests a lot of money and time into training new recruits and should do whatever is required to help them succeed. After each emergency call with Shauna, Morgan filled out a preceptor form to evaluate her performance, then discussed the form with her. A 1 means "needs retraining," 2 means "below expectations," 3 means "meets expectations," and 4 means "exceeds expectations." Morgan admits that the preceptor ratings are subjective. He gave Shauna mostly scores of 1 or 2, although he gave her some 3s. He testified that none of those scores were based on her being a woman. Morgan relayed to Robinson his concerns about Shauna's EMS decision making, including that she was too slow to make decisions.

Mattbew Cohen ("Cohen"), the president of the firefighter's union, was also one of Shauna's preceptors. Cohen approached Robinson several times to express his concerns that Shauna was not physically or clinically ready to perform her firefighter and paramedic duties. For example, he reported that on one occasion Shauna was unable to complete the stair chair of a patient down a few steps. One time, in the ambulance, Cohen asked Shauna to interpret a 12-lead EKG and she could not. Morgan then required her to attend a 12-lead re-education class. On another occasion, Shauna failed to report a GI bleed to hospital staff. On another call, she did not know that all EPI injections had to be transported to the hospital.

Deputy Chief William Hocking ultimately was responsible for overseeing Shauna's training because Robinson could not do so due to the conflict of interest. Captain Cipullo and

Morgan spoke to Deputy Chief Hocking about their concerns about Shauna's lack of progress, and Hocking passed those concerns on to Robinson. Deputy Chief Hocking told Shauna that he knew she was having trouble and that he was there to help and answer any questions. In all his years with the Fire Department, Deputy Chief Hocking never saw another firefighter who had the level of deficiencies Shauna did. Deputy Chief Hocking would have terminated Shauna's probation based on her poor performance and believed that Robinson was giving her special treatment by not doing so.

Captain Boccuzzo, who had been a paramedic for more than 20 years, was not involved in training Shauna but was informed of her progress. Boccuzzo attended an ambulance shift during which he told Shauna he expected her to be the primary treating paramedic for all calls. After the shift, he told Captain Cipullo and Morgan that he was not impressed with Shauna's performance.

In December of 2013, Captain Cipullo told Robinson that Shauna was not ready to move off training status and be assigned to "shift strength." A firefighter on shift strength must be able to perform all the duties of a firefighter and paramedic. Captain Cipullo was concerned that Shauna could not raise the ladder on the quintuple combination pumper ("quint"), which serves the dual purpose of an engine and a ladder truck.

Corrigan, the other new recruit trained at the same time as Shauna, testified that the training was intense and stressful. However, she progressed through the training period without any problems. She had been an on-call firefighter in Duxbury and had more experience than Shauna with certain equipment. Corrigan did not observe the trainers ignoring Shauna, nor did she observe any signs of gender discrimination at the Department. However, she testified that morale under Robinson was low and there was a lot of conflict with the union and between

Robinson and others. Before the end of her first year as a firefighter, Corrigan took a job with the Hanson Fire Department because she did not like the environment in Marshfield. After she put in her two-weeks of notice and took a sick day, Robinson fired her.

On January 1, 2014, Captain Cipullo spoke to Shauna and told her that she was running out of time to improve skills such as speed and accuracy, even though she had up to a year on probation to train. On January 1, 2014, Captain Cipullo emailed Deputy Chief Hocking that Shauna did several evolutions with a loaded stair chair without incident.

Shauna complained to Robinson that she was being treated unfairly. Robinson reviewed Shauna's preceptor forms in January 2014. Robinson believed that Shauna was not being treated the same as male paramedics who were struggling with their skills had been treated in the past.

Shaun told Robinson that he did not believe Shauna was being treated fairly during her training. Shaun requested a meeting with Robinson and Deputy Chief Hocking to discuss the unfair treatment. At that meeting on January 10, 2014, Shaun disagreed with the negative assessments of Shauna's performance. Shaun opined that since Shauna was struggling, she should be moved to a different group to train with Captain Boccuzzo, who was an EMT. Robinson agreed to meet with Shauna to discuss her problems. In his notes of this meeting, Robinson wrote that no one helped Shauna or even spoke to her on emergency calls and Captain Cipullo "treats her like crap" and forces her to second guess everything she does. Deputy Chief Hocking testified that gender discrimination was never raised or discussed during this meeting; although Shaun opined that Shauna was being treated unfairly, he did not compare her treatment to that of male firefighters.

Robinson met with Captain Boccuzzo and asked whether Boccuzzo felt he could train Shauna if she were moved into his training group. Captain Boccuzzo replied that Captain

Cipullo was an excellent firefighter and if he had concerns about Shauna's performance, Robinson should listen. Captain Boccuzzo said that if Shauna were transferred to his group, she would have a clean slate but if she did not meet standards, he would not sign off on it. This conversation made Captain Boccuzzo uncomfortable because he respected Captain Cipullo and Morgan's opinion. Robinson asked Captain Boccuzzo to keep their discussion confidential, which also made him uncomfortable.

On January 17, 2014, Captain Cipullo emailed Deputy Chief Hocking to report that Shauna had operated the quint without incident. However, he expressed concern to Robinson about her physical ability to pass the recruit training at the fire academy. Robinson responded that they should see what they could do to improve the situation. Robinson promoted Shauna to shift strength on January 20, 2014 and no one opposed that assignment. However, Morgan is not aware of any other trainee who was placed on shift strength with scores of 2, "needs improvement," on the preceptor forms.

On January 22, 2014, Longo and the Town's labor counsel, John Clifford, met with Robinson to discuss a possible Chapter 268A conflict of interest violation based on Robinson's intervening on January 10 in Shauna's training and evaluation process. Clifford wanted to place Shauna's training under Longo's supervision. However, Robinson opposed that plan because Longo was not an EMT with the proper knowledge to oversee Shauna's progress with EMT skills. Robinson therefore asked that outside Fire Chiefs evaluate Shauna.

After the meeting, Clifford emailed Robinson and Longo recommending that Longo file a complaint with the State Ethics Commission seeking a determination whether an ethics violation had occurred. Clifford opined that Robinson should recuse himself from any further involvement in decisions concerning Shauna's training and evaluation, and Longo should contact

a Fire Chief from a neighboring community to advise him on Shauna's training, assessment, and progress during probation, with Deputy Chief Hocking participating as necessary to implement that advice. Clifford's email concluded: "If Rocco and the Designated Fire Chief determine, after appropriate monitoring, that Firefighter Shauna Robinson should be terminated for not meeting appropriate standards during her probationary period, they should forward that determination to Chief Robinson, in writing. As the appointing authority, Chief Robinson is the only person with the legal ability to terminate, and he agrees that he will follow that recommendation." In an email dated the same day, Robinson agreed to follow Clifford's recommendations concerning Shauna and to cooperate in any ethics investigation.

Longo then filed a complaint with the State Ethics Commission about Robinson's involvement with Shauna's training. The Commission can refer violations to the Attorney General's Office for civil penalties or the District Attorney's Office for criminal penalties.

Clifford sought the assistance of Rockland Fire Chief Scott Duffey, who met with Longo and obtained Shauna's preceptor forms. Longo asked Duffey to determine whether Shauna was qualified to perform the duties of a shift strength firefighter/paramedic and if not, how to get her to that level. Longo was clear that he was not looking for a recommendation as to whether to terminate Shauna. Duffey brought in Whitman Fire Chief Timothy Grenno, who had been a paramedic trainer. Duffey recommended that the Town engage an independent evaluator. Clifford then hired Glen Coffin ("Coffin"), the President of Emergency Medical Teaching Services, Inc., to assess Shauna's paramedic skills. Coffin interviewed Shauna and conducted written and practical examinations. He noted gaps in her protocol and procedure, knowledge, and application, especially with respect to major cardiac events. Longo testified that it was

unusual for the Town to have a firefighter employee evaluated by outside Fire Chiefs and an independent organization.

Duffey and Grenno received Coffin's assessment but never spoke to Shauna or observed her performance. They met with Longo, Deputy Chief Hocking, and Marshfield Police Chief Philip Tavares and opined that Shauna was not qualified at that time to work as a shift strength firefighter/paramedic. They recommended that she receive additional training in the areas of noted deficiencies and be transferred to different work groups in the Department for training and evaluation. However, Longo was concerned about moving Shauna to groups with her father or cousin, so she was never moved.

Robinson again reviewed Shauna's preceptor forms in March of 2014. Between November 25, 2013 and March 31, 2014, more than a third of Shauna's evaluations indicated that she needed retraining or needed improvement in various EMT skills.

In a March 28, 2014 meeting, Longo suggested to Robinson that Shauna withdraw as a probationary candidate. If Shauna refused, Longo recommended that she be terminated based on her poor performance during the probationary period. Robinson testified that he rejected this recommendation because he did not believe that Shauna posed a safety issue for the Department or the public, and believed that Shauna was being treated differently than male firefighters had been treated in the past.

For example, Robinson testified that in late 2012, firefighter John Taylor failed his physical ability test the first time and was allowed to retake it in 2013. He was hired but during training, struggled with emergency medical skills and Captain Bazzucco put into place a plan to help him with an extra month of training. According to Cohen, Taylor did not have skills issues but was out of shape. He progressed and went to shift strength without a problem. Ultimately,

Taylor went to the fire academy twice but was not able to pass and resigned rather than face termination.

Also in 2012, firefighter Michael Marshall was struggling with emergency medical training. He was sent to different training groups to get instruction from different people. He was then able to perform as a paramedic with no further issues. David Fleming received numerous demerits while at the fire academy. Robinson drove to the academy to counsel Fleming and advised him to slow down and listen to instructions carefully. Fleming then was able to pass the academy and return to full duty as a firefighter. However, Cohen opined that Fleming did not have the same skill deficiencies as Shauna. In 2013, another firefighter, John Bazule, was unable to complete some physical tasks such as pull-ups and climbing to a second-floor window. Robinson counseled him to get a personal trainer. In addition, paramedic Gary Semedo was given remedial training to help him perform medical skills at the proper level.

On March 28, 2014, Longo wrote a memo to Robinson and copied the Board, concluding that Shauna lacked the requisite paramedic skills to continue as a probationary firefighter and should be terminated. Longo noted that Robinson had refused to follow that recommendation.

In April of 2014, Deputy Chief Hocking advised Robinson that Shauna was not grasping either the firefighter or medical side of training. On April 2, 2014, Captain Cipullo emailed Robinson to ask if Shauna should be placed on shift strength. Robinson replied yes, if she was ready. Captain Cipullo took this as a strong suggestion that she should be placed on shift strength and Robinson testified that he assigned Shauna to shift strength. Shauna was placed on shift strength and assigned to the quint. She was not the only paramedic on the quint, so Robinson was not concerned that patient care would be affected by her slow decision making.

Cohen did not believe that Shauna was ready to be placed on shift strength in April of 2014. He was not aware of any other firefighter who had ever been placed on shift strength with 1s on the preceptor forms. Cohen believed Shauna was given special treatment in that she was permitted to change training groups and her training lasted longer than the typical time. He testified that no other trainee had showed such deficiencies, and no other trainee had the training period extended beyond six months. Cohen did not believe that Shauna was treated differently during the training process because she is a woman. Robinson never complained to Cohen, as union President, that Shauna was being discriminated against based on gender.

On April 7, 2014, the firefighter's union filed a grievance complaining that Shauna's placement on shift strength created a safety issue. Clifford instructed the Board to hear the union's grievance without any step 1 action by Robinson under the collective bargaining agreement. Clifford advised Robinson that his conduct violated Chapter 268A.

Also on April 7, Robinson sent Longo and the Board a lengthy letter about Shauna, stating that he disagreed with the characterization of the problem as a disciplinary issue and considered it to be a training issue. He stated:

> Multiple firefighters in the past who were not performing to the established standard during their probationary period have not been treated as a discipline issue but as a training issue and have been given additional training and/or coaching and counseling to resolve the issue. This is what I am trying to accomplish with this current training issue.

Robinson's letter complained that there was no documentation of Shauna's training after January 21 and no assessment performed until March 25. Robinson noted that the Fire Chiefs did not recommend removal but recommended remedial training, which was occurring. He further stated in the letter:

> We have many examples of firefighters who cannot perform all of the duties assigned and being paid while the department works to bring this firefighter into

> compliance with our standards. This included multiple trips to the fire academy in Stow for the resources needed to support the training of the individuals. . . An extended training period is not unprecedented when a new member is having difficulty with skills required to meet our standard in the last two years. Additionally, other members have been required to attend additional training or receive additional experience when their job performance is below our standard.

Nowhere in this letter did Robinson identify these other firefighters or indicate that they were men. However, the Department is overwhelmingly male with only three or four female firefighters at any one time.

Shauna suffered a shoulder injury that rendered her unable to report to the fire academy. Robinson told her that because she was physically unable to complete the academy, she could either resign or he would terminate her. Shauna submitted her resignation to Robinson on April 13, 2014. Shauna testified that she resigned because she felt that the Department was not evaluating her abilities fairly. Even though she had already worked for several years as a paramedic, Morgan insisted that she was doing everything wrong. Working at the Department was a miserable and stressful experience for her.

The Board held the union grievance hearing on April 14. Robinson submitted a letter to the Board setting out twenty-five questions for the union. That letter referenced the extra training of Firefighters 92, 60 and 94 within the last two years, but did not identify them by name or reference gender discrimination. At the conclusion of the hearing, Robinson presented Shauna's resignation letter and the Board voted to deny the union's grievance upon receipt of her resignation. On April 24, 2014, Longo and the Board received an anonymous letter from an employee of the Department complaining that Robinson fostered an atmosphere of mistreatment, harassment, and retaliation of employees and favoritism of his family, including Shauna.

On May 21, 2014, Robinson asked the Board to meet with him about his treatment by Longo and Clifford. However, the Board did not meet with him. On May 26, 2014, the Board

received an anonymous letter from "a Senior Marshfield Firefighter" identifying Cohen as the author of the earlier anonymous letter, opining that its intent was to undermine Robinson's credibility, and asserting that the majority of union members were embarrassed by that letter.

On June 17, 2014, Robinson, accompanied by counsel, attended a meeting with Clifford and Longo. Retired Norton Fire Chief Richard Gomes ("Gomes") also attended this meeting to support Robinson. Clifford started the meeting by commenting that Robinson was nearing retirement age and asking when he intended to retire. When Robinson stated he had more work to do and had no immediate plans to retire, Clifford responded that he should think about retiring before his reputation was damaged. To Gomes, it was clear from the tone of the meeting that the Town wanted Robinson gone.

Robinson sought a two percent annual salary increase under his employment contract and also sought to renegotiate his employment contract with the Town. In an executive session on June 30, 2014, the Board voted not to enter into contract negotiations with Robinson and not to approve the requested salary increase.

On August 19, 2014, Robinson stated at an officer's meeting that under the collective bargaining agreement, everyone on the overtime list was entitled to be asked if they wanted a shift. However, after this meeting, on August 22, Shaun skipped Deputy Chief Hocking and took an overtime shift himself. Longo recommended that Shaun be disciplined by suspension without pay for two twenty-four hour shifts for skipping people on the overtime list, and for an additional shift for violating Chapter 268A. Robinson met with Clifford and Longo and then reduced the suspension by one shift. Shaun, who attributed his problems with the Department to people wanting to get rid of Robinson, appealed the two-shift suspension.

Board member Stephen Robbins ("Robbins") testified that firefighters often complained to the Board that they were unhappy with the way Robinson ran the Department. They also raised concerns that with four members of the Robinson family in the Department, they would be supervising each other. There were complaints to the Board that Robinson interfered in his niece's training and reduced his brother's discipline. The Board became concerned with potential ethics violations. Robbins testified that Robinson never complained to the Board that Shauna was being treated differently because of her gender. If Robinson had complained about gender discrimination, the Board would have investigated. Robbins further testified that the decisions not to renew Robinson's contract and approve a salary increase were not based on Robinson's complaints that Shauna was treated unfairly, but on the morale issues in the Department.

Board member Matthew McDonough ("McDonough") also testified that several members of the Department, including Captain Cipullo and Cohen, complained to him about poor morale, including over Shauna's training. Longo told the Board there were possible conflicts of interest involving overtime to Robinson's family members and the Board was concerned about an ethical violation in reducing Shaun's discipline. McDonough testified that Robinson never raised the issue of gender discrimination in any executive session with the Board. In conversations, Robinson mentioned that he was unhappy with the way Shauna was being evaluated but he never told the Board that she was treated differently because she is a woman. McDonough was not aware that there was an issue with gender until he learned about Robinson's lawsuit. According to McDonough, the Board did not renew Robinson's contract because of ethical concerns and low morale. However, the Board never spoke to Robinson about

this low morale. The Board did not give Robinson written notice of his performance deficiencies and three months to fix them as required by his contract.

The Board Chair, John Hall ("Hall"), testified that he received many complaints about Robinson from various firefighters, but referred those complaints to Longo as Town Administrator. The Board was aware that Robinson had placed Shauna on shift strength against the recommendation of her trainers, and that Robinson reduced Shaun's discipline. Hall testified that the Board is bound by the anti-discrimination laws prohibiting retaliation. He agreed that Robinson was bound by the law pertaining to gender discrimination and was required to investigate any complaints. The Town of Marshfield has a formal Antiharassment and Complaint Procedure. Hall testified that Robinson never complained to the Board that Shauna's treatment was based on her gender.

On August 28, 2014, Clifford and Robinson had a meeting about the allegations of wrongdoing against Shaun. Clifford expressed concern about Robinson's health, stating that he did not look good, and suggested that he should retire before his reputation was damaged.

On November 24, 2014, the Board hired Attorney Mark Smith of Laredo & Smith, LLP to investigate any potential violations of state ethics law in the Department, including Robinson's involvement in training Shauna. Attorney Smith was assisted by investigator Edward Johnson ("Johnson"). In an email dated November 12, Clifford had inquired about Attorney Smith's familiarity with Chapter 268A and his hourly rate, and asked: "Following an investigation into misconduct, have you ever exonerated the employee(s) that were the subject of the investigation? If so, can you estimate how many times that has occurred?" The Board notified Robinson about the special investigation on November 25 and ordered him to cooperate. By email to Attorney Smith dated December 1, 2014, Longo offered to help wade through the box of documents sent

for his review. However, Longo did not send him the Department's preceptor guidelines. On December 15, 2014, Johnson interviewed Deputy Chief Hocking, Captain Cipullo, and Captain Boccuzzo. The next day, Johnson interviewed Cohen, Morgan, and Pat Daley, a union officer.

On January 15, 2015, Longo received a letter from the Massachusetts Commission Against Discrimination ("MCAD") stating that Shauna had filed a complaint of gender discrimination against the Department and attaching a copy of her complaint. A week later, Town Counsel Robert Galvin forwarded the MCAD complaint to Attorney Smith and noted that a certain statement in the complaint "would indicate that the Chief had/has a role in the MCAD matter (by minimally repeating that conversation) against the Fire Department and Rocco Longo."[2]

On January 21, 2015, Attorney Smith met with Robinson even though his attorney was unavailable to attend. Robinson pulled out a tape recorder, but Smith told him they were not recording any interviews. Robinson then left, stating that his attorney had instructed him to record the interview. Attorney Smith never interviewed Shauna because she was no longer employed by the Town at that point and he did not have subpoena power. Attorney Smith testified that the Town did not limit in any way what witnesses he could talk to during the investigation, and he did not feel that the Town pressured him to reach a certain conclusion.

On February 13, 2015, Longo emailed Attorney Smith a copy of Robinson's contract with the Town and the language of the Town Charter provisions relating to removal of a town officer for cause. On February 23, Attorney Smith sent Attorney Galvin a thirty-five-page draft report concluding that Robinson "may have" violated Chapter 268A. In an email the next day,

[2]The MCAD ultimately found no probable cause for Shauna's complaint in 2017.

Attorney Galvin told Attorney Smith that Clifford felt that Smith's conclusions should be framed as his opinions. The Town paid Attorney Smith almost $50,000 for his investigation.

On February 25, 2015, Attorney Smith issued a thirty-five page report on the ethics investigation, concluding that both Robinson and Shaun violated Chapter 268A and recommending that the Town refer the matter to the State Ethics Commission. Attorney Smith concluded that Robinson violated numerous sections of Chapter 268A by interfering with Shauna's training and evaluation and rejecting the Town Administrator's recommendations. He further concluded that Robinson violated Chapter 268A with respect to his investigation and disciplinary action of Shaun for overtime violations. Attorney Smith testified that an employee cannot immunize himself from an ethics violation under Chapter 268 by entering into a disclosure agreement with his employer.

The Board published a notice of a February 27, 2015 meeting "[t]o investigate charges of criminal misconduct or to consider the filing of criminal complaints, including but not limited to violations of MGL 268A, the Conflict of Interest Law."

Based on Attorney Smith's report, the Town again referred the matter to the Ethics Commission on March 2, 2015. The Board concluded that it would be best for the Town to terminate Robinson's employment. The Board was not aware of any criminal conduct by Robinson but based its decision on the alleged ethical violations.

By letter dated March 2, 2015, the Board placed Robinson on paid administrative leave for sixty days, pending an investigation into his handling of union grievances and potential conflict of interest violations. Robinson, who was shoveling fire hydrants out of the snow, was called to the station by Longo. When he arrived, accompanied by his son, Deputy Chief Hocking and Johnson were there. The Police Captain was sitting in his cruiser in the parking

lot. Robinson was handed the letter stating that he had been placed on leave. That letter imposed the conditions that he was not permitted to go to any fire station without the permission of Town Counsel Robert Galvin, he had to turn over his keys to the department building and equipment, including his fire department vehicle, he could not engage in any official activities unless directed to do so by Town Counsel, and he was to fully cooperate with any investigation into his conduct. Robinson was given a few minutes to collect his personal belongings and was then escorted from the premises by Deputy Chief Hocking and Johnson. He was shocked to be treated like a common criminal.

The next day, a constable served Robinson at his house with a notice to show cause why he should not be terminated based on Attorney Smith's report. The notice informed Robinson of his right to a public hearing. There was then a barrage of negative publicity in the media stating that Robinson was being investigated for criminal conduct.

Robinson's administrative leave was unusual. Morgan had been investigated by the Office of Emergency Medical Services as the result of a call that led to a patient's death and a negligence lawsuit against the Town. Ater that investigation, the OEMS recommended remedial training. Banzul and Yeaton were required to retake advanced cardiac life support and CPR training and Morgan was required to retake training on patient refusal. However, none of them were placed on administrative leave during the investigation. In addition to Robinson and Shaun, only two other Fire Department employees were placed on administrative leave over the years: one for harassment of a fellow employee, and one for a DUI arrest.

In response to the show cause notice, Robinson tendered his written resignation to the Town, effective March 30, 2015. He felt he faced a hostile environment, and the Town was trying to force him out. He also was concerned that the show cause hearing officer chosen by the

Town would not be impartial. He wanted to spare his family the ongoing negative publicity in local papers, and he did not want to risk losing payment of certain unused time if he were fired. On March 30, 2015, five years before the mandatory retirement age, Robinson retired from the Department. He received a payout of $83,969.31 in unused time.

On April 17, 2015, the State Ethics Commission sent a letter to Robinson notifying him that it did not intend to conduct any further investigation into his actions, based on his retirement. The letter stated, however, that if he re-entered public service, it was critically important that he take care in his official dealings with family members and on matters that affect them.

On April 23, 2015, the State Ethics Commission sent a letter to Longo that stated, in relevant part: "We have reviewed the information you furnished to the [Commission] on January 22, 2014 by email. After reviewing the information you provided, and conducting any necessary follow-up investigation, we have determined that this matter does not warrant a public resolution or the imposition of formal sanctions. . . . This decision does not necessarily mean that your complaint was without merit." Longo forwarded this letter to Attorney Smith, stating: "I can't tell you how disappointed I am with that outcome and feel let down by the State."

Robinson testified that he loved his job and was fully invested in the Marshfield Fire Department. When Shauna became eligible for appointment, his relationship with Longo and Town Counsel began to deteriorate and they put obstacles in his way, requiring him to work fifty or sixty hours a week to keep up. They excluded him from contract negotiations with the firefighters' union, in which he always participated in the past He felt isolated and frustrated and the sudden constant criticism of his work performance was very stressful. Being escorted from the Department premises with a police presence was an unusual occurrence and made him feel humiliated like he was a criminal. He began to have heartburn and acid reflux requiring

medication. He was not sleeping well and stopped attending Town meetings and participating in Town events because he felt he was perceived as a criminal. He did not get the customary public retirement celebration of other Fire Chiefs. Robinson testified that he took an interim job in East Greenwich, Rhode Island, where there is no mandatory retirement age. He received negative publicity in the Rhode Island press about a union censure he received for his performance there, calling him a cancer on firefighting and stating that he was no longer recognized in the brotherhood. The Fire Chiefs Association of Massachusetts asked him to resign and he refused. However, management and the Town Council in East Greenwich supported Robinson against the union and made public statements of support. Robinson testified that his emotional state started to improve in 2020, when he reached the age of 65 and would have had to retire anyway. He never saw a mental health counselor for his distress but handled it on his own.

Robinson's wife, Tammy, testified that Robinson was devastated when the Board published notice that he was being investigated for possible criminal actions. He was despondent when he was placed on leave and escorted out of the fire station with police present. He stopped leaving the house and no longer participated in many community events. Town officials no longer spoke to him and he felt that members of the public were looking at him the wrong way.

This Court denied the Town's motion for a directed verdict on November 8, 2023. The jury returned its special verdict on November 13, 2023. The jury found that Robinson reasonably and in good faith believed that the Town discriminated against Shauna based on her gender. The jury also found that Robinson acted reasonably in response to that belief. The jury further found that the Town knew of Robinson's protected activity and acted adversely against

him, and there was a direct causal connection between Robinson's protected activity and the Town's adverse action.

The jury found that the Town would have treated Robinson the same regardless of whether he engaged in protected activity. However, the jury found that the Town's articulated, nonretaliatory reasons were not true or were not the sole reason for the adverse action. The jury awarded Robinson $300,000 in compensatory damages for emotional distress. The jury found that the Town intentionally discriminated against Robinson, and its actions were outrageous. The jury awarded Robinson $1,100,000 in punitive damages. On November 17, 2023, the Court entered final judgment for Robinson in the amount of $1,532,652.80, which included prejudgment interest.

DISCUSSION

JNOV

The Town first moves for judgment notwithstanding the verdict ("JNOV") under Mass. R. Civ. P. 50(b). "Because the jury are a pillar of our justice system, nullifying a jury verdict is a matter for the utmost judicial circumspection." *Cahaly* v. *Benistar Prop. Exch. Trust Co., Inc.*, 451 Mass. 343, 350, cert. den., 555 U.S. 1047 (2008). The court examines whether anywhere in the evidence, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff. See *Gyulakian* v. *Lexus of Watertown, Inc.*, 475 Mass. 290, 295 n.11 (2016). To be reasonable, an inference must be based on probabilities rather than possibilities and cannot be the result of mere speculation and conjecture. *Cahaly* v. *Benistar Prop. Exch. Trust Co., Inc.*, 451 Mass. at 350; *Phelan* v. *May Dep't Stores Co.*, 443 Mass. 52, 55 (2004). See also *McCarthy* v. *Waltham*, 76 Mass. App. Ct. 554, 563, rev. den., 457

Mass. 1108 (2010) (JNOV is appropriate where jury could not find in favor of plaintiff without engaging in speculation or conjecture). The court must construe the evidence in the light most favorable to the non-moving party and disregard the evidence favorable to the movant. *O'Brien* v. *Pearson*, 449 Mass. 377, 383 (2007). Nonetheless, a party cannot avoid JNOV "if any essential element of his case rests upon a 'mere scintilla' of evidence." *Stapleton* v. *Macchi*, 401 Mass. 725, 728 (1988).

The Town contends that it is entitled to JNOV because no more than a scintilla of evidence supported several elements of Robinson's case. A retaliation claim requires the plaintiff to prove that he reasonably and in good faith believed the employer engaged in discrimination, he acted reasonably in response to that belief and engaged in protected conduct, he suffered an adverse employment action, and there is a causal connection between the protected conduct and the adverse action. *Verdrager* v. *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, 474 Mass. 382, 405-406 (2016); *Psy-Ed Corp.* v. *Klein*, 459 Mass. 697, 707 (2011). Retaliation under G.L. c. 151B, § 4(4) is a separate and independent cause of action and a jury may find retaliation even if there was no discrimination. *Verdrager* v. *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, 474 Mass. at 405; *Psy-Ed Corp.* v. *Klein*, 459 Mass. at 706.

The Town first argues that there was no evidence that Robinson reasonably believed that Shauna was the victim of gender discrimination because on cross-examination, he testified that he was not sure whether her training deficiencies were based on gender and further testified: "I did not know what the issue was." However, Robinson also testified: "I know that she was being treated differently than the male firefighters in the past." He testified about numerous male firefighters who struggled and were given assistance to help them perform satisfactorily. In addition, there was evidence that he was involved in Shauna's claim of gender discrimination

before the MCAD. Thus, drawing all reasonable inferences in Robinson's favor, there was sufficient evidence that he believed Shauna was discriminated against based on gender and that such a belief was reasonable.

The Town further argues that it is entitled to JNOV because there was no more than a scintilla of evidence that Robinson engaged in protected conduct. The Town emphasizes that Robinson never reported gender discrimination to Longo or the Board. Although there was no evidence that Robinson used the term "gender discrimination" when complaining about Shauna's unfair treatment, he did contrast her treatment to that of other firefighters in the past two years. Moreover, on January 15, 2015, the Town was notified by the MCAD that Shauna claimed gender discrimination. In the email to Attorney Smith forwarding this notice, Town Counsel stated that he believed that Robinson was assisting Shauna with her claim. Cf. *Bonds* v. *School Comm. of Boston*, 2011 WL 5220323 at *1 (Mass. App. Ct. Rule 1:28) (evidence that defendant knew of MCAD complaint sufficient to show knowledge of protected activity). Accordingly, drawing all reasonable inferences in Robinson's favor, there was more than a scintilla of evidence that the Town was aware that he believed that Shauna had been subjected to gender discrimination.

The Town next contends that it is entitled to JNOV because there was no more than a scintilla of evidence that it took adverse action against Robinson. An adverse employment action is one that affects the terms, conditions, or privileges of employment and materially disadvantages the employee in a way that is more than trivial. *Yee* v. *Massachusetts State Police*, 481 Mass. 290, 296 (2019). There must be real harm that is objectively apparent to a reasonable person in the employee's position, and subjective feelings of disappointment are insufficient. *Id.* at 297; *King* v. *Boston*, 71 Mass. App. Ct. 460, 468 (2008). Conditions of employment include

financial and economic conditions as well as the general environment or quality of the workplace. *Yee* v. *Massachusetts State Police*, 481 Mass. at 295 n.6.

There was evidence that the Town failed to renegotiate Robinson's contract, denied him a 2% cost of living increase, publicly accused him of criminal conduct, placed him on administrative leave purportedly to conduct an investigation and then immediately issued a show cause notice for his termination, and escorted him from the Department with a police presence outside. Drawing all reasonable inferences in Robinson's favor, those actions affected the objective aspects of his employment as Fire Chief. See, e.g., *McDonough* v. *Quincy*, 452 F.3d 8, 18 (1st Cir. 2006) (placement on administrative leave was adverse employment action). There was more than a mere scintilla of evidence that the Town subjected Robinson to an adverse employment action.

Finally, the Town contends that there was insufficient evidence to support any award of punitive damages. A JNOV motion is available only when a directed verdict motion was made at the close of the evidence. *Gyulakian* v. *Lexus of Watertown, Inc.*, 475 Mass. at 299 (noting that motion for JNOV is technically revised motion for directed verdict). A directed verdict motion must state the specific grounds on which it is based and a party may not raise an issue in a JNOV motion that was not first raised in a motion for a directed verdict. *Id.*; *Shafir* v. *Steele*, 431 Mass. 365, 371 (2000). Robinson argues that the Town waived its right to seek JNOV because its oral motion for a directed verdict did not specifically raise the issue of punitive damages. However, a directed verdict motion that challenges the sufficiency of the evidence of Chapter 151B liability encompasses the potential for punitive damages. *Gyulakian* v. *Lexus of Watertown, Inc.*, 475 Mass. at 299.

Punitive damages under Chapter 151B may be awarded for conduct that is outrageous or egregious; i.e., conduct that is so offensive that it justifies punishment and not merely compensation. *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. 91, 110 (2009). The factfinder must determine that an award of punitive damages either is needed to deter behavior toward the protected class of which the plaintiff is a member or that the conduct is so egregious that it warrants public condemnation and punishment. *Id.* at 111. Relevant factors include: whether there was a conscious or purposeful effort to demean or diminish the plaintiff because he is a member of the protected class; whether the defendant was aware that the discriminatory conduct would likely cause serious harm; the actual harm to the plaintiff; the defendant's conduct after learning that its initial conduct would likely cause harm; and the duration of the wrongful conduct and any concealment of that conduct. *Gyulakian* v. *Lexus of Watertown, Inc.*, 475 Mass. at 304; *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. at 111.[3] Actual harm from intentional discrimination, without more, is insufficient to sustain a punitive damage award. *Kiely* v. *Teradyne, Inc.*, 85 Mass. App. Ct. 431, 436, rev. den., 469 Mass. 1108 (2014).

The Court agrees that the Town's conduct is less egregious than the conduct reported in many of the cases in which punitive damages have been upheld. See, e.g., *Gyulakian* v. *Lexus of Watertown, Inc.*, 475 Mass. at 300-304 (employer's conducting sham investigation and failing to remedy known sexual harassment by supervisor, which included vulgar profanity toward women and unwanted physical contact with plaintiff, was outrageous or egregious); *Clifton* v. *Massachusetts Bay Transp. Auth.*, 445 Mass. 611, 623-624 (2005) (punitive damages warranted where African-American employee was subjected to egregious racial harassment, including

[3]The factor of whether there was a conscious or purposeful effort to demean or diminish the plaintiff because he is a member of a protected class is not particularly relevant in a retaliation case. *Kiely* v. *Teradyne, Inc.*, 85 Mass. App. Ct. 431, 437, rev. den., 469 Mass. 1108 (2014).

racial epithets and physical violence, and employer failed to stop harassment and retaliated against employee for complaining); *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. at 108-109 (punitive damages warranted where employer engaged in pattern of unequal treatment of male and female pharmacists, including refusing to pay females equally and conducting sham investigation and firing female for single infraction while failing to investigate or discipline males for more serious offenses). However, drawing all reasonable inferences in favor of Robinson, the Court cannot conclude that no reasonable jury could find the Town's conduct to warrant punishment. See *Brown* v. *Office of Comm'r of Prob.*, 2011WL 3612284 at *3 (Mass. Super. Ct.) (Troy, J.); aff'd, 2013 WL 4710391 (Mass. App. Ct. Rule 1:28), rev. den., 466 Mass. 1108 (2013) (characterizing case as "close" where evidence of retaliation was tenuous and there was ample evidence of non-retaliatory reasons for adverse actions, but denying JNOV on punitive damages because jury concluded that defendant's conduct was outrageous enough to warrant them). Cf. *Kiely* v. *Teradyne, Inc.*, 85 Mass. App. Ct. at 440 (judge properly concluded that punitive damages were not warranted where jury reasonably found that company knew that retaliatory failure to rehire employee would harm her, but found she sustained no actual harm); *Smith* v. *Bell Atlantic*, 63 Mass. App. Ct. 702, 722, rev. den., 444 Mass. 1108 (2005) (judge properly directed verdict on punitive damage claim where although employer's accommodation of employee's disability fell short, its conduct did not warrant condemnation).

Thus, the Court concludes that the Town has not demonstrated its entitlement to JNOV under Mass. R. Civ. P. 50(b). See *Esler* v. *Sylvia-Reardon*, 473 Mass. 775, 781 (2016) (denying JNOV where evidence of retaliation was sufficient if far from compelling).

New Trial

In the alternative, the Town requests a new trial. The grant or denial of a motion for a new trial lies in the sound discretion of the trial judge. *Wojcicki* v. *Caragher*, 447 Mass. 200, 209 (2006); *Turnpike Motors, Inc.* v. *Newbury Group, Inc.*, 413 Mass. 119, 127 (1992). A new trial should be granted only where on a survey of the entire case it appears that otherwise a miscarriage of justice will result. *Fitzpatrick* v. *Wendy's Old Fashioned Hamburgers of New York, Inc.*, 487 Mass. 507, 514 (2021).

The Town contends that the jury's finding of retaliation was against the weight of the evidence. In resolving such a claim, the judge necessarily considers the probative force of all the evidence presented, determining credibility and weighing conflicting evidence. *O'Brien* v. *Pearson*, 449 Mass. 377, 384 (2007); *Waite* v. *Goal Sys. Int'l, Inc.*, 55 Mass. App. Ct. 700, 706 (2002), rev. den., 439 Mass. 1105 (2003). However, the judge should not grant a new trial simply because he would have reached a different result had he been the trier of fact. *Turnpike Motors, Inc.* v. *Newbury Group, Inc.*, 413 Mass. at 127; *Passatempo* v. *McMenimen*, 86 Mass. App. Ct. 742, 746 (2014). A judge should set aside a jury verdict only when it is so greatly against the weight of the evidence as to induce in the judge's mind the strong belief that it was not due to a careful consideration of the evidence but was the product of bias, misapprehension, or prejudice. *O'Brien* v. *Pearson*, 449 Mass. at 384; *Turnpike Motors, Inc.* v. *Newbury Group, Inc.*, 413 Mass. at 127. A new trial is warranted where the judge is persuaded that the jury failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law. *Id.*

The Town argues that no reasonable person would believe that Shauna was subjected to gender discrimination based on the "overwhelming" evidence that she did not meet the

performance standards to be a firefighter, and the testimony of Deputy Chief Hocking, Captain Cipullo, Captain Boccuzzo, Cohen, Morgan, and Corrigan that they did not observe gender discrimination in Shauna's training. Foremost, the jury was not required to credit the testimony of those witnesses with respect to whether any unfair treatment was based on gender. In addition, Robinson testified that several male firefighters in roughly the same time frame struggled with performance issues and were given additional training and opportunities to succeed that Shauna was not. Based on all the credible evidence, the jury properly could conclude that Robinson reasonably believed that Shauna had been subjected to gender discrimination.

The Town further argues that a finding that Robinson engaged in protected activity was against the weight of the evidence because none of his written objections to Longo and the Board expressly mentioned gender discrimination and the defendants uniformly testified that Robinson complained only that Shauna was receiving "unfair" treatment. However, there was some evidence that Robinson raised the issue of other firefighters' treatment to Longo and the Board and while he did not refer to those other firefighters by name, the Department was overwhelmingly male. In addition, the Town received notice from the MCAD of Shauna's gender discrimination complaint on January 15, 2015 and Town Counsel opined to Attorney Smith that Robinson was supporting Shauna in that proceeding. Based on all the credible evidence, the jury could have drawn the reasonable inference that Robinson's complaints about Shauna's unfair treatment related to her gender. The fact that the jury could have returned a verdict for the Town does not make the verdict against the weight of the evidence or inconsistent with substantial justice. See *Jamgochian* v. *Dierker*, 425 Mass. 565, 570 (1997). The Town has

failed to prove that the verdict of retaliation was so against the weight of the evidence as to induce the strong belief that it resulted from bias, misunderstanding, or prejudice.

Legal Error

The Town next contends that it is entitled to a new trial due to error in the jury instructions and verdict slip with respect to a "same decision" defense. The trial judge has wide latitude in framing the language to be used in jury instructions as long as the instructions adequately explain the applicable law. *Kelly* v. *Foxboro Realty Assoc., LLC*, 454 Mass. 306, 316 (2009). The party claiming error must show not only that the instructions were incorrect but that it suffered prejudice from the error. *Governo Law Firm LLC* v. *Bergeron*, 487 Mass. 188, 194 (2021); *Carter* v. *Commissioner of Corr.*, 43 Mass. App. Ct. 212, 226 (1997). See also *Main* v. *R.J. Reynolds Tobacco Co.*, 100 Mass. App. Ct. 827, 834 (2022) (erroneous jury instruction warrants new trial if result plausibly might have been different absent the error). The court considers the instruction as a whole to determine whether it adequately explains the applicable law. *Governo Law Firm LLC* v. *Bergeron*, 487 Mass. at 194. See also *Lipchitz* v. *Raytheon Co.*, 434 Mass. 493, 507 (2001) (reversible error will not be found merely by considering fragment of instruction which is open to criticism).

The Town contends that the Court erred with respect to its affirmative defense that it would have acted in the same manner regardless of whether Robinson engaged in protected activity. The Court instructed the jury on causation, in relevant part, as follows:

> The plaintiff need not prove that retaliation was the sole reason for the alleged adverse employment action. He need only show that but for the retaliatory motive, he would not have been subjected to an adverse employment action. You may find that the plaintiff was the victim of unlawful retaliation even if other considerations also motivated the employer at the time that any alleged adverse employment action was taken against him.

The Court further instructed the jury on "non-retaliatory basis for employment decision" as follows:

> An employer may take adverse employment action against an employee for many non-retaliatory reasons. It will be up to you to decide whether the Plaintiff has proved by a preponderance of the evidence that the Defendant committed an adverse employment action in retaliation for his report of opposition to gender discrimination against his niece, Shauna . . .
>
> If you find that the Defendant had other alleged legitimate reasons for its actions with respect to the Plaintiff, or that other alleged legitimate reason was the sole reason for its action against the Plaintiff you must find for the Defendant unless the Plaintiff has adduced some significantly probative evidence that the Town's proffered reasons [are] pretextual.
>
> If you find that the Defendant would have acted the same even if the Plaintiff did not complain about or oppose gender discrimination, then you must find for the Defendant.
>
> The town has asserted that it had legitimate non-retaliatory reasons for its action. If the plaintiff convinces you that the alleged non-retaliatory reasons put forth by the Defendant for the adverse actions are false, that fact may be used by you to infer that the reason for the adverse action was retaliation.

Question 6 on the Special Verdict Form asked: "Has the Town of Marshfield proven by a preponderance of the evidence that it would have treated Mr. Robinson the same regardless of whether he engaged in protected activity?" The jury answered: "Yes." Question 7 asked: "Has Mr. Robinson proven by a preponderance of the evidence that the Town's articulated, nonretaliatory reasons were not true *or not the sole reason for the alleged adverse actions*?" (emphasis added). The jury answered: "Yes."

The Town argues that the jury instructions, conpled with Question 7, were erroneous because Federal jury instructions under Title VII state that the plaintiff is not entitled to damages if the defendant proves that it would have taken the same action regardless of the plaintiff's protected activity. The Supreme Judicial Court ("SJC") has stated that the three-stage burden-

shifting paradigm applied in discrimination cases is based on the idea "that *either* a legitimate *or* an illegitimate set of considerations led to" the adverse employment action. *Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrim.*, 431 Mass. 655, 666 (2000) (emphasis in original). The SJC then addressed the "same decision" issue as follows:

> There exists, however, a rare class of cases, referred to as "mixed-motive" cases, in which the plaintiff, armed with some strong (direct) evidence of discriminatory bias, demonstrates that at least one factor motivating the employer's decision is illegitimate. . .The inquiry in these cases is not whether a legitimate reason for the employment is a "pretext." Rather, the appropriate question is whether the employer's proffered legitimate reason *also* motivated the employment decision and, if so, to what extent: If a plaintiff in an unlawful discrimination case shows that an impermissible motive played a part in an employment decision, an employer may not prevail by showing a legitimate reason for its decision; the employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Wynn & Wynn, P.C. v. *Massachusetts Comm'n Against Discrim.*, 431 Mass. at 666 (quotations and citations omitted). The SJC has explained that this mixed motive analysis is limited to those cases where the plaintiff demonstrates by direct or strong evidence that proscribed criteria played a motivating part in the decision. *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. 91, 112-113 (2009); *Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrim.*, 431 Mass. at 666-667. Where strong direct evidence of animus is lacking and the plaintiff establishes discrimination only through the three-stage prima facie case framework, the case should be decided on pretext principles, not the mixed motive "same decision" framework. *Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrim.*, 431 Mass. at 670-671 n.32.

A plaintiff is entitled to proceed to trial under both frameworks, but once all the evidence is received, the judge must decide which framework properly applies. *Id.* Here, Robinson lacked strong, direct evidence of a retaliatory animus by the Town and instead supported his case with circumstantial and inferential evidence. Accordingly, this was not a mixed motive case, and the

pretext framework applied. The Town therefore was not entitled to the same decision defense instruction or Question 6. Although the jury instructions erroneously contained elements of both frameworks, those instructions as a whole adequately conveyed the applicable law because they directed the jury to find for Robinson if he proved that the Town's proffered non-discriminatory reason was pretextual. See *Verdrager* v. *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, 474 Mass. at 406 (plaintiff bears burden to produce evidence that employer's stated reason was pretext for retaliation). See also *id.* at 409 (where plaintiff does not possess direct evidence that employer's proffered reason was false, court analyzes retaliation claim using three-stage burden-shifting paradigm). Thus, the Town has not demonstrated an error of law warranting a new trial. Cf. *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. at 114 (error in mixed motive instructions was harmless where instructions as whole properly emphasized plaintiff's burden to prove discrimination); *Cranska* v. *Bonander*, 2003 WL 21649425 at *3 (Mass. App. Ct. Rule 1:28), rev. den., 440 Mass. 1102 (2003) (noting that there was no entitlement to mixed motive instruction where there was no strong evidence of discriminatory animus, and any error in pretext instruction did not rise to level of reversible error where instructions as whole accurately explained governing principles of discrimination law).

The Town also contends that the Court erred in admitting evidence about its treatment of male firefighters who struggled with performance issues. The Town argues that none of the firefighters identified by Robinson were similarly situated to Shauna. The trial judge has broad discretion to make evidentiary rulings. *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. at 112. An error in the admission of evidence requires a new trial only if it prejudiced one of the parties and infected the trial with error. *Grant* v. *Lewis/Boyle, Inc.*, 408 Mass. 269, 274 (1990); *David* v. *Kelly*, 100 Mass. App. Ct. 443, 451 (2021). See also *Sacco* v. *Roupenian*, 409 Mass. 25,

31 (1990) (judge's erroneous evidentiary ruling warrants new trial if it prejudiced party by materially affecting outcome).

To prove differential treatment under Chapter 151B, the plaintiff may identify persons who were similarly situated in all relevant respects but treated differently. *Trustees of Health & Hosp. of Boston, Inc.* v. *Massachusetts Comm'n Against Discrim.*, 449 Mass. 675, 682 (2007); *Matthews* v. *Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 129 (1997). The comparators must be similarly situated in terms of performance, qualifications, and conduct without differentiating or mitigating circumstances. *Matthews* v. *Ocean Spray Cranberries, Inc.*, 426 Mass. at 130. However, a comparator's circumstances need not be identical to the plaintiff's and need only be substantially similar concerning the adverse employment decision. *Trustees of Health & Hosp. of Boston, Inc.* v. *Massachusetts Comm'n Against Discrim.*, 449 Mass. at 682. The test is whether a reasonable person looking objectively at the incidents would think them roughly equivalent. *Id.*; *Downey* v. *Johnson*, 104 Mass. App. Ct. 361, 376 (2024).

The Town argues that none of the male firefighters identified by Robinson were similarly situated to Shauna because their performance issues did not arise during training but rather, after they had successfully completed the probationary period. However, the male firefighters' circumstances were close enough for the jury to be permitted to determine the weight to be given to evidence of their treatment. Critically, in this case, the comparator evidence was admitted not to show that Shauna was in fact treated differently based on gender but to show that Robinson had a good faith and reasonable basis for believing that Shauna experienced discrimination. The Court is not persuaded that the admission of the comparator evidence was prejudicial error warranting a new trial.

Remittitur

The Town moves for remittitur under Mass. R. Civ. P. 59(a), arguing that the jury's award of $300,000 in emotional distress damages was excessive. A judge acting on a motion for remittitur has broad discretion. *Clifton* v. *Massachusetts Bay Transp. Auth.*, 445 Mass. at 623. When considering whether the damages awarded were against the weight of the evidence, a judge has no right to set aside an award merely because he would have assessed damages in a different amount. *Solimene* v. *B. Grauel & Co.*, 399 Mass. 790, 803 (1987). The judge should not disturb an award of damages unless those damages were grossly disproportionate to the injury proven or represent a miscarriage of justice. See *Labonte* v. *Hutchins & Wheeler*, 424 Mass. 813, 824 (1997); *Moose* v. *Massachusetts Inst. of Tech.*, 43 Mass. App. Ct. 420, 427 (1997).

The standard for emotional distress damages under Chapter 151B is not stringent and the law acknowledges that it is difficult to develop quantitative criteria for emotional distress, which is inherently difficult to prove. *Labonte* v. *Hutchins & Wheeler*, 424 Mass. at 825; *Borne* v. *Haverhill Golf & Country Club, Inc.*, 58 Mass. App. Ct. 306, 320, rev. den., 440 Mass. 1101 (2003). Accordingly, emotional distress damages may be recovered without physical injury or psychiatric consultation. *Borne* v. *Haverhill Golf & Country Club, Inc.*, 58 Mass. App. Ct. at 320. See, e.g., *Charles* v. *Leo*, 96 Mass. App. Ct. 326, 343-344 (2019) (affirming $500,000 emotional distress award in racial discrimination and retaliation case). Although Robinson did not seek treatment for his emotional distress, the jury apparently credited his testimony as to the physical symptoms and emotional toll he suffered from being forced out of the Department. The Court cannot conclude that the $300,000 award, while generous, represents a miscarriage of justice.

Finally, the Town moves for remittitur on the ground that the $1,100,000 punitive damage award was excessive. When determining whether punitive damages are excessive, the court considers the degree of reprehensibility of the defendant's conduct, the ratio of the punitive damage award to the actual harm inflicted on the plaintiff, and a comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. at 109; *Clifton* v. *Massachusetts Bay Transp. Auth.*, 445 Mass. at 624; *Charles* v. *Leo*, 96 Mass. App. Ct. at 348. The absence of identified penalties for retaliation does not favor remittitur because the Legislature has not limited punitive damages under Chapter 151B to any particular amount or ratio. *Charles* v. *Leo*, 96 Mass. App. Ct. at 352.

The court also may consider the reasonable relationship to the harm likely to occur from the defendant's conduct, the harm that did occur, the reasonable relationship to the degree of reprehensibility of the defendant's conduct, the removal of any profit from illegal activity, the defendant's financial position, the encouragement of plaintiffs to bring wrongdoers to trial, and whether other civil actions have been filed against the defendant. *Labonte* v. *Hutchins & Wheeler* 424 Mass. at 827; *Charles* v. *Leo*, 96 Mass. App. Ct. at 350 n.12. The judge's role is not to review the wisdom of the punitive damage award or substitute his judgment for that of the jury but only to determine whether the award is excessive under these standards. *Charles* v. *Leo*, 96 Mass. App. Ct. at 348. The judge must articulate a reasoned basis for any remittitur. *Id.* at 353.

The Court acknowledges that the evidence that Robinson complained to the Town about gender discrimination rather than general "unfairness" in the handling of Shauna's training was far from overwhelming, and there was ample evidence that the Town had legitimate non-retaliatory reasons for failing to renew Robinson's contract, including ethical violations and

morale problems in the Department. Nonetheless, the jury found that the Town's retaliatory conduct, which lasted several months after the Town learned of the MCAD complaint and included a very public insinuation of criminal wrongdoing, caused Robinson substantial actual harm in the form of emotional distress. The Court cannot say that the $1,100,000 award bears no reasonable relationship to the reprehensibility of the Town's conduct, nor can the Court conclude that the punitive to compensatory ratio of three and a half to one is excessive. Cf. *Brown* v. *Office of Comm'r of Prob.*, 2013 WL 4710391 (Mass. App. Ct. Rule 1:28) (reducing punitive damages of $500,000 in retaliation case to $108,000 where jury awarded only $6,000 in compensatory damages).

The Court is not empowered to rule on the wisdom of this punitive damage award and is not permitted to simply substitute its view for the jury's view of this close case. Accordingly, the Court declines to exercise its discretion to reduce the punitive damage award.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendant Town of Marshfield's Motion for Judgment Notwithstanding the Verdict, Or, In the Alternative For a New Trial Or For Remittitur of the Verdict be **DENIED**.

Gregg J. Pasquale
Justice of the Superior Court

DATED: November 17, 2024

100 Mass.App.Ct. 1129
Unpublished Disposition

Appeals Court of Massachusetts.

Daniel J. KELLEY
v.
The CITY KNOWN AS the TOWN OF GREENFIELD.[1]

21-P-157
|
Entered: March 24, 2022.

By the Court (Neyman, Singh & Grant, JJ.[2])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** The plaintiff appeals from summary judgment entered in favor of the defendant (town), dismissing his complaint asserting a violation of the whistleblower statute, G. L. c. 149, § 185, when the town terminated his employment, allegedly for exposing problems with its accounting practices. A judge of the Superior Court allowed the town's motion for summary judgment on the basis that the plaintiff failed to establish a prima facie case. We affirm.

Background. In April 2016, Greenfield Community Energy and Technology (GCET) was established as a municipal lighting plant pursuant to G. L. c. 164. The plaintiff was hired in September 2016 as interim general manager. According to his contract, the plaintiff was "subject to the direction and control of the [m]ayor ... pursuant to [G. L. c. 164, § 56]." Within a couple of months, the plaintiff began to have disputes with the town accountant and town treasurer over accounting practices involving GCET. During an e-mail exchange with the town auditor in March 2017, the plaintiff stated that he was not going to discuss the issues anymore and that the matter was in the hands of an attorney.

In an August 2017 meeting of the town council, the mayor reported that the plaintiff had contemplated suing the town but that he had since reconsidered. The mayor defended the plaintiff's concerns about the town's accounting practices with respect to GCET, explaining that the plaintiff had been advised by counsel that he could be held responsible for violation of G. L. c. 164, if the town did not follow proper procedures. Shortly thereafter, a town councilor requested the plaintiff to provide documentation of the legal opinion he relied on, along with "full financials" of GCET. The plaintiff refused.

On the following day, August 31, 2017, the mayor sent the plaintiff an e-mail instructing the plaintiff to "cease from further communications to [c]ouncilors, media or others" without consulting him. The mayor also requested the plaintiff to provide him with certain GCET financials by September 5, 2017, at 5:00 p.m. The mayor sent follow-up e-mails on September 14 and 15, 2017, concerning the requested information. In the September 15, 2017 e-mail, the mayor specified that the plaintiff was required to provide that information in both hard copy and electronic form by September 18, 2017, at 1:00 p.m. Additionally, the mayor emphasized that he was "required to prepare a report to the [c]ouncil by the end of the [first] quarter / September 30, 2017," and that he was "currently [ ] unable to complete [the report] without [his] requests being satisfied. Time is of the essence." The mayor terminated the plaintiff's employment on September 19, 2017, the next business day following the deadline set for the requested information.

Discussion. On a motion for summary judgment, the moving party bears the burden of demonstrating that there are no genuine issues of material fact in dispute and that those undisputed facts, viewed in the light most favorable to the nonmoving party, entitle the moving party to judgment as a matter of law. See DiLiddo v. Oxford Street Realty, Inc., 450 Mass. 66, 70 (2007), citing Augat,

Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). Whereas, here, the nonmoving party will bear the burden of proof at trial, summary judgment is appropriate if the moving party demonstrates that the nonmoving party has no reasonable expectation of proving an essential element of that party's case. See HipSaver, Inc. v. Kiel, 464 Mass. 517, 522 (2013), citing Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). An appellate court reviews a motion for summary judgment de novo. See Psychemedics Corp. v. Boston, 486 Mass. 724, 731 (2021).

***2** In order to make out his whistleblower claim under G. L. c. 149, § 185, the plaintiff was required to establish "(1) the plaintiff-employee engaged in an activity protected by the act; (2) the protected activity was the cause of an adverse employment action, such that the employment action was retaliatory; and (3) the retaliatory action caused the plaintiff damages." Edwards v. Commonwealth, 488 Mass. 555, 568-569 (2021). Here, there is no dispute that the plaintiff engaged in what could be considered protected activities, including disclosing or objecting to certain accounting practices believed to be improper, and that the plaintiff sustained an adverse employment action, namely termination from employment.

The issue is whether the plaintiff's engagement in protected activity was the cause of his termination, thus making the termination retaliatory. In the absence of direct evidence of retaliatory motive, causation can be inferred, for example, where "adverse action is taken against a satisfactorily performing employee in the immediate aftermath of the employer's becoming aware of the employee's protected activity." Psy-Ed Corp. v. Klein, 459 Mass. 697, 707 (2011), quoting Mole v. University of Mass., 442 Mass. 582, 592 (2004). Even then, the employer's desire to retaliate against the employee must be shown to be a determinative factor in its decision to take adverse action. Psy-Ed Corp., supra. See Edwards, 488 Mass. at 573 ("the determinative cause standard applicable in employment discrimination cases should be used in claims for retaliation brought under the whistleblower act").

Here, the plaintiff began making claims about the town's accounting practices within a few months of his hiring. The mayor was fully aware of the controversy from its inception, and he supported the plaintiff's position throughout the year-long controversy. It was only after, and immediately after, the deadline had passed for the plaintiff to provide the mayor certain GCET information that the plaintiff was terminated. Under the circumstances, an inference of retaliation cannot be sustained. See Mole, 442 Mass. at 595 (as elapsed time between employer learning of employee's protected activity and employer's adverse employment action "becomes greater, the inference weakens and eventually collapses"). "[U]nless the termination is very closely connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation" (citation omitted). Id.

Here, the plaintiff points to communications from town council members, particularly an August 30, 2017 e-mail from a town councilor to the plaintiff and the mayor, and argues that they support an inference that the mayor's decision to terminate his employment was brought about by pressure from the town council.[3] While there may have been members of town government who sought to retaliate against the plaintiff for making the accounting issues public, the chain of causation was broken by the mayor's independent decision to terminate the plaintiff. See Mole, 442 Mass. at 598 ("a third person's independent decision to take adverse action breaks the causal connection between the supervisor's retaliatory or discriminatory animus and the adverse action").

***3** To the extent that the plaintiff argues that others were pulling the mayor's strings, the record does not support such a theory. "When assessing the independence of the ultimate decision maker, courts place considerable emphasis on the decision maker's giving the employee the opportunity to address the allegations in question, and on the decision maker's awareness of the employee's view that the underlying recommendation is motivated by bias or a desire to retaliate." Mole, 442 Mass. at 600. Here, the mayor was well aware of the long-standing controversy between the plaintiff and others in town government. The mayor steadfastly supported the plaintiff throughout. It was only after he gave the plaintiff an opportunity to provide requested GCET documents to him that the mayor took any adverse action against the plaintiff. Under the circumstances, the plaintiff has failed to establish a causal link between his protected activity and the mayor's termination of his employment.

The town's motion for summary judgment was properly allowed because the plaintiff failed to establish a prima facie case under the whistleblower statute.

Judgment affirmed.

All Citations

100 Mass.App.Ct. 1129, 184 N.E.3d 814 (Table), 2022 WL 868796

Footnotes

1 As is our custom, we set forth the parties' names as they appear in the complaint. We note, however, that the name of the defendant, the city known as the town of Greenfield, was changed to the city of Greenfield after the filing of the complaint in this case. See St. 2018, c. 449, § 1.

2 The panelists are listed in order of seniority.

3 The letter requested the plaintiff to voluntarily release information concerning GCET financials and, in the event that the plaintiff declined, set forth options that the town council had. Among them were passing a resolution calling on the mayor to replace the plaintiff and withholding funds from mayoral priorities if he refused to replace the plaintiff.

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 151B. Unlawful Discrimination Because of Race, Color, Religious Creed, National Origin, Ancestry or Sex (Refs & Annos)

M.G.L.A. 151B § 4

§ 4. Unlawful practices

Currentness

It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry or status as a veteran of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1A. It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day and the employer shall make reasonable accommodation to the religious needs of such individual. No individual who has given notice as hereinafter provided shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided, however, that any employee intending to be absent from work when so required by his or her creed or religion shall notify his or her employer not less than ten days in advance of each absence, and that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time. Nothing under this subsection shall be deemed to require an employer to compensate an employee for such absence. “Reasonable Accommodation”, as used in this subsection shall mean such accommodation to an employee’s or prospective employee’s religious observance or practice as shall not cause undue hardship in the conduct of the employer’s business. The employee shall have the burden of proof as to the required practice of his creed or religion. As used in this subsection, the words “creed or religion” mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization.

Undue hardship, as used herein, shall include the inability of an employer to provide services which are required by and in compliance with all federal and state laws, including regulations or tariffs promulgated or required by any regulatory agency having jurisdiction over such services or where the health or safety of the public would be unduly compromised by the absence of such employee or employees, or where the employee’s presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the

period of absence, or where the employee's presence is needed to alleviate an emergency situation. The employer shall have the burden of proof to show undue hardship.

1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1C. For the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law.

1D. For an employer, an employment agency, the commonwealth or any of its political subdivisions, by itself or its agents, to deny initial employment, reemployment, retention in employment, promotion or any benefit of employment to a person who is a member of, applies to perform, or has an obligation to perform, service in a uniformed military service of the United States, including the National Guard, on the basis of that membership, application or obligation.

1E. (a) For an employer to deny a reasonable accommodation for an employee's pregnancy or any condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child if the employee requests such an accommodation; provided, however, that an employer may deny such an accommodation if the employer can demonstrate that the accommodation would impose an undue hardship on the employer's program, enterprise or business. It shall also be an unlawful practice under this subsection to:

(i) take adverse action against an employee who requests or uses a reasonable accommodation in terms, conditions or privileges of employment including, but not limited to, failing to reinstate the employee to the original employment status or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other applicable service credits when the need for a reasonable accommodation ceases;

(ii) deny an employment opportunity to an employee if the denial is based on the need of the employer to make a reasonable accommodation to the known conditions related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child;

(iii) require an employee affected by pregnancy, or require said employee affected by a condition related to the pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child, to accept an accommodation that the employee chooses not to accept, if that accommodation is unnecessary to enable the employee to perform the essential functions of the job;

(iv) require an employee to take a leave if another reasonable accommodation may be provided for the known conditions related to the employee's pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child, without undue hardship on the employer's program, enterprise or business;

(v) refuse to hire a person who is pregnant because of the pregnancy or because of a condition related to the person's pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child; provided, however, that the person is capable of performing the essential functions of the position with a reasonable accommodation and that reasonable accommodation would not impose an undue hardship, demonstrated by the employer, on the employer's program, enterprise or business.

(b) As used in this subsection, the following words shall have the following meanings unless the context clearly requires otherwise:

"Reasonable accommodation", may include, but shall not be limited to: (i) more frequent or longer paid or unpaid breaks; (ii) time off to attend to a pregnancy complication or recover from childbirth with or without pay; (iii) acquisition or modification of equipment or seating; (iv) temporary transfer to a less strenuous or hazardous position; (v) job restructuring; (vi) light duty; (vii) private non-bathroom space for expressing breast milk; (viii) assistance with manual labor; or (ix) a modified work schedule; provided, however, that an employer shall not be required to discharge or transfer an employee with more seniority or promote an employee who is not able to perform the essential functions of the job with or without a reasonable accommodation.

"Undue hardship", an action requiring significant difficulty or expense; provided, however, that the employer shall have the burden of proving undue hardship; provided further, that in making a determination of undue hardship, the following factors shall be considered: (i) the nature and cost of the needed accommodation; (ii) the overall financial resources of the employer; (iii) the overall size of the business of the employer with respect to the number of employees and the number, type and location of its facilities; and (iv) the effect on expenses and resources or any other impact of the accommodation on the employer's program, enterprise or business.

(c) Upon request for an accommodation from the employee or prospective employee capable of performing the essential functions of the position involved, the employee or prospective employee and the employer shall engage in a timely, good faith and interactive process to determine an effective, reasonable accommodation to enable the employee or prospective employee to perform the essential functions of the employee's job or the position to which the prospective employee has applied. An employer may require that documentation about the need for a reasonable accommodation come from an appropriate health care or rehabilitation professional; provided, however, that an employer shall not require documentation from an appropriate health care or rehabilitation professional for the following accommodations: (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting more than 20 pounds; and (iv) private non-bathroom space for expressing breast milk. An "appropriate health care or rehabilitation professional" shall include, but shall not be limited to, a medical doctor, including a psychiatrist, a psychologist, a nurse practitioner, a physician assistant, a psychiatric clinical nurse specialist, a physical therapist, an occupational therapist, a speech therapist, a vocational rehabilitation specialist, a midwife, a lactation consultant or another licensed mental health professional authorized to perform specified mental health services. An employer may require documentation for an extension of the accommodation beyond the originally agreed to accommodation.

(d) Written notice of the right to be free from discrimination in relation to pregnancy or a condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, including the right to reasonable accommodations for conditions related to pregnancy pursuant to this subsection, shall be distributed by an employer to its employees. The notice shall be provided in a handbook, pamphlet or other means of notice to all employees including, but not limited to: (i) new employees at or prior to the commencement of employment; and (ii) an employee who

notifies the employer of a pregnancy or an employee who notifies the employer of a condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child not more than 10 days after such notification.

(e) Subject to appropriation, the commission shall develop courses of instruction and conduct public education efforts as necessary to inform employers, employees and employment agencies about the rights and responsibilities established under this subsection not more than 180 days after the appropriation.

(f) This subsection shall not be construed to preempt, limit, diminish or otherwise affect any other law relating to sex discrimination or pregnancy or in any way diminish the coverage for pregnancy or a condition related to pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child under section 105D of chapter 149.

2. For a labor organization, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or status as a veteran of any individual, or because of the handicap of any person alleging to be a qualified handicapped person, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide occupational qualification.

3. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry or status as a veteran, or the handicap of a qualified handicapped person or any intent to make any such limitation, specification or discrimination, or to discriminate in any way on the ground of race, color, religious creed, national origin, sex, gender identity, sexual orientation, age, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry, status as a veteran or the handicap of a qualified handicapped person, unless based upon a bona fide occupational qualification.

3A. For any person engaged in the insurance or bonding business, or his agent, to make any inquiry or record of any person seeking a bond or surety bond conditioned upon faithful performance of his duties or to use any form of application in connection with the furnishing of such bond, which seeks information relative to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of the person to be bonded.

3B. For any person whose business includes granting mortgage loans or engaging in residential real estate-related transactions to discriminate against any person in the granting of any mortgage loan or in making available such a transaction, or in the terms or conditions of such a loan or transaction, because of race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age or handicap. Such transactions shall include, but not be limited

to:

(1) the making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or

(2) the selling, brokering, or appraising of residential real estate.

In the case of age, the following shall not be an unlawful practice:

(1) an inquiry of age for the purpose of determining a pertinent element of credit worthiness;

(2) the use of an empirically derived credit system which considers age; provided, however, that such system is based on demonstrably and statistically sound data; and provided, further, that such system does not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any mortgage loan, to a limited age group;

(4) the failure or refusal to grant any mortgage loan to a person who has not attained the age of majority;

(5) the failure or refusal to grant any mortgage loan the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table.

Nothing in this subsection prohibits a person engaged in the business of furnishing appraisals of real property from taking into consideration factors other than those hereinabove proscribed.

3C. For any person to deny another person access to, or membership or participation in, a multiple listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against such person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age, or handicap.

4. For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.

4A. For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.

5. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

6. For the owner, lessee, sublessee, licensed real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other person having the right of ownership or possession or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such a person, or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withhold from any person or group of persons such accommodations because of the race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status of such person or persons or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap; (b) to discriminate against any person because of his race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, or marital status or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap in the terms, conditions or privileges of such accommodations or the acquisitions thereof, or in the furnishings of facilities and services in connection therewith, or because such a person possesses a trained dog guide as a consequence of blindness, or hearing impairment; (c) to cause to be made any written or oral inquiry or record concerning the race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or marital status of the person seeking to rent or lease or buy any such accommodation, or concerning the fact that such person is a veteran or a member of the armed forces or because such person is blind or hearing impaired or has any other handicap. The word “age” as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the executive office of housing and livable communities. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

For purposes of this subsection, discrimination on the basis of handicap includes, but is not limited to, in connection with the design and construction of: (1) all units of a dwelling which has three or more units and an elevator which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one; and (2) all ground floor units of other dwellings consisting of three or more units which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one, a failure to design and construct such dwellings in such a manner that (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all the doors are designed to allow passage into and within all premises within such dwellings and are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (iii) all premises within such dwellings contain the following features of adaptive design; (a) an accessible route into and through the dwelling; (b) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (c) reinforcements in bathroom walls to allow later installation of grab bars; and (d) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

7. For the owner, lessee, sublessee, real estate broker, assignee or managing agent of other covered housing accommodations

or of land intended for the erection of any housing accommodation included under subsection 10, 11, 12, or 13 of section one, or other person having the right of ownership or possession or right to rent or lease or sell, or negotiate for the sale or lease of such land or accommodations, or any agent or employee of such a person or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or lease or otherwise to deny or withhold from any person or group of persons such accommodations or land because of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed forces, blindness, hearing impairment, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment or other handicap of such person or persons; (b) to discriminate against any person because of his race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed services, blindness, or hearing impairment or other handicap, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment in the terms, conditions or privileges of such accommodations or land or the acquisition thereof, or in the furnishing of facilities and services in the connection therewith or (c) to cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, marital status, veteran status or membership in the armed services, blindness, hearing impairment or other handicap or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment, of the person seeking to rent or lease or buy any such accommodation or land; provided, however, that this subsection shall not apply to the leasing of a single apartment or flat in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence. The word “age” as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the executive office of housing and livable communities. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

7A. For purposes of subsections 6 and 7 discrimination on the basis of handicap shall include but not be limited to:

(1) a refusal to permit or to make, at the expense of the handicapped person, reasonable modification of existing premises occupied or to be occupied by such person if such modification is necessary to afford such person full enjoyment of such premises; provided, however, that, in the case of publicly assisted housing, multiple dwelling housing consisting of ten or more units, or contiguously located housing consisting of ten or more units, reasonable modification shall be at the expense of the owner or other person having the right of ownership; provided, further, that, in the case of public ownership of such housing units the cost of such reasonable modification shall be subject to appropriation; and provided, further, that, in the case of a rental, the landlord may, where the modification to be paid for by the handicapped person will materially alter the marketability of the housing, condition permission for a modification on the tenant agreeing to restore or pay for the cost of restoring, the interior of the premises to the condition that existed prior to such modification, reasonable wear and tear excepted;

(2) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling; and

(3) discrimination against or a refusal to rent to a person because of such person’s need for reasonable modification or accommodation.

Reasonable modification shall include, but not be limited to, making the housing accessible to mobility-impaired, hearing-impaired and sight-impaired persons including installing raised numbers which may be read by a sight-impaired person, installing a door bell which flashes a light for a hearing-impaired person, lowering a cabinet, ramping a front entrance of five or fewer vertical steps, widening a doorway, and installing a grab bar; provided, however, that for purposes of this subsection, the owner or other person having the right of ownership shall not be required to pay for ramping a front entrance of more than five steps or for installing a wheelchair lift.

Notwithstanding any other provisions of this subsection, an accommodation or modification which is paid for by the owner or other person having the right of ownership is not considered to be reasonable if it would impose an undue hardship upon the owner or other person having the right of ownership and shall therefore not be required. Factors to be considered shall include, but not be limited to, the nature and cost of the accommodation or modification needed, the extent to which the accommodation or modification would materially alter the marketability of the housing, the overall size of the housing business of the owner or other person having the right of ownership, including but not limited to, the number and type of housing units, size of budget and available assets, and the ability of the owner or other person having the right of ownership to recover the cost of the accommodation or modification through a federal tax deduction. Ten percent shall be the maximum number of units for which an owner or other person having the right of ownership shall be required to pay for a modification in order to make units fully accessible to persons using a wheelchair pursuant to the requirements of this subsection.

<[Fourth paragraph of subsection 7A effective until September 12, 2024. For text effective September 12, 2024, see below.]>

In the event a wheelchair accessible unit becomes or will become vacant, the owner or other person having the right of ownership shall give timely notice to a person who has, within the previous twelve months, notified the owner or person having the right of ownership that such person is in need of a unit which is wheelchair accessible, and the owner or other person having the right of ownership shall give at least fifteen days notice of the vacancy to the Massachusetts rehabilitation commission, which shall maintain a central registry of accessible apartment housing under the provisions of section seventy-nine of chapter six. During such fifteen day notice period, the owner or other person having the right of ownership may lease or agree to lease the unit only if it is to be occupied by a person who is in need of wheelchair accessibility.

<[Fourth paragraph of subsection 7A as amended by 2024, 205, Sec. 76 effective September 12, 2024. For text effective until September 12, 2024, see above.]>

In the event a wheelchair accessible unit becomes or will become vacant, the owner or other person having the right of ownership shall give timely notice to a person who has, within the previous twelve months, notified the owner or person having the right of ownership that such person is in need of a unit which is wheelchair accessible, and the owner or other person having the right of ownership shall give at least fifteen days notice of the vacancy to MassAbility, which shall maintain a central registry of accessible apartment housing under the provisions of section seventy-nine of chapter six. During such fifteen day notice period, the owner or other person having the right of ownership may lease or agree to lease the unit only if it is to be occupied by a person who is in need of wheelchair accessibility.

Notwithstanding any general or special law, by-law or ordinance to the contrary, there shall not be established or imposed a rent or other charge for such handicap-accessible housing which is higher than the rent or other charge for comparable nonaccessible housing of the owner or other person having the right of ownership.

7B. For any person to make print, or publish, or cause to be made, printed, or published any notice, statement or

advertisement, with respect to the sale or rental of multiple dwelling, contiguously located, publicly assisted or other covered housing accommodations that indicates any preference, limitation, or discrimination based on race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, national origin, genetic information, ancestry, children, marital status, public assistance recipiency, or handicap or an intention to make any such preference, limitation or discrimination except where otherwise legally permitted.

8. For the owner, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, commercial space: (1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such commercial space because of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry handicap or marital status of such person or persons. (2) To discriminate against any person because of his race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status in the terms, conditions or privileges of the sale, rental or lease of any such commercial space or in the furnishing of facilities or services in connection therewith. (3) To cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status of a person seeking to rent or lease or buy any such commercial space. The word “age” as used in this subsection shall not apply to persons who are minors, nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in self-contained retirement communities constructed expressly for use by the elderly and which are at least twenty acres in size and have a minimum age requirement for residency of at least fifty-five years.

9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information, or (iv) a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.

9 ½. For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant’s application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses.

9A. For an employer himself or through his agent to refuse, unless based upon a bonafide occupational qualification, to hire or employ or to bar or discharge from employment any person by reason of his or her failure to furnish information regarding his or her admission, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such person has been discharged from such facility or facilities and can prove by a psychiatrist's certificate that he is mentally competent to perform the job or the job for which he is applying. No application for employment shall contain any questions or requests for information regarding the admission of an applicant, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from such public or private facility or facilities and is no longer under treatment directly related to such admission.

10. For any person furnishing credit, services or rental accommodations to discriminate against any individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program.

11. For the owner, sublessees, real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession or right to rent or lease or sell such accommodations, or any agent or employee of such person or organization of unit owners in a condominium or housing cooperative, to refuse to rent or lease or sell or otherwise to deny to or withhold from any person such accommodations because such person has a child or children who shall occupy the premises with such person or to discriminate against any person in the terms, conditions, or privileges of such accommodations or the acquisition thereof, or in the furnishing of facilities and services in connection therewith, because such person has a child or children who occupy or shall occupy the premises with such person; provided, however, that nothing herein shall limit the applicability of any local, state, or federal restrictions regarding the maximum number of persons permitted to occupy a dwelling. When the commission or a court finds that discrimination in violation of this paragraph has occurred with respect to a residential premises containing dangerous levels of lead in paint, plaster, soil, or other accessible material, notification of such finding shall be sent to the director of the childhood lead poisoning prevention program.

This subsection shall not apply to:

(1) Dwellings containing three apartments or less, one of which apartments is occupied by an elderly or infirm person for whom the presence of children would constitute a hardship. For purposes of this subsection, an "elderly person" shall mean a person sixty-five years of age or over, and an "infirm person" shall mean a person who is disabled or suffering from a chronic illness.

(2) The temporary leasing or temporary subleasing of a single family dwelling, a single apartment, or a single unit of a condominium or housing cooperative, by the owner of such dwelling, apartment, or unit, or in the case of a subleasing, by the sublessor thereof, who ordinarily occupies the dwelling, apartment, or unit as his or her principal place of residence. For purposes of this subsection, the term "temporary leasing" shall mean leasing during a period of the owner's or sublessor's absence not to exceed one year.

(3) The leasing of a single dwelling unit in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence.

11A. For an employer, or an employer's agent, to refuse to restore certain employees to employment following an absence by reason of a parental leave taken pursuant to section 105D of chapter 149 or to otherwise fail to comply with that section, or for the commonwealth and any of its boards, departments and commissions to deny vacation credit to an employee for the fiscal year during which the employee is absent due to a parental leave taken pursuant to said section 105D of said chapter 149, or to impose any other penalty as a result of a parental leave of absence.

12. For any retail store which provides credit or charge account privileges to refuse to extend such privileges to a customer solely because said customer had attained age sixty-two or over.

13. For any person to directly or indirectly induce, attempt to induce, prevent, or attempt to prevent the sale, purchase, or rental of any dwelling or dwellings by:

(a) implicit or explicit representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, gender identity, national or ethnic origin, or economic level or a handicapped person, or a person having a child, or implicit or explicit representations regarding the effects or consequences of any such entry or prospective entry;

(b) unrequested contact or communication with any person or persons, initiated by any means, for the purpose of so inducing or attempting to induce the sale, purchase, or rental of any dwelling or dwellings when he knew or, in the exercise of reasonable care, should have known that such unrequested solicitation would reasonably be associated by the persons solicited with the entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, gender identity, national or ethnic origin, or economic level or a handicapped person, or a person having a child;

(c) implicit or explicit false representations regarding the availability of suitable housing within a particular neighborhood or area, or failure to disclose or offer to show all properties listed or held for sale or rent within a requested price or rental range, regardless of location; or

(d) false representations regarding the listing, prospective listing, sale, or prospective sale of any dwelling.

14. For any person furnishing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex, gender identity, marital status, age or sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object; provided that in the case of age the following shall not be unlawful practices:

(1) an inquiry of age for the purpose of determining a pertinent element of creditworthiness;

(2) the use of empirically derived credit systems which consider age, provided such systems are based on demonstrably and statistically sound data and provided further that such systems do not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any credit or services, to a limited age group;

(4) the denial of any credit or services to a person who has not attained the age of majority;

(5) the denial of any credit or services the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table; or

(6) the offering of more favorable credit terms to students, to persons aged eighteen to twenty-one, or to persons who have reached the age of sixty-two.

Any person who violates the provisions of this subsection shall be liable in an action of contract for actual damages; provided, however, that, if there are no actual damages, the court may assess special damages to the aggrieved party not to exceed one thousand dollars; and provided further, that any person who has been found to violate a provision of this subsection by a court of competent jurisdiction shall be assessed the cost of reasonable legal fees actually incurred.

15. For any person responsible for recording the name of or establishing the personal identification of an individual for any purpose, including that of extending credit, to require such individual to use, because of such individual's sex or marital status, any surname other than the one by which such individual is generally known.

16. For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business. For purposes of this subsection, the word employer shall include an agency which employs individuals directly for the purpose of furnishing part-time or temporary help to others.

In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:--

(1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

(2) the type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) the nature and cost of the accommodation needed.

Physical or mental job qualification requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

An employer may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

16A. For an employer, personally or through its agents, to sexually harass any employee.

17. Notwithstanding any provision of this chapter, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to:

(a) observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section, except that no such employee benefit plan shall excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any person because of age except as permitted by paragraph (b).

(b) require the compulsory retirement of any person who has attained the age of sixty-five and who, for the two year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such person entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of the employer, which equals, in the aggregate, at least forty-four thousand dollars.

(c) require the retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure or similar arrangement providing for unlimited tenure at an independent institution of higher education, or to limit the employment in a faculty capacity of such an employee, or another person who has attained seventy years of age who was formerly employed under a contract of unlimited tenure or similar arrangement, to such terms and to such a period as would serve the present and future needs of the institution, as determined by it; provided, however, that in making such a determination, no institution shall use as a qualification for employment or reemployment, the fact that the individual is under any particular age.

18. For the owner, lessee, sublessee, licensed real estate broker, assignee, or managing agent of publicly assisted or multiple

dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession, or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such person or any organization of unit owners in a condominium or housing cooperative to sexually harass any tenant, prospective tenant, purchaser or prospective purchaser of property.

Notwithstanding the foregoing provisions of this section, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to inquire of an applicant for employment or membership as to whether or not he or she is a veteran or a citizen.

Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

Notwithstanding the foregoing provisions of this section, (a) every employer, every employment agency, including the division of employment and training, and every labor organization shall make and keep such records relating to race, color or national origin as the commission may prescribe from time to time by rule or regulation, after public hearing, as reasonably necessary for the purpose of showing compliance with the requirements of this chapter, and (b) every employer and labor organization may keep and maintain such records and make such reports as may from time to time be necessary to comply, or show compliance with, any executive order issued by the President of the United States or any rules or regulations issued thereunder prescribing fair employment practices for contractors and subcontractors under contract with the United States, or, if not subject to such order, in the manner prescribed therein and subject to the jurisdiction of the commission. Such requirements as the commission may, by rule or regulation, prescribe for the making and keeping of records under clause (a) shall impose no greater burden or requirement on the employer, employment agency or labor organization subject thereto, than the comparable requirements which could be prescribed by Federal rule or regulation so long as no such requirements have in fact been prescribed, or which have in fact been prescribed for an employer, employment agency or labor organization under the authority of the Civil Rights Act of 1964, from time to time amended.[1] This paragraph shall apply only to employers who on each working day in each of twenty or more calendar weeks in the annual period ending with each date set forth below, employed more employees than the number set forth beside such date, and to labor organizations which have more members on each such working day during such period.

Period Ending.	***Minimum Employees or Members.***
June 30, 1965	100
June 30, 1966	75
June 30, 1967	50

June 30, 1968 and thereafter 25

Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment agency or labor organization to grant preferential treatment to any individual or to any group because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry of such individual or group because of imbalance which may exist between the total number or percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization or admitted to or employed in, any apprenticeship or other training program, and the total number or percentage of persons of such race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry in the commonwealth or in any community, section or other area therein, or in the available work force in the commonwealth or in any of its political subdivisions.

19. (a) It shall be unlawful discrimination for any employer, employment agency, labor organization, or licensing agency to

(1) refuse to hire or employ, represent, grant membership to, or license a person on the basis of that person's genetic information;

(2) collect, solicit or require disclosure of genetic information from any person as a condition of employment, or membership, or of obtaining a license;

(3) solicit submission to, require, or administer a genetic test to any person as a condition of employment, membership, or obtaining a license;

(4) offer a person an inducement to undergo a genetic test or otherwise disclose genetic information;

(5) question a person about their genetic information or genetic information concerning their family members, or inquire about previous genetic testing;

(6) use the results of a genetic test or other genetic information to affect the terms, conditions, compensation or privileges of a person's employment, representation, membership, or the ability to obtain a license;

(7) terminate or refuse to renew a person's employment, representation, membership, or license on the basis of a genetic test or other genetic information; or

(8) otherwise seek, receive, or maintain genetic information for non-medical purposes.

<[There is no paragraph (b).]>

Credits

Added by St.1946, c. 368, § 4. Amended by St.1947, c. 424; St.1950, c. 697, §§ 6 to 8; St.1955, c. 274; St.1957, c. 426, §§ 2, 3; St.1959, c. 239, § 2; St.1960, c. 163, § 2; St.1961, c. 128; St.1963, c. 197, § 2; St.1965, c. 213, § 2; St.1965, c. 397, §§ 4 to 6; St.1966, c. 361; St.1969, c. 90; St.1969, c. 314; St.1971, c. 661; St.1971, c. 726; St.1971, c. 874, §§ 1 to 3; St.1972, c. 185; St.1972, c. 428; St.1972, c. 542; St.1972, c. 786, § 2; St.1972, c. 790, § 2; St.1973, c. 168; St.1973, c. 187, §§ 1 to 3; St.1973, c. 325; St.1973, c. 701, § 1; St.1973, c. 929; St.1973, c. 1015, §§ 1 to 3; St.1974, c. 531; St.1975, c. 84; St.1975, c. 367, § 3; St.1975, c. 637, §§ 1, 2; St.1978, c. 89; St.1978, c. 288, §§ 1, 2; St.1979, c. 710, § 2; St.1980, c. 343; St.1983, c. 533, §§ 4 to 6; St.1983, c. 585, § 7; St.1983, c. 628, §§ 1 to 3; St.1984, c. 266, §§ 5 to 7; St.1985, c. 239; St.1986, c. 588, § 3; St.1987, c. 270, §§ 1, 2; St.1987, c. 773, § 11; St.1989, c. 516, §§ 4 to 7 and 9 to 14; St.1989, c. 544; St.1989, c. 722, §§ 13 to 23; St.1990, c. 177, § 341; St.1990, c. 283, §§ 1, 2; St.1996, c. 262; St.1997, c. 2, § 2; St.1997, c. 19, §§ 105, 106; St.1998, c. 161, § 532; St.2000, c. 254, §§ 6 to 23A; St.2001, c. 11, §§ 1, 2; St.2004, c. 355, § 1, eff. Dec. 22, 2004; St.2006, c. 291, §§ 1, 2, eff. Dec. 6, 2006; St.2010, c. 256, § 101, eff. Nov. 4, 2010; St.2011, c. 199, § 7, eff. July 1, 2012; St.2014, c. 484, § 2, eff. April 7, 2015; St.2016, c. 141, §§ 22 to 24, eff. July 14, 2016; St.2017, c. 54, §§ 1, 2, eff. April 1, 2018; St.2018, c. 69, §§ 103, 104, eff. Oct. 13, 2018; St.2023, c. 7, § 290, eff. May 30, 2023; St.2024, c. 205, § 76, eff. Sept. 12, 2024.

Footnotes

[1] 42 U.S.C.A. § 2000a.

M.G.L.A. 151B § 4, MA ST 151B § 4
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 268A. Conduct of Public Officials and Employees (Refs & Annos)

M.G.L.A. 268A § 17

§ 17. Municipal employees; gift or receipt of compensation from other than municipality; acting as agent or attorney

Currentness

(a) No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

(b) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(c) No municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

A special municipal employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

This section shall not prevent a municipal employee from taking uncompensated action, not inconsistent with the faithful performance of his duties, to aid or assist any person who is the subject of disciplinary or other personnel administration proceedings with respect to those proceedings.

This section shall not prevent a municipal employee, including a special employee, from acting, with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for

whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the official responsible for appointment to his position approves.

This section shall not prevent a present or former special municipal employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the city or town; provided, that the head of the special municipal employee's department or agency has certified in writing that the interest of the city or town requires such aid or assistance and the certification has been filed with the clerk of the city or town. The certification shall be open to public inspection.

This section shall not prevent a municipal employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

This section shall not prevent a municipal employee from applying on behalf of anyone for a building, electrical, wiring, plumbing, gas fitting or septic system permit, nor from receiving compensation in relation to any such permit, unless such employee is employed by or provides services to the permit-granting agency or an agency that regulates the activities of the permit-granting agency.

Credits

Added by St.1962, c. 779, § 1. Amended by St.1998, c. 100; St.2009, c. 28, § 76, eff. Sept. 29, 2009.

M.G.L.A. 268A § 17, MA ST 268A § 17
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

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Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 268A. Conduct of Public Officials and Employees (Refs & Annos)

M.G.L.A. 268A § 19

§ 19. Municipal employees, relatives or associates; financial interest in particular matter

Currentness

(a) Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

(b) It shall not be a violation of this section (1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee, or (2) if, in the case of an elected municipal official making demand bank deposits of municipal funds, said official first files, with the clerk of the city or town, a statement making full disclosure of such financial interest, or (3) if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

Credits

Added by St.1962, c. 779, § 1. Amended by St.1965, c. 395; St.1982, c. 612, § 11; St.2009, c. 28, § 78, eff. Sept. 29, 2009.

M.G.L.A. 268A § 19, MA ST 268A § 19
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

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Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 268A. Conduct of Public Officials and Employees (Refs & Annos)

M.G.L.A. 268A § 23

§ 23. Supplemental provisions; standards of conduct

Currentness

(a) In addition to the other provisions of this chapter, and in supplement thereto, standards of conduct, as hereinafter set forth, are hereby established for all state, county, and municipal employees.

(b) No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(1) accept other employment involving compensation of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of his public office;

(2) (i) solicit or receive anything of substantial value for such officer or employee, which is not otherwise authorized by statute or regulation, for or because of the officer or employee's official position; or (ii) use or attempt to use such official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals;

(3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion; or

(4) present a false or fraudulent claim to his employer for any payment or benefit of substantial value.

(c) No current or former officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(1) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority;

(2) improperly disclose materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and were acquired by him in the course of his official duties nor use such information to further his personal interest.

(d) Any activity specifically exempted from any of the prohibitions in any other section of this chapter shall also be exempt from the provisions of this section. The state ethics commission, established by chapter two hundred and sixty-eight B, shall not enforce the provisions of this section with respect to any such exempted activity.

(e) Where a current employee is found to have violated the provisions of this section, appropriate administrative action as is warranted may also be taken by the appropriate constitutional officer, by the head of a state, county or municipal agency. Nothing in this section shall preclude any such constitutional officer or head of such agency from establishing and enforcing additional standards of conduct.

(f) The state ethics commission shall adopt regulations: (i) defining substantial value; provided, however, that substantial value shall not be less than $50; (ii) establishing exclusions for ceremonial privileges and exemptions; (iii) establishing exclusions for privileges and exemptions given solely because of family or friendship; and (iv) establishing additional exclusions for other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest.

Credits

Added by St.1962, c. 779, § 1. Amended by St.1975, c. 508; St.1982, c. 612, § 14; St.1983, c. 409; St.1986, c. 12, § 2; St.2009, c. 28, §§ 81 to 83, eff. Sept. 29, 2009.

M.G.L.A. 268A § 23, MA ST 268A § 23
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

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Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
VI. Trials (Refs & Annos)

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 50

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

Currentness

(a) Motion for Directed Verdict: When Made; Effect. A party may move for a directed verdict at the close of the evidence offered by an opponent, and may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A party may also move for a directed verdict at the close of all the evidence. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may serve a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may serve a motion for judgment in accordance with the motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a

new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Credits

Amended October 1, 1998, effective November 2, 1998.

Rules Civ. Proc., Rule 50, MA ST RCP Rule 50
Current with amendments received through March 1, 2025. Some rules may be more current; see credits for details.

Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
VII. Judgment

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 59

Rule 59. New Trials: Amendment of Judgments

Currentness

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the Commonwealth; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the Commonwealth. A new trial shall not be granted solely on the ground that the damages are excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges is excessive. A new trial shall not be granted solely on the ground that the damages are inadequate until the defendant has first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rules Civ. Proc., Rule 59, MA ST RCP Rule 59
Current with amendments received through March 1, 2025. Some rules may be more current; see credits for details.

End of Document

CERTIFICATE OF COMPLIANCE
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and contains 10,820, total non-excluded words as counted using the word count feature of Microsoft Word 2013.

/s/ Justin L. Amos
Justin L. Amos

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2025, I have served the foregoing Brief via the Massachusetts Tyler Host electronic filing system upon:

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