COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2022-P-0304

WORCESTER, ss.

MATTHEW DUNN, Appellant

V.

PHOENIX COMMUNICATIONS, INC., MARK W. LANGEVIN, and

MARIE LANGEVIN, Appellees

On Appeal from WORCESTER SUPERIOR COURT

Appellant's Memorandum of Law

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STATEMENT OF ISSUES

1. Whether the statute of limitations set forth at G. L. c. 151B § 5 was included among "all civil statutes of limitations" tolled by the Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, as updated; and
2. Whether, if the statute of limitations set forth at G. L. c. 151B § 5 was not tolled by the Supreme Judicial Court's Order, the Superior Court should have applied equitable tolling in this case with respect to the deadline for Mr. Dunn to file his Chapter 151B claims pursuant to the statute.

STATEMENT OF THE CASE

On July 29, 2020, Matthew Dunn ("Mr. Dunn") filed suit against Phoenix Communications ("Phoenix"), Mark Langevin ("Mr. Langevin"), and Marie Langevin ("Ms. Langevin")(collectively "the Phoenix parties") in Worcester Superior Court for failure to pay wages in violation of G. L. c. 149, §148 and non-payment of wages and overtime in violation of 29 U.S.C. §201 *et seq.* (R.A. 3) On November 16, 2020, Mr. Dunn filed a complaint with the Massachusetts Commission Against

Discrimination ("MCAD") pursuant to G. L. 151B § 5 asserting claims against Phoenix and Mr. Langevin for sexual harassment and related retaliation in violation of G. L. c. 151B, §4(4 and 16A) ("Chapter 151B claims").(R.A. 9) The Phoenix parties responded to the Superior Court complaint shortly thereafter. (R.A. 14).

On April 1, 2021 the MCAD dismissed Mr. Dunn's case at his request so that he could exercise his right to file his Chapter 151B claims in Superior Court pursuant to G. L. c. 151B § 9. (R.A. 85-86). Mr. Dunn subsequently moved for leave to amend his Superior Court complaint to add the Chapter 151B claims, which motion the Phoenix parties opposed on statute of limitations grounds. (R.A. 20 and 22). The Superior Court heard and granted Mr. Dunn's motion on July 16, 2021. (R.A. 42). Mr. Dunn filed his Amended Complaint incorporating his Chapter 151B claims on July 23, 2021. (R.A. 48).

The Phoenix parties then moved pursuant to Mass. R. Civ. P. 12(b)(6) to dismiss Mr. Dunn's Chapter 151B claims as well as his claim for negligent infliction of emotional distress. (R.A. 58; R.A. 94; R.A. 101). Mr. Dunn opposed the motion, and the Superior Court

(Kenton-Walker, J.) heard oral argument on October 21, 2021. The Superior Court allowed in part and denied in part the Phoenix parties' Partial Motion to Dismiss. (R.A. 111). The Superior Court dismissed Mr. Dunn's Chapter 151B claims, but denied dismissal of the claim for negligent infliction of emotional distress. (R.A. 118).

Mr. Dunn timely filed a petition pursuant to G. L. c. 231, s. 118, par. 1 for interlocutory relief. (R.A. 119). On February 15, 2022 Justice Ditkoff issued an order granting Mr. Dunn the right to an interlocutory appeal from that portion of the Superior Court's decision dismissing his Chapter 151B claims, having concluded that Mr. Dunn's petition "raises complex questions about the interplay of the MCAD filing deadline and court filing deadlines and the circumstances in which equitable tolling is appropriate during the pandemic." (R.A. 119). Mr. Dunn timely filed his Notice of Appeal in the Superior Court pursuant to Justice Ditkoff's order and entered this appeal. (R.A. 120).

STATEMENT OF FACTS[1]

Phoenix is a contractor specializing in the construction, maintenance and management of fiber optic networks. (R.A. 10). Phoenix employed Mr. Dunn from June 8, 2014 through November 21, 2019. Id. Phoenix first hired Mr. Dunn as a groundman, then subsequently designated him a lineman before promoting him. (R.A. 10, 49 and 50).

In January 2019, Mr. Langevin invited Mr. Dunn along with Deb Dunn [Smith], who was Mr. Dunn's girlfriend at the time and has since become his wife, to a "leadership conference" in Puerto Rico. (R.A. 51). Mr. Dunn and his wife soon learned that the purported "leadership conference" served no meaningful business purpose and was actually a series of parties characterized by excessive use of alcohol and inappropriate sexual comments addressed to Mr. Dunn's wife and other women present. Id. During the "leadership conference," Mr. Langevin directed sexually suggestive comments to Mr. Dunn's wife in a manner that made both Mr. Dunn and his wife extremely

[1] For purposes of context, this section includes both facts relevant to Mr. Dunn's Chapter 151B claims and a summary of the SJC's relevant orders in response to the COVID-19 pandemic.

uncomfortable. Id. The sexual harassment and excessive drinking continued, and Mr. Dunn and his wife felt that they had no choice but to leave the "conference" early. (R.A. 52).

Following the trip there was substantial tension between Mr. Langevin and Mr. Dunn, and working for Phoenix became very stressful for Mr. Dunn. Id. In or about September 2019, Mr. Dunn complained to Phoenix's Director of Operations and Controller about the sexual harassment in Puerto Rico and the associated lack of respect he felt. (R.A. 53). After that conversation, Phoenix retaliated against Mr. Dunn in multiple respects. Id.

On November 21, 2019, exactly 300 days after the incident of sexual harassment in Puerto Rico, Phoenix terminated Mr. Dunn's employment without providing a stated reason. Id. Mr. Dunn has alleged that his termination was motivated by his complaint about Mr. Langevin's sexual harassment, and that the termination was timed based on Phoenix's belief that by waiting 300 days to terminate Mr. Dunn the company could escape liability for any discrimination complaint. (R.A. 53). The abrupt termination of Mr. Dunn's employment compounded the emotional distress that had

already been caused by Phoenix's refusal to address Mr. Langevin's behavior. (R.A. 54).

On March 10, 2020, Massachusetts Governor Charlie Baker declared a state of emergency in response to the COVID-19 pandemic. Declaration of a State of Emergency to Respond to COVID-19, https://www.mass.gov/info-details/covid-19-state-of-emergency. Three days later, the Massachusetts Supreme Judicial Court (SJC) issued the first of a series of orders constituting the judiciary branch's response to the pandemic. See generally Repealed Supreme Judicial Court Orders in re: COVID-19 (coronavirus) pandemic, https://www.mass.gov/lists/repealed-supreme-judicial-court-orders-in-re-covid-19-coronavirus-pandemic. On April 1, 2020, the SJC issued its Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic "pursuant to its superintendence and rule making authority" and in order "to continue to reduce the number of people coming to Massachusetts State courthouses." https://www.mass.gov/doc/repealed-sjc-order-regarding-court-operations-under-the-exigent-circumstances-created-by-the/download. Paragraph 11

of that order tolled "[a]ll statutes of limitation" from March 17, 2020 through May 3, 2020. Id.

The SJC subsequently updated its Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic on successive occasions, and its Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, effective June 1, 2020, extended the tolling of "[a]ll civil statutes of limitation" from March 17, 2020 through June 30, 2020. https://www.mass.gov/doc/repealed-sjc-second-updated-order-regarding-court-operations-under-the-exigent-circumstances/download. The SJC's Third Updated Order reiterated the tolling provision but did not extend it further, and made clear that future orders would not further extend the tolling "unless there is a new surge in COVID-19 cases in the Commonwealth and the SJC determines that a new or extended period of tolling is needed." https://www.mass.gov/doc/repealed-sjc-third-updated-order-regarding-court-operations-under-the-exigent-circumstances/download. At the time Mr. Dunn filed his MCAD complaint on November 16, 2020, the SJC had issued its Fourth Updated Order (for

the sake of clarity, referred to here in combination with the Third Updated Order as "the SJC Tolling Order"). https://www.mass.gov/doc/repealed-sjc-fourth-updated-order-regarding-court-operations-under-the-exigent-circumstances/download. That order did not further extend civil statutes of limitations, but reiterated the calculation of statutes of limitations for cases (such as Mr. Dunn's) with limitations periods that were pending as of March 17, 2020. Id. at n. 7. Specifically, the order stated that "[t]he new date for the expiration of a statute of limitation is calculated as follows: determine how many days remained as of March 17, 2020, until the statute of limitations would have expired, and that same number of days will remain as of July 1, 2020 in civil cases." Id.

SUMMARY OF ARGUMENT

At the time the SJC Tolling Order was issued, established precedent recognized that the 300-day limitations period set forth in G. L. c. 151B § 5 constitutes a statute of limitations. See pp. 57-58. Because the SJC Tolling Order clearly applied to G. L. c. 151B § 5, and the limitations period for Mr. Dunn's

Chapter 151B claims had begun at the time the SJC Tolling Order was issued, Mr. Dunn's filing of his Chapter 151B claims was timely. See pp. 57-58, 66. The Superior Court in this case was bound by the SJC Tolling Order and lacked discretion to dismiss Mr. Dunn's Chapter 151B claims as untimely. See pp. 57-58, 66.

The MCAD's tolling guidelines did not apply generally to control the G. L. c. 151B § 5 statute of limitations with respect to civil actions filed in court pursuant to G. L. c. 151B § 9. See pp. 57-58, 66. In Mr. Dunn's case, the MCAD made no determination at all concerning the timeliness of his Chapter 151B complaint and he was not required to seek one prior to removing pursuant to G. L. c. 151B § 9. See pp. 57-58, 66. Because the statutory scheme creates two independent avenues for redress, via the MCAD and via the courts, courts have authority to interpret the G. L. c. 151B § 5 statute of limitations in civil actions and the MCAD has the authority to do so in administrative cases pending before it. See pp. 57-58, 66.

Even if the SJC Tolling Order did not apply to extend the G. L. c. 151B § 5 statute of limitations

for Mr. Dunn's Chapter 151B claims, the Superior Court should have applied equitable tolling in this case. See pp. 57-58, 66. Under the unique circumstances presented by the SJC Tolling Order, and if the SJC Tolling Order did not actually apply, the state of the law concerning the G. L. c. 151B § 5 limitations period was at least unclear and it would be manifestly unfair to impose on Mr. Dunn an interpretation that he and his counsel could not reasonably have anticipated. See pp. 57-58, 66.

ARGUMENT

I. Mr. Dunn filed his Chapter 151B claims timely.

a. The SJC Tolling Order in effect at the time Mr. Dunn filed his Chapter 151B claims tolled all civil statutes of limitation, including the statute of limitation set forth at G. L. c. 151B § 5.

At the time the SJC issued the Tolling Order, it had been well established for decades that the deadline in G. L. c. 151B § 5 for filing claims with the MCAD constitutes a statute of limitations subject to equitable tolling. See Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 817 (1988); see also Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 534 (2001); Cherella v. Phoenix Techs. Ltd., 32 Mass. App. Ct. 919, 921 (1992) and Brader v. Biogen Inc.,

983 F.3d 39, 60 (1st Cir. 2020) (all expressly referring to § 5 as a "statute of limitations"); see also Pettengill v. Curtis, 584 F. Supp. 2d 348, 364 (D. Mass. 2008)(noting that the minority tolling statute applied to G. L. c. 151B § 5). The statute itself uses the word "limitations" in its title. G. L. c. 151B § 5. The analogous federal statute, which explicitly contemplates and accommodates proceedings before state enforcement agencies, has likewise been treated as a statute of limitations subject to equitable tolling. 42 U.S.C.A. § 2000e-5; Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982); Martinez-Rivera v. Commonwealth of Puerto Rico, 812 F.3d 69, 77 (1st Cir. 2016).

The SJC Tolling Order did not mention, contemplate, or imply any exceptions to its tolling of "all civil statutes of limitations." When subsequently asked to review the scope of the Tolling Order, the SJC held that its use of the phrase "all civil statutes of limitations" had been "clear and unambiguous." Shaw's Supermarkets, Inc. v. Melendez, 488 Mass. 338, 342 (2021). The SJC emphasized that "[i]n common usage, 'all' means 'the whole of'; 'the

greatest possible'; 'every'; and 'any,'" and that in adopting "this broad tolling order" the Court had been "cognizant of the challenges that the COVID-19 pandemic has engendered not only for the judiciary and court staff, but also for attorneys and litigants considering the initiation of legal action." Id. By its plain language, by design, and according to pre-existing precedent, the SJC Tolling Order clearly applied to the deadline set forth in G. L. c. 151B § 5.

b. According to the calculation prescribed by the SJC Tolling Order, Mr. Dunn's MCAD complaint was filed timely.

Mr. Dunn was terminated on November 21, 2019, and his termination constituted the last discriminatory and/or retaliatory act for purposes of his Chapter 151B claims. As of March 17, 2020, 117 days had passed since Mr. Dunn's termination and 183 remained prior to expiration of the 300-day limitations period set forth at G. L. c. 151B § 5. According to the calculation prescribed by the SJC Tolling Order, 183 days therefore continued to remain as of July 1, 2020 and the new deadline for Mr. Dunn to file his Chapter 151B claims was December 31, 2020. He ultimately filed

his Chapter 151B claims on November 16, 2020. (R.A. 9) Notwithstanding their disagreement on substantive legal grounds concerning the application of the SJC Tolling Order, the Phoenix parties do not challenge this calculation.

c. The Superior Court was bound by the SJC Tolling Order in considering the timeliness of Mr. Dunn's MCAD complaint for purposes of G. L. 151B § 5.

Despite the unambiguous language of the SJC Tolling Order, and even though the MCAD had not made any decision concerning the timeliness of Mr. Dunn's MCAD complaint, the Superior Court concluded in this case that only the MCAD could control the limitations period set forth at G. L. c. 151B § 5 for purposes of Mr. Dunn's Chapter 151B claims. In doing so the Superior Court disregarded the plain language of the SJC Tolling Order and precedent established in Christo, 402 Mass. at 817, and relied instead solely on the reasoning of the U.S. District Court decision in Harrington v. Lesley Univ., 554 F. Supp. 3d 211, 225 (D. Mass. 2021). (Addendum at p. 49). In Harrington, supra, which entailed a variety of issues not relevant to this case, Judge Woodlock concluded that the SJC Tolling Order did not apply to toll the

Chapter 151B claims of a plaintiff in federal court. Id. For several reasons, the Superior Court erred in following Harrington rather than complying with the SJC's Tolling Order as it was bound to do.

1. The SJC's Tolling Order bound the Superior Court in this case because the Tolling Order was issued pursuant to the SJC's superintendence powers.

First, the Superior Court lacked discretion to disregard the SJC Tolling Order. One of the bases for the SJC's authority to issue the Tolling Order was its "superintendence powers over all of the courts in the Commonwealth." Shaw's Supermarkets, Inc., 488 Mass. at 340, citing G. L. c. 211, § 3. Harrington was a decision of the U.S. District Court, over which the SJC lacks superintendence. Although the plaintiff in Harrington withdrew her Chapter 151B claims from the MCAD and filed them in Superior Court, the defendants in that case removed to federal court before moving to dismiss on statute of limitations grounds. Harrington, 554 F. Supp. 3d at 220. The Harrington decision understandably did not consider whether it was bound the SJC's Order as a matter of superintendence. Id. generally. Unlike the U.S. District Court, however, the Superior Court in this case was a Massachusetts

court subject to the SJC's superintendence powers and therefore to its Tolling Order. Consequently, it lacked discretion to rule on the timeliness of Mr. Dunn's complaint in manner contrary to the SJC's directive.

2. The MCAD's tolling guidelines do not apply generally to control timeliness for purposes of civil actions filed pursuant to G. L. c. 151B § 9.

Second, and in any event, Harrington was wrongly decided because the opinion erroneously assumed that the MCAD's tolling guidelines published at some point during the pandemic applied generally to control the timeliness of civil actions filed in court. The SJC's decision in Christo made clear that Massachusetts courts have independent authority to decide the timeliness of Chapter 151B claims filed in court. Christo, 402 Mass. at 817 (citing the analogous federal anti-discrimination statutes and corresponding federal case law). Though not subject to the SJC's superintendence, federal courts are bound to follow "the SJC's interpretations of its own state law." Marshall v. Bristol Superior Court, 753 F.3d 10, 12 (1st Cir. 2014). Indeed, at least two other U.S. District Court decisions in Massachusetts concluded

that the SJC Tolling Order applied to toll claims asserted for constitutional violations under 42 U.S.C. § 1983. See Silva v. New Bedford, D. Mass., No. CV 20-11866-WGY (May 10, 2022) and Veal v. Comm'r of Bos. Ctrs. for Youth & Families, No. 21-cv-10265-ADB, 2022 WL 715712, at *5 (D. Mass. Mar. 10, 2022).

The Harrington decision's very brief discussion of the SJC's Tolling Order omitted any mention, let alone analysis, of the SJC's holding in Christo, 402 Mass. at 817, that G. L. 151B § 5 should be treated as a statute of limitations. Nor did Harrington address G. L. c. 151B § 9, the statute authorizing claimants to pursue Chapter 151B claims in Superior Court. Instead, Harrington relied solely on its observation that at some point during the pandemic the MCAD issued "its own directive tolling Chapter 151B deadlines on a case-by-case basis at the discretion of an individual commissioner." Id. at 226, citing *MCAD COVID-19 Information Resource Center: How to Submit a Request for Tolling and Extensions*, MASS.GOV (2021), https://www.mass.gov/guides/mcad-covid-19-information-resource-center.

The MCAD guidelines referenced in Harrington include a general statement that "[t]he MCAD

Commissioners are keenly aware that not everyone may have the ability to file a Complaint during this crisis, and employers and businesses may not be fully functioning and may need additional time to respond to complaints," followed by a note that "extending a filing deadline (tolling) and granting a motion requesting an extension will be determined on a case-by-case basis through each individual Investigating Commissioner." Id. "To submit a motion," the guidelines add, "please email a PDF of your motion to the investigator or staff member assigned to your case." Id. Nothing about the MCAD guidelines purports to control statutes of limitations for purposes of civil actions filed pursuant to G. L. c. 151B § 9, nor do the guidelines suggest that complainants must move for an extension prior to filing a § 9 civil action. The guidelines implicitly assume that motions for extension would be submitted after an investigator has been assigned to a case, and that complainants would submit motions for purposes of receiving authorization from an investigator to proceed with the administrative process at the MCAD.

The Harrington decision, and the Superior Court in this case, failed to consider the unique

circumstances presented by the pandemic and the SJC Tolling Order. Harrington emphasized an SJC holding issued before Christo, subsequently abrogated on other grounds, that the MCAD had "primary responsibility to determine the scope of [Chapter 151B]." Harrington, supra 554 F. Supp. 3d at 226, quoting Rock v. Mass. Comm'n Against Discrimination, 384 Mass. 198 (1981). The holding in Rock concerned the question of whether the MCAD's adoption of a rule on "continuing violations," which effectively extended the statute of limitations under certain circumstances, was consistent with Chapter 15B's statutory scheme. Rock, supra, at 205-206.

Harrington also relied on Cuddyer, 434 Mass. at 534, for the premise that the SJC has "consistently granted deference to MCAD decisions and policies." Harrington, supra 554 F. Supp. 3d at 226. Like Rock, the issue in Cuddyer concerned the continuing violation doctrine. Cuddyer, supra at 531-536. In addition to granting deference to the MCAD's rules, the SJC based its decision in Cuddyer on "the legislative mandate in G. L. c. 151B § 9, that the 'provisions of this chapter shall be construed liberally' in order to eliminate discriminatory

conduct and practices." Id. at 534. The SJC ultimately concluded that the issue of the statute of limitations set forth at G. L. c. 151B § 5 in Cuddyer was one to be determined by the jury under the legal standard described in its opinion. Id. at 541.

Both Rock and Cuddyer involved an established MCAD rule extending the G. L. c. 151B § 5 limitations period under certain circumstances. Neither case stands for the proposition that the MCAD may, through informal guidelines, overrule a clear and unambiguous order issued by the SJC pursuant to its superintendence powers in response to an unprecedented global pandemic for the purpose of limiting complainants' avenues of redress.

3. The MCAD made no determination concerning the timeliness of Mr. Dunn's complaint, and Mr. Dunn was not required to seek one from the MCAD.

"There are two largely independent avenues for redress of violations of the anti-discrimination laws of the Commonwealth, one through the MCAD and the other in the courts." Christo, 402 Mass. at 817, citing Carter v. Supermarkets Gen. Corp., 684 F.2d 187, 190-191 (1st Cir. 1982). After ninety days the complainant has the unqualified right to pursue the

claims in Superior Court and the MCAD must grant the complainant's request for dismissal pursuant. Id., citing G. L. c. 151B § 9. The prerequisite of filing initially at the MCAD "does not require a plaintiff to await a determination by the MCAD prior to filing a civil suit." Everett v. 357 Corp., 453 Mass. 585, 601 (2009), citing G. L. c. 151B § 9. "The statutory scheme . . . does not show a concern for prompt agency action as an alternative to judicial process." Christo, supra, at 818 n. 1. "In fact, no agency action is required at all as a precondition to the bringing of a § 9 civil action." Id. "The statutory scheme rejects the administrative law principles of primary jurisdiction and exhaustion of administrative remedies." Id. at 817.

The two avenues for redress are not only independent but mutually exclusive. A complainant who files a civil action pursuant to G. L. c. 151B § 9 is foreclosed from pursuing any further action at the MCAD. G. L. c. 151B § 9. "The purpose of the prohibition in § 9 barring a party from subsequently bringing a complaint on the same matter is to ensure that a complainant obtains either a formal agency hearing or pursues a judicial action, but not both."

Derin v. Stavros Ctr. for Indep. Living, Inc., D. Mass., No. CV 21-30051-MGM (Jan. 19, 2022), citing Brunson v. Wall, 405 Mass. 446 (1989).

Although the initial filing in the MCAD pursuant to G. L. c. 151B § 5 must be timely, the Superior Courts are not bound by the MCAD's determination of timeliness. Id. That can be true even when the MCAD has made a specific determination concerning the timeliness of a complaint, as in Christo, 402 Mass. at 818. In this case, however, the MCAD made no determination of timeliness because Mr. Dunn withdrew and filed his Chapter 151B claims in Superior Court before the MCAD took any action on his complaint. (R.A. 3).

The Superior Court's decision in this case rested solely on the reasoning of Harrington, which in turn rested solely on the existence of a general MCAD policy that equitable tolling should be considered on a case-by-case basis. According to the reasoning of Harrington, and the Superior Court in this case, Mr. Dunn was effectively required to exhaust his administrative remedies by first asking the MCAD to apply equitable tolling before filing in Superior Court. Yet that is precisely the reasoning rejected

by the SJC in Christo, 402 Mass. at 818, and again in Everett, 453 Mass. at 601.

The Phoenix parties have cited a Superior Court decision, Samson v. City of Boston, 10 Mass. L. Rptr. 456 (Sikora, J.), in an effort to distinguish Christo from the facts of this case. Yet in the Samson case the MCAD had made a fact-based determination that the complainant's complaint had been filed late and the complainant had not raised the issue of equitable tolling. Id. Judge Sikora deferred to the MCAD's finding of facts, and pointed out that the plaintiff had chosen not to appeal the tolling question to the full Commission, a right that had not existed at the time Christo was decided. Id. at 2.

The holding in Samson has no application to the facts of this case because the MCAD made no determination at all concerning the timeliness of Mr. Dunn's complaint. When the MCAD dismissed Mr. Dunn's complaint at his request, its jurisdiction was extinguished. G. L. c. 151B § 9. In the absence of any MCAD determination concerning the timeliness of Mr. Dunn's complaint, the Superior Court was not required to hypothesize about any appeal of such a determination or deference owed to it.

The Phoenix parties also cite to East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination, 364 Mass. 444, 448 (1973). That case involved a plaintiff private club bringing a declaratory judgment action against the MCAD without a complaint having been filed pursuant to G. L. c. 151B § 5. The administrative remedy referred to in East Chop Tennis Club consisted of the use of Chapter 151B's "comprehensive scheme of administrative procedures and remedies" rather than resorting to the declaratory judgment statute, G. L. c. 231A. Id. In this case, Mr. Dunn duly employed that comprehensive scheme – which includes the provision set forth at G. L. c. 151B § 9 entitling him to withdraw his MCAD complaint and file his claims in Superior Court. Nothing in East Chop Tennis Club suggests the existence of any remedies that Mr. Dunn was required but failed to exhaust.

It may be true that in the event of a decision by the MCAD concerning the timeliness of a particular complaint, the complainant must seek appellate review from the Commission or ask for judicial review of the decision pursuant to G. L. c. 151B § 6. But that question need not be addressed, because in this case

there was no MCAD decision to review. The MCAD issued no determination whatsoever concerning the substance or timeliness of Mr. Dunn's complaint.

Nevertheless, the Phoenix parties appear to be arguing that Mr. Dunn was required to affirmatively seek the MCAD's permission to file his complaint beyond the normal 300-day deadline prior to withdrawing pursuant to G. L. c. 151B § 9 even in the absence of any decision by the MCAD. No authority supports such a premise, however. The MCAD's guidelines cited by the court in Harrington contemplate extensions of the filing deadline being granted "on a case-by-case basis through each individual Investigating Commissioner." https://www.mass.gov/guides/mcad-covid-19-information-resource-center. As a practical matter, no guarantee exists that an investigative commissioner will be assigned or decide a motion prior to the ninety-day period set forth in G. L. c. 151B § 9. To insist that complainants must first file a motion asking an investigative commissioner for an extension prior to filing a Superior Court complaint would be to utterly negate the plain language of G. L. c. 151B § 9.

In Toto v. Lowe's Home Centers, LLC, MCAD Docket No. 20SEM01792 (October 15, 2020), cited by the Phoenix parties themselves, the Investigating Commissioner granted the complainant's motion for acceptance of a late-filed complaint "[u]nder the present circumstances, solely related to the public health crisis of COVID-19." Id. Perhaps Mr. Dunn could have chosen to file such a motion, but he was not required to do so. Everett, 453 Mass. at 601; Christo, 402 Mass. at 818 n. 1. He was only required to do so if he wanted the complaint to be "authorized for investigation" by the MCAD like the complaint in Toto, supra. Mr. Dunn chose instead to pursue his Chapter 151B claims in Superior Court, which made practical sense because he already had a pending Superior Court case against the Phoenix parties.

Of course, Mr. Dunn's case also differs from the Samson case because at the time he filed his MCAD claim the SJC had issued an extraordinary order in response to an unprecedented pandemic explicitly tolling the statute of limitations. The plaintiff in Samson had no basis on which to argue that the statute of limitations had been extended, especially because he had failed to make such an argument before the

MCAD. Samson, supra 10 Mass. L. Rptr. at 456. In contrast, at the time Mr. Dunn filed his MCAD case there was a "clear and unambiguous" order applying to extend "all statutes of limitations." Shaw's Supermarkets, Inc., 488 Mass. at 342.

d. Application of the SJC's Tolling Order to the G. L. c. 151B § 5 deadline in this case would not in any way infringe on the MCAD's independence.

Both the Superior Court in this case and the court in Harrington were concerned about the MCAD's status as an independent agency. Yet both courts misunderstood the MCAD's tolling guidelines and their relationship to the SJC Tolling Order. Far from making any proclamation generally prohibiting the extension of the § 5 deadline, the MCAD simply indicated that it would allow investigative commissioners to extend the deadline on a case-by-case basis for purposes of authorizing complaints for administrative investigation.

The MCAD Commissioner's order in Toto, MCAD Docket No. 20SEM01792, made a point of distinguishing the SJC Tolling Order's application to "*court filings*" (emphasis in the original) from the "requirements for an administrative charge of discrimination at the

Commission." The Commissioner did not suggest that a complainant wishing to pursue relief under G. L. c. 151B § 9 must ask the Commission for leave to file a late complaint. Nor did her order claim that the SJC Tolling Order had no application to limitations period in G. L. c. 151B § 5. The order in Toto rested on the MCAD's authority to determine the timeliness of complaints for purposes of its administrative proceedings.

The SJC Tolling Order applied to Mr. Dunn's Chapter 151B claims in this case not because the SJC has authority to bind the MCAD, but because the MCAD's jurisdiction expired prior to any determination concerning the timeliness of Mr. Dunn's complaint. Mr. Dunn chose to pursue a judicial action, as was his right ninety days after he filed his MCAD complaint. Once he did so, the die was cast for his avenue of redress. But applying the SJC Tolling Order to the statute of limitations for Mr. Dunn's Chapter 151B claims, and vacating the Superior Court decision in this case, would not at all affect the MCAD's investigative resolutions of cases that complainants have chosen to keep at the MCAD. Administrative cases at the MCAD and Superior Court litigation pursuant to

G. L. c. 151B § 9 would continue to afford complainants and plaintiffs "independent avenues for redress". Christo, 402 Mass. at 817. Moreover, the SJC Tolling Order's effect is inherently limited because it only applies to those claims whose limitations periods had already begun to run prior to July 1, 2020. See Tolling Order, Addendum p. 57-58, 66; see also Sabatini v. Knouse, Mass. App. Ct., No. 2021-J-0540 at n. 1 (Dec. 1, 2021) (Englander, J.) (pointing out that the SJC "identified the specific date on which its limited tolling period would end").

II. Even if the SJC Tolling Order were held not to apply to the statute of limitations in this case, equitable tolling should have been applied in this case.

Even if the SJC Tolling Order were somehow inapplicable to the statute of limitations at issue here, despite its plain language and the SJC's reiteration that "all means all," the Superior Court should have applied equitable tolling to deem Mr. Dunn's filing timely. Courts are empowered to equitably toll the limitations period in G. L. c. 151B § 5 without regard to any decision by the MCAD. Christo, 402 Mass. at 818. The SJC has made clear that "equitable tolling is available in circumstances

in which a plaintiff is excusably ignorant" about the limitations period set forth in G. L. c. 151B § 5. Andrews v. Arkwright Mutual Insurance Co., 423 Mass. 1021 (1996).

Under normal circumstances, no complainant represented by counsel could claim to be excusably ignorant about Section 5's limitations period. Id. Yet to say that Mr. Dunn's November 16, 2020 MCAD was filed under *abnormal* circumstances would be an understatement. In response to the COVID-19 pandemic countries closed borders and banned foreign and domestic travel. Amelia Cheatham, Claire Felter, Lindsay Maizland, Sabine Baumgartner, The Year the Earth Stood Still, Council on Foreign Relations (December 7, 2020), https://www.cfr.org/article/2020-year-earth-stood-still-covid-19. The U.S. Peace Corps, for the first time since 1961, halted all operations. Id. Cities, states and nations went on lockdowns, forcing people to stay inside except for essential personnel only. Id. The Boston Marathon, previously held during world wars, domestic tension and rain/snowstorms, was canceled for the first time in its 124-year history. Tayla Minsberg and Matthew Futterman, Boston Marathon Canceled for the First

Time, N.Y. Times, May 29, 2020, https://www.nytimes.com/2020/05/28/sports/boston-marathon-canceled.html. The SJC has concluded in at least one instance that the pandemic itself "has given rise to exceptional circumstances" justifying a trial continuance. Vazquez Diaz v. Commonwealth, 487 Mass. 336, 344 n. 13 (2021) (denial of trial continuance was abuse of discretion, although it would not have been "outside the confines of the COVID-19 pandemic").

Yet if the pandemic alone did not present "exceptional circumstances" that prevented Mr. Dunn from filing his MCAD complaint timely, the SJC's issuance of an order that for all appearances extended the deadline for his filing certainly did. The SJC's Tolling Order was unprecedented both in its scope and in its prospective extension of statutes of limitations. See Sabatini v. Knouse, Mass. App. Ct. No. 2021-J-0540 at n. 1 (acknowledging that the SJC's Tolling Order was the only instance known to Justice Englader of an order tolling statutes of limitations prospectively). Under those entirely unique circumstances, if in fact the SJC Tolling Order did not apply to extend the limitations period at G. L. c. 151B § 5 then equitable tolling was appropriate. At

the time Mr. Dunn filed his MCAD complaint, the SJC Tolling Order had been issued; the SJC had issued its decision in Shaw's Supermarkets, Inc., 488 Mass. 342, indicating that the reference to "all civil statutes of limitations" was unambiguous; the well-established precedent treating G. L. c. 151B § 5 as a "statute of limitations" had been in place for decades; and there was no reason for Mr. Dunn to believe that the limitations period had not been extended for his Chapter 151B claims.

In declining to apply equitable tolling in this case, the Superior Court reasoned that the doctrine is "exceedingly limited" and should only be invoked in "exceptional cases". Superior Court decision, Addendum p. 50. The Superior Court implicitly assumed that an "exceptional case" could only be demonstrated by an individualized showing of circumstances that rendered Mr. Dunn excusably ignorant. Yet nothing about the doctrine of equitable tolling requires the circumstances to be individualized. Although "excusable ignorance" has historically been demonstrated most frequently through misleading conduct by employers or agencies, equitable tolling

has also been applied when litigants have been confused by unclear orders or laws.

In Carlile v. S. Routt Sch. Dist. RE 3-J, 652 F.2d 981, 986 (10th Cir. 1981), the plaintiff had asserted a sex discrimination claim against her former employer, a school district. Id. at 982. She filed a complaint with the Colorado Civil Rights Commission and then obtained a right-to-sue letter from the U.S. Department of Justice. Id. The plaintiff then filed a motion seeking waiver of fees and appointment of counsel. Id. at 983. The District Court issued an order granting her motion and indicating that "this action shall be deemed commenced upon filing of the aforesaid Motion [for appointment of counsel." Id. Relying on that order, the plaintiff's counsel failed to file a civil action within the ninety-day limitations period that began when the right-to-sue letter was issued. Id. at 986. Although reluctant to apply equitable tolling, the Tenth Circuit concluded that the plaintiff's attorney had relied on the District Court's "unsolicited order extending the time within which she could file a complaint" and that it would be unfair to dismiss her case for failing to file within the normal limitations period. Id.

The U.S. Supreme Court cited Carlile approvingly in describing "four situations where principles of equity may support tolling in Title VII cases." Rosinski v. DRS EW & Network Sys., Inc., W.D.N.Y., No. 08-CV-0005S(SC)(Nov. 21, 2008), citing Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S. Ct. 1723, 1726, 80 L. Ed. 2d 196 (1984). The holding in Carlile was followed in Nielsen v. Flower Hosp., 639 F. Supp. 738, 747 (S.D.N.Y. 1986), where the pro se plaintiff had relied on a defective pleading form provided by the court. Similarly, the Tenth Circuit applied equitable tolling to excuse a late filing where a plaintiff relied on an ambiguous notice from the Equal Employment Opportunity Commission. Martinez v. Orr, 738 F.2d 1107, 1111 (10th Cir. 1984). More recently, in Griffin v. Rogers, 399 F.3d 626, 637 (6th Cir. 2005) the Sixth Circuit applied equitable tolling where it found that the law was "unclear" because the deadline for a particular type of habeas petition had not been settled. The plaintiff's counsel could not have known that cases decided subsequently would impose a retroactive deadline. Id.

If the SJC Tolling Order did not apply to G. L. c. 151B § 5, that was certainly not clear at the time

Mr. Dunn filed his MCAD complaint. Like the plaintiff in Griffin, Mr. Dunn "had not simply stopped pursuing relief" but was represented by counsel acting on his behalf. Griffin, 399 F.3d at 637. Mr. Dunn had already filed his Superior Court lawsuit. He was diligent in pursuit of redress. He simply could not have anticipated that the Superior Court would disregard the SJC Tolling Order, just as counsel for Griffin could not have anticipated the outcome of a subsequent court decision. Id.

REQUEST FOR ATTORNEYS' FEES AND COSTS

Prevailing plaintiffs in cases filed pursuant to G. L. c. 151B § 9 are entitled to an award of their reasonable attorneys' fees and costs. G. L. c. 151B § 9; Fontaine v. Ebtec Corp., 415 Mass. 309, 324 (1993). They are also entitled to reasonable attorneys' fees and costs in connection with an appeal in which they prevail. Melnychenko v. 84 Lumber Co., 424 Mass. 285, 295 (1997), citing G.L. c. 151B, § 9 and Yorke Mgt. v. Castro, 406 Mass. 17, 20 (1989). Pursuant to Mass. R. App. P. 16(a)(10), Mr. Dunn requests that he be awarded his reasonable attorneys' fees and costs

incurred in this appeal including his successful petition for interlocutory relief.

CONCLUSION

The Superior Court erred in dismissing Mr. Dunn's Chapter 151B claims as untimely, because they were timely filed pursuant to the SJC Tolling Order and alternatively because it was an abuse of discretion not to apply equitable tolling under the unique circumstances presented by the SJC Tolling Order. This Court should vacate that portion of its order dismissing those claims so that Mr. Dunn and the Phoenix parties can litigate the claims together with his other pending claims. The Court should also award Mr. Dunn his reasonable attorneys' fees and costs incurred in prosecuting this appeal, including his successful petition for interlocutory relief.

Respectfully submitted,

Petitioner Matthew Dunn by his attorney:

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Date: July 12, 2022

ADDENDUM

Addendum Table of Contents

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2085CV801

MATTHEW DUNN

vs.

PHOENIX COMMUNICATIONS, INC. & another[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' PARTIAL MOTION TO DISMISS

The defendants, Phoenix Communications, Inc. ("Phoenix"), and Mark W. Langevin ("Langevin") (collectively, "defendants"), move this court to dismiss Counts IV-VI of the plaintiff, Matthew Dunn's ("Dunn") amended complaint for failure to state a claim upon which relief can be granted under Mass. R. Civ. P. 12(b)(6). The defendants contend that Dunn's claims for sexual harassment (Count IV) and retaliation (Count V) must be dismissed because Dunn failed to file a complaint with the Massachusetts Commission Against Discrimination ("MCAD") within 300 days of the alleged discriminatory act, as required under G. L. c. 151B, § 5. The defendants also contend that Dunn's claim for negligent infliction of emotional distress (Count VI) is barred by the exclusivity provision under G. L. c. 152, § 24, of the Workers' Compensation Act. For the reasons discussed below, the defendants' motion is **ALLOWED in part** and **DENIED in part**.

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BACKGROUND

The court accepts as true the allegations in the amended complaint and draws every reasonable inference in Dunn's favor. See *Dartmouth* v. *Greater New Bedford Reg'l Vocational Tech. High Sch. Dist.*, 461 Mass. 366, 374 (2012).

[1] Mark W. Langevin

Phoenix is a contractor specializing in the construction, maintenance, and management of fiber optic networks. Dunn worked from Phoenix from June 2014 through November 2019.

In May 2017, Dunn was promoted to the position of "project manager." Upon his promotion, Phoenix stopped compensating Dunn on an hourly basis and classified him as a salaried employee exempt from overtime pay. As a project manager, Dunn was responsible for compiling cost estimates for jobs and requested scheduling of lineman and groundmen. He did not make hiring, termination, or disciplinary decisions. Nor did Dunn direct other employees.

At some time, Dunn asked Phoenix[2] why he was classified as exempt from overtime; he was told that all employees who worked in the office were considered exempt. Dunn reportedly worked over forty hours per work without receiving compensation for extra hours worked.[3]

In or about August 2018, Phoenix offered Dunn a new position as "lead project manager," which he accepted. In this role, Dunn was authorized to conduct quarterly or yearly reviews of employees. Dunn still reportedly lacked, however, the authority to make decisions and to exercise independent judgment.

In January 2019, Langevin, the President of Phoenix, invited Dunn and his then-girlfriend Deb Smith ("Deb"),[4] to a "leadership conference" in Puerto Rico. Dunn eventually learned that the purported leadership conference served no meaningful business purpose and was a series of parties that involved excessive alcohol consumption. At these parties, Langevin directed sexually suggestive comments toward Deb that made her and Dunn uncomfortable. As a result of continuous sexually suggestive comments, Dunn and his wife left the conference early.

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[2] The amended complaint does not identify whom Dunn asked at Phoenix.
[3] Although not specified in the complaint, the court assumes that Phoenix paid Dunn for a forty-hour workweek.
[4] The two have since married and share the same surname. The court will refer to Deb Dunn by her first name to avoid confusion with the plaintiff.

After this trip, there was tension between Langevin and Dunn, creating a stressful working environment for Dunn. In September 2019, after allegedly working over ninety hours per week for several weeks, Dunn told Phoenix's director of operations and controller that the company needed to find someone else to cover work outside of the regularly scheduled office hours. Following that conversation, Phoenix moved Dunn's office so that he was isolated from other project managers. Phoenix also allegedly began preparing another employee to replace Dunn. Phoenix then demoted Dunn back to the position of project manager, a position that Dunn was already performing. This demotion reduced Dunn's bonus potential from $20,000 a year to $10,000.

On November 21, 2019, exactly 300 days after the alleged sexual harassment at the conference in Puerto Rico, Phoenix fired Dunn. Dunn contends that Phoenix fired him because it believed that the statute of limitations had run for Dunn to bring a discrimination claim.

Dunn filed his original complaint in the Superior Court in July 2020. Four months later, Dunn filed a complaint with the MCAD, alleging claims for sexual harassment and retaliation. Dunn filed his MCAD complaint 361 days after his November 21, 2019 termination. Dunn did not seek an extension of the 300-day deadline for filing an MCAD complaint under G. L. c. 151B, § 5. Nor did Dunn seek to file his MCAD complaint late. Dunn eventually sought a voluntary dismissal of his MCAD complaint so that he could bring his c. 151B claims in the Superior Court. The MCAD granted Dunn's motion for voluntary dismissal.

In July 2021, this court allowed Dunn's motion for leave to amend his original complaint. In his amended complaint, Dunn added the three counts at issue here against the defendants for sexual harassment (Count IV), retaliation (Count V), and negligent infliction of emotional distress (Count VI). The defendants now move to dismiss these three counts for failure to state a claim under rule 12(b)(6).

DISCUSSION

I. Legal Standard

To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint must contain "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief . . . ." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). "The allegations must be more than 'mere labels and conclusions,' and must 'raise a right to relief above the speculative level'" (citation omitted). *Buffalo-Water 1, LLC* v. *Fidelity Real Estate Co.*, 481 Mass. 13, 17 (2018). The court must "accept as true the factual allegations in the complaint and the attached exhibits, [and] draw all reasonable inferences in the plaintiff's favor . . . ." *Id.*

II. Analysis

a. Sexual Harassment (Count IV) and Retaliation (Count V)

General Laws c. 151B, § 5, provides that a plaintiff must first file a complaint with the MCAD "within 300 days after the alleged act of discrimination" before bringing a discrimination claim in the Superior Court. "Absent a timely MCAD complaint, a plaintiff is barred from filing a Superior Court action under G. L. c. 151B, § 9." *Flint* v. *City of Boston*, 94 Mass. App. Ct. 298, 303 (2018). After filing with the MCAD, a plaintiff must wait ninety days or receive a right to sue letter from the MCAD and then must file a civil action "not later than three years after the alleged unlawful practice." G. L. c. 151B, § 9.

Dunn argues that his MCAD complaint was timely as a result of the Supreme Judicial Court's tolling of all civil statute of limitations in response to the COVID-19 pandemic. See In Re *Covid-19 (Coronavirus) Pandemic*, OE-144 *Third Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic* ("SJC

Order") (repealed September 17, 2020), https://www.mass.gov/doc/repealed-sjc-third-updated-order-regarding-court-operations-under-the-exigent-circumstances/download (last accessed Nov. 9, 2021). Alternatively, Dunn argues that, even if the SJC Order did not toll the 300-day deadline to file his MCAD complaint, equitable tolling should apply. The court will address both arguments in turn.

i. Tolling Under the Supreme Judicial Court's COVID-19 Order

The July 1, 2020 SJC Order states that "[a]ll civil statutes of limitations were tolled by Prior SJC Orders from March 17, 2020, through June 30, 2020, and will not be tolled any further . . . ." *Id.* at par. 13. Dunn argues that the tolling of all civil statutes of limitations encompasses the 300-day deadline set forth under G. L. c. 151B, § 5. This court disagrees.

A few months ago, the federal district court of Massachusetts addressed this exact issue. See *Harrington* v. *Lesley Univ.*, 2021 WL 3616075, at *9 (D. Mass. 2021). The court (Woodlock, J.) noted that the Supreme Judicial Court's tolling order applies "only to courts" by its terms, and found that the Supreme Judicial Court has "no general superintendence authority over an administrative agency designated by the Commonwealth as the primary enforcement agency for certain state laws, such as the MCAD for Chapter 151B claims." *Id.* Like the defendants here, the federal district court highlighted the MCAD's directive in response to the pandemic tolling c. 151B claims on a "case-by-case" basis at the commissioner's discretion. In the end, the *Harrington* court held that the SJC Order did not toll the statute of limitations for the plaintiff's c. 151B claims and that the MCAD's directive controlled. *Id.* This court agrees with the federal district court's reasoning and adopts it here. Accordingly, the court finds that the SJC Order also did not toll the statute of limitations for Dunn's c. 151B claims.

ii. Equitable Tolling

"Equitable tolling is to be 'used sparingly,' and the circumstances where tolling is available are exceedingly limited" (citation omitted). *Halstrom* v. *Dube*, 481 Mass. 480, 485 (2019). "[E]quitable tolling 'is applicable [to MCAD proceedings] only where the prospective plaintiff did not have, and could not have had with due diligence, the information essential to bringing suit" (citation omitted). *Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrim.*, 431 Mass. 655, 673 (2000). Here, Dunn has not shown that he was "excusably ignorant" about the statutory filing period or that the defendant or the MCAD "affirmatively misled" him. *Andrews* v. *Arkwright Mut. Ins. Co.*, 423 Mass. 1021 (1996) (rescript). Nor has Dunn identified any other circumstances that would warrant the application of the doctrine. See *Tardania* v. *Aetna Life & Cas. Co.*, 41 Mass. App. Ct. 443, 446 (1996) (a statute of limitations may be tolled . . . by reason of the employer having caused the employee to delay acting, i.e., an equitable estoppel . . . ."); *Cherella* v. *Phoenix Techs., Ltd.*, 32 Mass. App. Ct. 919, 920 (1992) (where defendant "encourages or cajoles the potential plaintiff into inaction, that conduct may be a basis of extending the limitations period as matter of equity"). See also *Hall* v. *FMR Corp.*, 559 F. Supp. 2d 120, 126 (D. Mass. 2008) ("Equitable tolling . . . is not liberally applied in discrimination cases—'equitable tolling is reserved for exceptional cases.'" [citation omitted]).

Dunn filed his MCAD complaint alleging sexual harassment and retaliation on November 16, 2020, well over 300 days after his November 21, 2019 termination. Dunn does not allege any discriminatory act within the 300 days immediately preceding the filing of his MCAD complaint. Accordingly, Counts IV and V of Dunn's amended compliant are time-barred under c. 151B and must be dismissed.

b. Negligent Infliction of Emotional Distress (Count VI)

The defendants next contend that Count VI of Dunn's amended complaint also fails to state a cognizable claim because it is barred by the exclusivity provision of the Workers' Compensation Act. See G. L. c. 152, § 24.

Under the exclusivity provision of G. L. c. 152, § 24, "the act supplants common-law causes of action for injuries to an employee suffered in the course of employment unless he or she waives any compensation payments under the act at the time of hire." *Spagnuolo* v. *Holzberg*, 98 Mass. App. Ct. 661, 665 (2020). "Thus, in general, 'actions for negligence, recklessness, gross negligence, and willful and wanton misconduct by an employer are precluded by the exclusive remedy provision" (citation omitted). *Id.* A common law action is barred by § 24 only when: "the plaintiff is shown to be an employee; his condition is shown to be a 'personal injury' within the meaning of the compensation act; and the injury is shown to have arisen 'out of and in the course of . . . employment.'" *Foley* v. *Polaroid Corp.*, 381 Mass. 545, 548, 549 (1980), quoting G. L. c. 152, § 26. General Laws. c. 151, § 1(7A), provides that "[p]ersonal [i]njury" shall not include any injury resulting from an employee's purely voluntary participation in any recreational activity, including but not limited to athletic events, parties, and picnics, even though the employer pays some or all of the cost thereof."[5]

The court agrees with Dunn that, at this stage, there are insufficient facts in the record to determine if his negligent infliction of emotional distress claim is barred by the exclusivity provision of the Workers' Compensation Act. See *Case of Sikorski*, 455 Mass. 477, 480-481 (2009), citing *Moore's Case*, 330 Mass. 1, 4-5 (1953) (to determine whether injuries sustained

[5] The statute further provides that "[p]ersonal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment." G. L. c. 151, § 1(7A).

during an employee's recreation are compensable under Workers' Compensation Act, court applies five-factor test outlined in *Moore's Case*: (1) customary nature of the activity; (2) employer's encouragement or subsidization of the activity; (3) extent to which the employer managed or directed the activity; (4) the presence of pressure or compulsion to participate; and (5) the employer's expected or actual benefit from the employee's participation). See also *Bengston's Case*, 34 Mass. App. Ct. 239, 244 (1993) ("'Purely voluntary participation' is noncompensable when injury occurs during the recreational activity and the employer has done nothing more than pay for the costs of that activity. At the opposite end of the spectrum, the cases have stated that actual, express employer compulsion to participate in a recreational activity with resultant injury might itself be determinative of compensability in some situations . . . . The vast gray area in between is left to the trier of fact and 'requires an analysis of the facts of each case.'" [citations omitted]). Cf. *Resendes* v. *Steinhof*, 1999 WL 975119, at *3 (Mass. Super. Ct. 1999) (assessing whether plaintiff's participation in work outing was "purely voluntary" after bench trial). Accordingly, the defendants' motion is denied as to Count VI of Dunn's amended complaint.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendants' partial motion to dismiss is **ALLOWED** as to Counts IV and V of Dunn's amended complaint and is **DENIED** as to Count VI.

Janet Kenton-Walker
Justice of the Superior Court

DATE: November 12, 2021

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Entered and Copies Mailed 11/15/2021

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. OE-144

In Re: COVID-19 (Coronavirus) Pandemic

THIRD UPDATED ORDER
REGARDING COURT OPERATIONS UNDER THE EXIGENT
CIRCUMSTANCES CREATED BY THE COVID-19 (CORONAVIRUS) PANDEMIC

To safeguard the health and safety of the public and court personnel during the COVID-19 (coronavirus) pandemic while continuing to increase the business being conducted by the courts, the Supreme Judicial Court (SJC), pursuant to its superintendence and rule-making authority, issues the following ORDER:

1. Prior order. Effective July 1, 2020, this Order shall repeal and replace the Second Updated Order Regarding Court Operations Under The Exigent Circumstances Created By The COVID-19 (Coronavirus) Pandemic, which was issued on May 26, 2020, and took effect on June 1, 2020 (June 1 Order).

2. Conduct of court business and access to courthouses. Courthouses will physically reopen to the public for certain limited purposes on July 13, 2020, as provided in paragraphs 3 through 6. To continue to limit the number of persons entering courthouses, all courts will still conduct most court business virtually (i.e., by telephone, videoconference, email, or comparable means, or through the electronic filing system), in both civil and criminal cases. In cases with one or more self-represented litigants (SRLs) where a court is scheduling a videoconference, courts will recognize the possibility that SRLs may have limited access to the technology needed to conduct videoconferences or limited experience with it, and will either assist the SRL in being able to conduct a videoconference or offer an alternative to videoconferencing for the virtual hearing.

3. Gradual resumption of certain in-person proceedings. Until July 13, 2020, courts shall continue to address emergency and non-emergency matters virtually and in-person proceedings shall be conducted only where entry to a courthouse is required to address emergency matters[1] that cannot be handled virtually because a virtual proceeding is not practicable or would be inconsistent with the protection of constitutional rights. Trial Court departments shall thereafter begin, in two initial phases, to conduct in-person proceedings in emergency and non-emergency matters that either can be handled more effectively or efficiently in person, or cannot be handled virtually because a virtual proceeding is not practicable or would be inconsistent with the

[1] The Appeals Court and each of the Trial Court departments previously issued standing orders or guidelines, specifying what constitutes an emergency matter in that particular court, which were posted on the COVID-19 webpage) (see paragraph 17).

protection of constitutional rights. The first phase of additional in-person proceedings will begin on July 13, 2020, and in-person proceedings will be further expanded in a second phase beginning on August 10, 2020. Each Trial Court department shall post notices to the "Court System Response to COVID-19" webpage (https://www.mass.gov/guides/court-system-response-to-covid-19) (COVID-19 webpage) (see paragraph 17) that provide clear department-wide guidance to the public and members of the bar identifying the additional categories of matters that it will address in person in each of the two initial phases. Courts will conduct all other emergency and non-emergency matters virtually, except as provided in paragraph 7 below.

The Chief Justice of a Trial Court department, after consultation with the Chief Justice of the Trial Court, for reasons of public health and safety may order that a court division or location conduct all business virtually and/or may transfer some or all in-person matters to specified courts within the department. If any such action is taken, the applicable Trial Court department shall post notices to the COVID-19 webpage (see paragraph 17) that provide clear guidance to the public and members of the bar.

4. Who can enter courthouses. Until July 13, 2020, entry into a courthouse for the purpose of an emergency in-person proceeding shall continue to be limited to court personnel, attorneys, parties, witnesses, and other necessary persons as determined by the judge presiding over the proceeding, plus no more than three members of the "news media" as defined in Supreme Judicial Court Rule 1:19(2).

Further, in cases where a trial court judge has ordered electronic monitoring in the form of either GPS or remote alcohol monitoring or in cases where, pursuant to an earlier court order, previously installed electronic monitoring equipment requires maintenance or removal, all installations, maintenance, or removals of such equipment may occur in the courthouse to ensure security and access to personal protective equipment by probation personnel.

Beginning on July 13, 2020, entry into a courthouse will be limited to personnel who work in the courthouse and persons who are present for one or more of the following purposes: attending in-person court proceedings (see paragraph 5); conducting in-person business with a clerk's, register's, or recorder's office (see paragraph 6); meeting with a probation officer or probation staff person; or conducting business at other offices that are open to the public and housed in the courthouse.

The physical reopening of courthouses to the public on July 13, 2020 shall be undertaken with diligent regard for the health and safety of court users and personnel, in accordance with protocols established by the Trial Court or the relevant appellate court, as applicable. All court users and personnel shall be subject to appropriate screening before they are allowed to enter a courthouse for purposes of preventing the spread of COVID-19. For the same reason, courthouse staff may monitor the number of people entering and leaving a courthouse to ensure that the number within the courthouse does not exceed the occupancy limits established to protect public health and permit physical distancing. To limit the number of people in a courthouse at any given time, all departments and offices within a courthouse shall coordinate with each other and schedule proceedings in a staggered fashion throughout the day. If the number of court users entering a courthouse needs to be limited to avoid exceeding occupancy

limits, the following court users shall be given priority to enter, in the following order of priority: (i) persons seeking to address emergencies; (ii) persons participating in a scheduled in-person proceeding, including, without limitation, a bench trial, hearing, conference, or grand jury sitting; (iii) persons with scheduled or otherwise required meetings between probationers and probation staff for purposes of supervision, including but not limited to GPS, DNA or case supervision matters; (iv) persons having a scheduled appointment within the courthouse; and, then, (v) all others.

5. Physical presence in a courtroom. Court personnel, attorneys, parties, witnesses, and other necessary persons as determined by the presiding judge can be physically present in a courtroom for in-person proceedings. The presiding judge shall also determine the method by which members of the public, including the "news media" as defined in Supreme Judicial Court Rule 1:19(2), may access the proceeding, which may include allowing them to sit in the courtroom, provided there is sufficient space for them to maintain appropriate physical distance. Where a virtual hearing is scheduled, no one other than court personnel may be physically present in the courtroom during the virtual hearing without the approval of the judge or clerk-magistrate conducting the hearing. In the absence of exceptional circumstances, as determined by the judge or clerk-magistrate conducting the hearing, no party (or attorney for a party) may be physically present in the courtroom for a scheduled virtual hearing. Where an in-person hearing is scheduled, a judge, upon request, may authorize a participant (an attorney, party, or witness) to appear virtually while other participants appear in person, so long as it is consistent with the protection of constitutional rights. A participant who requests to appear virtually for an otherwise in-person proceeding shall have no grounds to object to other participants appearing in person.

6. Clerks', Registers', and Recorder's Offices. Until July 13, 2020, all court clerks', registers', and recorder's offices shall continue to conduct business virtually unless, in an emergency matter, the filing of pleadings and other documents cannot be accomplished virtually and can be done only in-person. On July 13, 2020, all such offices will physically reopen to the public to conduct court business. To continue to limit the number of persons entering courthouses, clerks', registers', and recorder's offices will still endeavor to conduct business virtually to the extent possible. Clerks', registers', and recorder's offices may provide a drop-box in a secure and accessible location at the courthouse for the benefit of those persons who wish to hand-deliver pleadings or other documents for filing. Each Trial Court department shall provide departmental-wide guidance on the COVID-19 webpage (see paragraph 17) as to how, in addition to by mail and, when available, electronic filing, pleadings and other documents can be filed without coming to the office of a court clerk, register, or recorder. Each clerk, register, or recorder is authorized to require the physical presence of additional staff as may be necessary to address the additional business contemplated by this order, provided that any such increase in staff presence will be conducted in accordance with health and safety protocols established by the Trial Court or the relevant appellate court.

7. Excluded matters. If a Trial Court department determines that it is not practicable to address certain categories of non-emergency matters virtually or in person in view of (a) limited court staffing, (b) technological constraints, (c) the need to prioritize emergency or other matters, or (d) legal constraints, such as the moratorium on evictions and foreclosures signed into law by

the Governor of the Commonwealth on April 20, 2020, see St. 2020, c. 65, it shall post notices to the COVID-19 webpage (see paragraph 17) that provide clear department-wide guidance to the public and members of the bar identifying any categories of non-emergency matters that the department will not be addressing.

8. Cell phones and other personal electronic devices in courthouses. Because of the increased reliance during the pandemic on cell phones and other personal electronic devices (PEDs)[2] to communicate with courts and facilitate court proceedings, beginning on July 13, 2020, cell phones and other PEDs shall not be banned from any courthouse. Cell phones and other PEDs must be used in compliance with the rules set forth in Trial Court Emergency Administrative Order 20-10 (Order Concerning Trial Court Policy on Possession & Use of Cameras & Personal Electronic Devices), which was issued on June 24, 2020, and becomes effective on July 13, 2020. The rules shall be posted on the COVID-19 webpage (see paragraph 17) and at the entrance to each courthouse.

9. Jury and Bench Trials. All jury trials, in both criminal and civil cases, scheduled to commence in Massachusetts state courts at any time from March 14, 2020, through September 4, 2020, are hereby continued to a date no earlier than September 8, 2020. Under Prior SJC Orders,[3] bench trials in criminal and civil cases that were scheduled to commence in Massachusetts state courts at any time from March 14, 2020, through June 30, 2020, were generally continued to a date no earlier than July 1, 2020, subject to certain potential exceptions. That general continuance is extended to July 13, 2020, subject to the same potential exceptions. There will be no further general continuance of bench trials beyond July 13, unless there is a new surge in COVID-19 cases in the Commonwealth and the SJC determines that a further general continuance is needed. Judges in Trial Court departments should therefore begin to schedule criminal and civil bench trials, if they have not already done so. Criminal bench trials shall be conducted in person, unless the parties and trial judge all agree to conduct the trial virtually. Civil bench trials may be conducted virtually in the discretion of the trial judge. During the two initial phases (beginning on July 13, 2020, and August 10, 2020, respectively), in-person bench trials may be conducted only if in-person bench trials are among the categories of matters identified by the applicable Trial Court department, pursuant to paragraph 3. In any event, priority should be given to scheduling bench trials in criminal cases where the defendant is in custody, with the highest priority given to those defendants who have been in custody the longest.

[2] A "personal electronic device" or "PED" is any device capable of communicating, transmitting, receiving, or recording messages, images, sounds, data, or other information by any means, including but not limited to a computer, tablet, cell phone, camera, or Bluetooth device.

[3] "Prior SJC Orders" means the June 1 Order, the March 13, 2020 Order Regarding Empanelment Of Juries, the March 17, 2020 Order Limiting In-Person Appearances In State Courthouses To Emergency Matters That Cannot Be Resolved Through A Videoconference Or Telephonic Hearing, the April 1, 2020 Order Regarding Court Operations Under The Exigent Circumstances Created By The COVID-19 (Coronavirus) Pandemic, and the May 4, 2020, Updated Order Regarding Court Operations Under The Exigent Circumstances Created By The COVID-19 (Coronavirus) Pandemic.

10. Application for conference. A party who has had a trial or other non-emergency hearing postponed as a result of this Order or the Prior SJC Orders may apply for a conference with the court where the trial or other non-emergency hearing was to occur to address matters arising from the postponement. In criminal cases, where appropriate, a defendant may ask the court for reconsideration of bail or conditions of release. Nothing in this Order addresses the disposition of such requests for reconsideration.

11. Speedy Trial Computations. The continuances occasioned by this Order and the Prior SJC Orders serve the ends of justice and outweigh the best interests of the public and criminal defendants in a speedy trial. Therefore, the time periods of such continuances shall be excluded from speedy trial computations under Mass. R. Crim. P. 36.

12. Grand jury. No new grand jury shall be empaneled prior to September 8, 2020, unless so ordered by the SJC. Grand juries whose terms expire before the empanelment of a new grand jury shall be extended until the date of that new empanelment or the date of the October 2020 empanelment in the relevant judicial district, whichever occurs first. No sitting grand jury shall be convened and, after September 8, no new grand jury shall be empaneled without the approval of the Superior Court Regional Administrative Justice (RAJ) who, after consultation with the Chief Justice of the Superior Court, shall set such conditions as may be necessary to minimize risk to members of the grand jury, court personnel, and witnesses. The RAJ or the Chief Justice of the Superior Court may consult with the Jury Commissioner regarding such conditions.

13. Statutes of limitation. All civil statutes of limitations were tolled by Prior SJC Orders from March 17, 2020, through June 30, 2020, and will not be tolled any further unless there is a new surge in COVID-19 cases in the Commonwealth and the SJC determines that a new or extended period of tolling is needed. All criminal statutes of limitation are tolled from March 17, 2020, through September 30, 2020, because of the limited availability of grand juries. The new date for the expiration of a statute of limitation is calculated as follows: determine how many days remained as of March 17, 2020, until the statute of limitation would have expired, and that same number of days will remain as of July 1, 2020 in civil cases and as of September 30, 2020 in criminal cases. For example, if fourteen (14) days remained as of March 17 before the statute of limitation would have expired in a civil case, then fourteen (14) days will continue to remain as of July 1, before the statute of limitation expires (i.e., July 15), and if fourteen (14) days remained as of March 17 before the statute of limitation would have expired in a criminal case, then fourteen (14) days will continue to remain as of September 30, before the statute of limitation expires (i.e., October 14).

14. Deadlines set forth in statutes or court rules, standing orders, or guidelines. Unless otherwise ordered by the applicable appellate court, court department, or judge(s) presiding over the court case, all deadlines set forth in statutes or court rules, standing orders, tracking orders, or guidelines that expired at any time from March 17, 2020, through June 30, 2020, were tolled by Prior SJC Orders from March 17, 2020, through June 30, 2020, and will not be tolled any further unless there is a new surge in COVID-19 cases in the Commonwealth and the SJC determines that a new or extended period of tolling is needed. The new deadline in each instance is calculated as follows: determine how many days remained as of March 17, 2020, until the

original deadline, and that same number of days will remain as of July 1, 2020, until the new deadline. For example, if a rule set a thirty (30) day deadline and fourteen (14) days remained as of March 17 before that deadline would have been reached, then fourteen (14) days will continue to remain as of July 1, before the new deadline is reached (i.e., July 15). If the thirty (30) day period commenced after March 16, then thirty (30) days remain as of July 1 before the new deadline is reached (i.e., July 31).[4] If a deadline tolled pursuant to this paragraph is one of a series of deadlines under a tracking order, all of the subsequent deadlines are extended by the same number of days as the deadline tolled pursuant to this paragraph, unless otherwise ordered by the applicable court. This paragraph does not affect the continuance of trials, which are governed by paragraph 9.

15. Court-ordered deadlines in particular cases. Unless otherwise specifically ordered by the judge presiding over the court case, all deadlines established by a court in a particular case prior to March 17, 2020, that expired at any time from March 17, 2020, through June 30, 2020, were tolled by Prior SJC Orders until July 1, 2020. No further tolling is anticipated unless there is a new surge in COVID-19 cases in the Commonwealth and the SJC determines that a new or extended period of tolling is needed. This paragraph does not affect the continuance of trials, which are governed by paragraph 9.

16. Expiring injunctions and similar orders. Unless otherwise ordered by the applicable court, all orders in a particular case that were issued prior to March 17, 2020, after an adversarial hearing (or the opportunity for an adversarial hearing), that enjoined or otherwise restrained or prohibited a party from taking some act or engaging in some conduct until a date at any time from March 17, 2020, through August 31, 2020, shall remain in effect until the matter is rescheduled and heard. To the extent they are not already doing so, Trial Court departments shall reschedule and hear these matters virtually, whenever practicable, or in person, pursuant to paragraph 3 above. Orders issued on or after March 17, 2020, after a virtual or in-person adversarial hearing (or the opportunity for an adversarial hearing), may issue for the full period allowed by the applicable statute.

17. Publication of COVID-19 orders. All orders, standing orders, guidelines, and notices issued by any court department or appellate court in response to this Order or the pandemic, as well as all amendments, modifications, and supplements thereto, or the equivalent, shall be posted upon issuance on the judiciary's COVID-19 webpage. Links to each document may be found on that webpage.

[4] The tolling of deadlines under paragraph 14 applies to motions filed under Mass. R. Crim. P. 29, see *Committee for Public Counsel Services v. Chief Justice of the Trial Court (No. 2)*, 484 Mass. 1029, 1030 n.3 (2020) (rescript), but not to deadlines set in the standing orders issued by the Boston Municipal Court (Standing Order 5-20), District Court (Standing Order 4-20), Juvenile Court (Standing Order 5-20), and Superior Court (Standing Order 5-20), effective April 6, 2020, regarding motions arising from the decision of the Superior Judicial Court in *Committee for Public Counsel Services* v. *Chief Justice of the Trial Court (No. 1)*, 484 Mass. 431 (2020).

18. The SJC may issue further Orders as necessary to address the circumstances arising from this pandemic.

This Order is effective July 1, 2020, and shall remain in effect until further order of the court.

RALPH D. GANTS) Chief Justice

BARBARA A. LENK)

FRANK M. GAZIANO) Justices

DAVID A. LOWY)

KIMBERLY S. BUDD)

ELSPETH B. CYPHER)

SCOTT L. KAFKER)

Entered: June 24, 2020
Effective: July 1, 2020

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. OE-144

In Re: COVID-19 (Coronavirus) Pandemic

FOURTH UPDATED ORDER
REGARDING COURT OPERATIONS UNDER THE EXIGENT
CIRCUMSTANCES CREATED BY THE COVID-19 (CORONAVIRUS) PANDEMIC

To safeguard the health and safety of the public and court personnel during the COVID-19 (coronavirus) pandemic while continuing to increase the business being conducted by the courts, the Supreme Judicial Court (SJC), pursuant to its superintendence and rule-making authority, issues the following ORDER:

1. Prior order. Effective September 17, 2020, this Order shall repeal and replace the Third Updated Order Regarding Court Operations Under The Exigent Circumstances Created By The COVID-19 (Coronavirus) Pandemic, which was issued on June 24, 2020, and took effect on July 1, 2020 (July 1 Order).

2. Conduct of court business and access to courthouses. Courthouses will continue to be physically open to the public for certain purposes, as generally outlined in this Order, and operated with diligent regard for the health and safety of court users and personnel, in accordance with protocols established by the Trial Court or the relevant appellate court, as applicable. To limit the number of persons entering courthouses, all courts will continue to conduct most court business virtually (i.e., by telephone, videoconference, email, or comparable means, or through the electronic filing system), in both civil and criminal cases. In cases with one or more self-represented litigants (SRLs) where a court is scheduling a videoconference, courts will recognize the possibility that SRLs may have limited access to the technology needed to conduct videoconferences or limited experience with it, and will either assist the SRL in being able to conduct a videoconference or offer an alternative to videoconferencing for the virtual hearing.

3. Certain proceedings conducted in person. Trial Court departments shall continue to conduct in-person proceedings in emergency and non-emergency matters that either can be handled more effectively or efficiently in person, or cannot be handled virtually because a virtual proceeding is not practicable or would be inconsistent with the protection of constitutional rights. Each Trial Court department shall post notices to the "Court System Response to COVID-19" webpage (https://www.mass.gov/guides/court-system-response-to-covid-19) (COVID-19 webpage) (see paragraph 16) that provide clear department-wide guidance to the public and members of the bar identifying the categories of matters that it will address in person. Courts will conduct all other emergency and non-emergency matters virtually, except as provided in paragraph 7 below.

The Chief Justice of a Trial Court department, after consultation with the Chief Justice of the Trial Court, for reasons of public health and safety may order that a court division or location conduct all business virtually and/or may transfer some or all in-person matters to specified courts within the department. If any such action is taken, the applicable Trial Court department shall post notices to the COVID-19 webpage (see paragraph 16) that provide clear guidance to the public and members of the bar.

4. Who can enter courthouses. Entry into a courthouse is limited to personnel who work in the courthouse and persons who are present for one or more of the following purposes: attending in-person court proceedings (see paragraph 5); conducting in-person business with a clerk's, register's, or recorder's office (see paragraph 6); reporting for jury service (see paragraphs 9 and 13); meeting with a probation officer or probation staff person; or conducting business at other offices that are open to the public and housed in the courthouse.

All court users and personnel shall be subject to appropriate screening before they are allowed to enter a courthouse for purposes of preventing the spread of COVID-19, as more fully addressed in the Third Order Regarding Access to State Courthouses & Court Facilities, which was issued on July 29, 2020, and became effective on August 3, 2020, and any amendments to or successors of that Order that may be issued.

For purposes of preventing the spread of COVID-19, courthouse staff may monitor the number of people entering and leaving a courthouse to ensure that the number within the courthouse does not exceed the occupancy limits established to protect public health and permit physical distancing. To limit the number of people in a courthouse at any given time, all departments and offices within a courthouse shall coordinate with each other and schedule proceedings in a staggered fashion throughout the day. If the number of court users entering a courthouse needs to be limited to avoid exceeding occupancy limits, the following court users shall be given priority to enter, in the following order of priority: (i) persons seeking to address emergencies; (ii) persons participating in a scheduled in-person proceeding, including, without limitation, a trial, jury service or empanelment, grand jury sitting, hearing, or conference; (iii) persons with scheduled or otherwise required meetings between probationers and probation officers or staff for purposes of supervision, including but not limited to GPS, DNA or case supervision matters; (iv) persons having a scheduled appointment within the courthouse; and, then, (v) all others.

5. Physical presence in a courtroom. Court personnel, attorneys, parties, potential or empaneled trial or grand jurors, witnesses, and other necessary persons as determined by the presiding judge can be physically present in a courtroom for in-person proceedings. The presiding judge shall also determine the method by which members of the public, including the "news media" as defined in Supreme Judicial Court Rule 1:19(2), may access the proceeding, which may include allowing them to sit in the courtroom, provided there is sufficient space for them to maintain appropriate physical distance. Where a virtual hearing is scheduled, no one other than court personnel may be physically present in the courtroom during the virtual hearing without the approval of the judge or clerk-magistrate conducting the hearing. In the absence of exceptional circumstances, as determined by the judge or clerk-magistrate conducting the

hearing, no party (or attorney for a party) may be physically present in the courtroom for a scheduled virtual hearing. Where an in-person hearing is scheduled, a party may move that the hearing be conducted virtually, and the judge or clerk-magistrate scheduled to preside at the hearing will rule on the motion. Alternatively, a judge, upon request, may authorize a participant (an attorney, party, or witness) to appear virtually while other participants appear in person, so long as it is consistent with the protection of constitutional rights. A participant who requests to appear virtually for an otherwise in-person proceeding shall have no grounds to object to other participants appearing in person.

6. Clerks', Registers', and Recorder's Offices. All court clerks', registers', and recorder's offices will be physically open to the public to conduct court business. To continue to limit the number of persons entering courthouses, clerks', registers', and recorder's offices will still endeavor to conduct business virtually to the extent possible. Clerks', registers', and recorder's offices may provide a drop-box in a secure and accessible location at the courthouse for the benefit of those persons who wish to hand-deliver pleadings or other documents for filing. Each Trial Court department shall provide department-wide guidance on the COVID-19 webpage (see paragraph 16) as to how, in addition to by mail and, when available, electronic filing, pleadings and other documents can be filed without coming to the office of a court clerk, register, or recorder. Each clerk, register, or recorder is authorized to require the physical presence of such staff as may be necessary to address court business, provided that any increase in staff presence will be conducted in accordance with health and safety protocols established by the Trial Court or the relevant appellate court.

7. Excluded matters. If a Trial Court department determines that it is not practicable to address certain categories of non-emergency matters virtually or in person in view of (a) limited court staffing, (b) technological constraints, (c) the need to prioritize emergency or other matters, or (d) legal constraints, such as any State or Federal moratoriums on evictions or foreclosures, it shall post notices to the COVID-19 webpage (see paragraph 16) that provide clear department-wide guidance to the public and members of the bar identifying any categories of non-emergency matters that the department will not be addressing.

8. Cell phones and other personal electronic devices in courthouses. Because of the increased reliance during the pandemic on cell phones and other personal electronic devices (PEDs)[1] to communicate with courts and facilitate court proceedings, cell phones and other PEDs shall not be banned from any courthouse. Cell phones and other PEDs must be used in compliance with the rules set forth in Trial Court Emergency Administrative Order 20-10 (Order Concerning Trial Court Policy on Possession & Use of Cameras & Personal Electronic Devices), which was issued on June 24, 2020, became effective on July 13, 2020, and is posted on the COVID-19 webpage (see paragraph 16) and at the entrance to each courthouse.

9. Jury Trials. No jury trials, in either criminal or civil cases, shall be conducted in Massachusetts state courts until on or after October 23, 2020, at which time courts shall resume

[1] A "personal electronic device" or "PED" is any device capable of communicating, transmitting, receiving, or recording messages, images, sounds, data, or other information by any means, including but not limited to a computer, tablet, cell phone, camera, or Bluetooth device.

in-person trials on a limited basis, in general accordance with the recommendations for Phase 1 contained in the report issued by the Jury Management Advisory Committee (JMAC) on July 31, 2020,[2] as clarified by the memorandum issued by the JMAC on September 1, 2020.[3] As recommended by the JMAC, Phase 1 will be limited to trials to juries of six (with alternates) conducted in a small number of locations, with no more than one trial at a time conducted in each location. As recognized by the JMAC, the resumption of jury trials will require close consultation and coordination among Trial Court Departments throughout the process, including in evaluating and selecting appropriate locations for trials. As further recognized by the JMAC, scheduling trials will be a collaborative process involving court leaders in each location and department, bar leaders, and counsel in each case. Ultimately, the case types and specific cases that will be tried to juries during Phase 1, as well as the locations thereof, shall be determined by the Chief Justice of the applicable Trial Court department, in consultation with the Chief Justice of the Trial Court.

The following provisions shall apply to trials conducted during Phase 1, notwithstanding any rule to the contrary:

(a) civil cases in the Superior Court and Housing Court that typically would be tried to juries of twelve, except sexually dangerous person cases under G.L. c. 123A, shall be tried to juries of six and each party will be limited to four peremptory challenges, regardless of whether additional jurors are empaneled;

(b) criminal cases in the Superior Court and youthful offender cases in Juvenile Court that typically would be tried to juries of twelve may be tried to juries of six only with the consent of the defendant(s) or juvenile(s), in which case each defendant or juvenile will be limited to four peremptory challenges and the Commonwealth to as many challenges as equal the whole number to which all the defendants or juveniles in the case are entitled, regardless of whether additional jurors are empaneled;

(c) sexually dangerous person cases under G.L. c. 123A that typically would be tried to juries of twelve may be tried to juries of six only with the consent of all parties, in which case each party will be limited to four peremptory challenges, regardless of whether additional jurors are empaneled;[4]

[2] Report and Recommendations to the Justices of the Supreme Judicial Court on the Resumption of Jury Trials in the Context of the COVID-19 Pandemic.

[3] Response to Public Comments on the Report of the Jury Management Advisory Committee to the Justices of the Supreme Judicial Court on the Resumption of Jury Trials in the Context of the COVID-19 Pandemic.

[4] See G.L. c. 123A, § 9 (petitioner or Commonwealth may demand jury trial) and § 14 (person named in petition or petitioning party may demand jury trial).

(d) in civil cases in the District Court and Boston Municipal Court, each party will be limited to two peremptory challenges, regardless of whether additional jurors are empaneled; and

(e) in criminal cases in the District Court and Boston Municipal Court and delinquency cases in the Juvenile Court, each defendant or juvenile will be limited to two peremptory challenges and the Commonwealth to as many challenges as equal the whole number to which all the defendants or juveniles in the case are entitled.

The SJC shall issue direction regarding the second phase of the resumption of jury trials (Phase 2) after reviewing the JMAC's evaluation of Phase 1 as described in the JMAC's report. In order to prepare for Phase 2, however, cases to be tried in Phase 2 in accordance with the JMAC's recommendations may be scheduled in anticipation of Phase 2 commencing in February 2021, with such jury trial dates subject to revision after the SJC's review of the JMAC's evaluation of Phase 1.

As recommended by the JMAC, the Jury Commissioner is hereby authorized, until further order of the SJC, to exercise discretion to excuse persons summoned for trial or grand jury duty upon request based on an identified vulnerability of the potential juror or a household member to COVID-19, or other circumstances related to COVID-19.

All plans and expectations regarding the resumption of jury trials may be adjusted if there is a significant change in the rate of COVID-19 transmission in the Commonwealth.

10. Continuances and Speedy Trial Computations. Pursuant to Prior SJC Orders,[5] all jury trials scheduled to commence in Massachusetts state courts at any time from March 14, 2020, through September 4, 2020, were continued to a date no earlier than September 8, 2020. As the number of jury trials conducted during Phase 1 necessarily will be greatly limited due to the measures to be taken to reduce the risk of the spread of COVID-19, this court concludes that, except as otherwise provided in this paragraph, it is necessary and appropriate to hereby order that all jury trials in all cases in Massachusetts state courts are further continued from September 5, 2020, until a date no earlier than the date of the commencement of Phase 2. Regarding the cases scheduled for trial during Phase 1 (see paragraph 9), the further general continuance effectuated by this Order shall apply until the scheduled date for the trial. The continuances occasioned by this Order and the Prior SJC Orders serve the ends of justice and outweigh the best interests of the public and criminal defendants in a speedy trial. Therefore, the time periods

[5] "Prior SJC Orders" means the March 13, 2020 Order Regarding Empanelment Of Juries, the March 17, 2020 Order Limiting In-Person Appearances In State Courthouses To Emergency Matters That Cannot Be Resolved Through A Videoconference Or Telephonic Hearing, and the prior Orders Regarding Court Operations Under The Exigent Circumstances Created By The COVID-19 (Coronavirus) Pandemic issued on April 1, 2020 (effective April 6, 2020), April 27, 2020 (updated order effective May 4, 2020), May 26, 2020 (second updated order effective June 1, 2020), and June 24, 2020 (third updated order effective July 1, 2020).

of such continuances shall be excluded from speedy trial computations under Mass. R. Crim. P. 36.[6]

11. Bench trials. Judges in Trial Court departments shall continue to schedule criminal and civil bench trials. Criminal bench trials shall be conducted in person, unless the parties and trial judge all agree to conduct the trial virtually. Civil bench trials may be conducted virtually in the discretion of the trial judge. In-person bench trials may be conducted only if bench trials are identified by the applicable Trial Court department as among the categories of matters that it will address in person, pursuant to paragraph 3. In any event, priority should be given to scheduling bench trials in criminal cases where the defendant is in custody, with the highest priority given to those defendants who have been in custody the longest.

12. Application for conference. A party who has had a trial or other non-emergency hearing postponed as a result of this Order or the Prior SJC Orders may apply for a conference with the court where the trial or other non-emergency hearing was to occur to address matters arising from the postponement. In criminal cases, where appropriate, a defendant may ask the court for reconsideration of bail or conditions of release. Nothing in this Order addresses the disposition of such requests for reconsideration.

13. Grand jury. No new grand jury shall be empaneled without the approval of the Superior Court Regional Administrative Justice (RAJ) who, after consultation with the Chief Justice of the Superior Court, shall set such conditions as may be necessary to minimize risk to members of the grand jury, court personnel, and witnesses. The RAJ or the Chief Justice of the Superior Court may consult with the Jury Commissioner regarding such conditions. As permitted by Rule 5 of the Massachusetts Rules of Criminal Procedure, which provides that "the court shall select not more than twenty-three grand jurors to serve," a grand jury of fewer than 23 grand jurors may be empaneled. Regardless of the number empaneled, a grand jury may sit only where there is a quorum of at least thirteen grand jurors, and may return an indictment only if at least twelve of the sitting grand jurors vote to indict.

14. Statutes of limitation. All criminal statutes of limitation are tolled from March 17, 2020, through October 23, 2020, because of the limited availability of grand juries. The new date for the expiration of a statute of limitation is calculated as follows: determine how many days remained as of March 17, 2020, until the statute of limitation would have expired, and that

[6] "Ordinarily, it is a trial judge who orders a continuance, who determines whether the delay will be excluded from the speedy trial computation, and who makes the required findings under rule 36 (b) (2) (F). But here, immediate and uniform action across the entire court system was needed to prevent the spread of the coronavirus and to avoid the inefficiencies and inconsistencies that would have resulted if trial judges had to make a separate decision and findings in each case as to whether a trial should be continued due to the COVID-19 pandemic. It was therefore necessary and appropriate for this court to order that all trials be continued, to determine that the resulting delay should be excluded from the speedy trial computation, and to make the required findings applicable to all cases." *Commonwealth v. Lougee*, 485 Mass. 70, 72 (2020).

same number of days will remain as of October 24, 2020. For example, if twenty (20) days remained as of March 17 before the statute of limitation would have expired, then twenty (20) days will continue to remain as of October 24, before the statute of limitation expires (i.e., November 13).[7]

15. Expiring injunctions and similar orders. Unless otherwise ordered by the applicable court, all orders in a particular case that were issued prior to March 17, 2020, after an adversarial hearing (or the opportunity for an adversarial hearing), that enjoined or otherwise restrained or prohibited a party from taking some act or engaging in some conduct until a date at any time from March 17, 2020, through August 31, 2020, shall remain in effect until the matter is rescheduled and heard on a date on or before October 13, 2020. To the extent they are not already doing so, Trial Court departments shall reschedule and hear these matters virtually, whenever practicable, or in person, pursuant to paragraph 3 above. Orders issued on or after March 17, 2020, after a virtual or in-person adversarial hearing (or the opportunity for an adversarial hearing), may issue for the full period allowed by the applicable statute.

16. Publication of COVID-19 orders. All orders, standing orders, guidelines, and notices issued by any court department or appellate court in response to this Order or the pandemic, as well as all amendments, modifications, and supplements thereto, or the equivalent, shall be posted upon issuance on the judiciary's COVID-19 webpage. Links to each document may be found on that webpage.

[end of page]

[7] Prior SJC Orders provided for the tolling of (1) civil statutes of limitation from March 17, 2020, through June 30, 2020, (2) deadlines set forth in statutes or court rules, standing orders, tracking orders, or guidelines, that expired at any time from March 17, 2020, through June 30, 2020, and (3) deadlines established by a court in a particular case prior to March 17, 2020, that expired at any time from March 17, 2020, through June 30, 2020. The new deadline or new date for the expiration of the statute of limitation, as applicable, is calculated as follows: determine how many days remained as of March 17, 2020, until the original deadline would have been reached or the statute of limitation would have expired, and that same number of days remained as of July 1, 2020, until the new deadline is (or was) reached or the statute of limitation expires (or expired). For example, if fourteen (14) days remained as of March 17 before the original deadline would have been reached or the statute of limitation would have expired, then fourteen (14) days continued to remain as of July 1, before the new deadline was reached or the statute of limitation expired (i.e., July 15).

17. The SJC may issue further Orders as necessary to address the circumstances arising from this pandemic.

This Order is effective on September 17, 2020, and shall remain in effect until further order of the court.

RALPH D. GANTS)
) Chief Justice[8]
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BARBARA A. LENK)
) Justices
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FRANK M. GAZIANO)
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DAVID A. LOWY)
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KIMBERLY S. BUDD)
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ELSPETH B. CYPHER)
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SCOTT L. KAFKER)

Entered: September 17, 2020
Effective: September 17, 2020

[8] Chief Justice Gants approved this order prior to his death.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXI LABOR AND INDUSTRIES

Chapter 151B UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Section 5 COMPLAINTS; PROCEDURE; LIMITATIONS; BAR TO PROCEEDING; AWARD OF DAMAGES

Section 5. Any person claiming to be aggrieved by an alleged unlawful practice or alleged violation of clause (e) of section thirty-two of chapter one hundred and twenty-one B or sections ninety-two A, ninety-eight and ninety-eight A of chapter two hundred and seventy-two may, by himself or his attorney, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general may, in like manner, make, sign and file such complaint. The commission, whenever it has reason to believe that any person has been or is engaging in an unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, may issue such a complaint. Any employer

whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner shall determine after such investigation that no probable cause exists for crediting the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a preliminary hearing before the commission to determine probable cause for crediting the allegations of the complaint, and the commission shall allow such request as a matter of right; provided, however, that such a preliminary hearing shall not be subject to the provisions of chapter thirty A. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of a complaint relative to a housing practice, the commissioner shall immediately serve notice upon the complainant and respondent of their right to elect judicial determination of the complaint as an alternative to determination in a hearing before the commission. If a complainant or respondent so notified wishes to elect such judicial determination, he shall do so in writing within twenty days of receipt of the said notice. The person making such election shall give notice of such election to the commission and to all other complainants and respondents to whom the probable cause finding relates. The commission, upon receipt of such

notice, shall dismiss the complaint pending before it without prejudice and the complainant shall be barred from subsequently bringing a complaint on the same matter before the commission. If any complainant or respondent elects judicial determination as aforesaid, the commission shall authorize, and not later than thirty days after the election is made the attorney general shall commence and maintain, a civil action on behalf of the complainant in the superior court for the county in which the unlawful practice occurred. Any complainant may intervene as of right in said civil action. If the court in such civil action finds that a discriminatory housing practice has occurred or is about to occur, the court may grant any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section nine. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under said section nine shall also accrue to that aggrieved person in a civil action under this section. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of any complaint and no complainant or respondent has elected judicial determination of the matter, he shall immediately endeavor to eliminate the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. In case of failure so to eliminate such practice or violation, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued

and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the commission, at a time and place to be specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designated by it. Before or after a determination of probable cause hereunder such commissioner may also file a petition in equity in the superior court in any county in which the unlawful practice which is the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, or in Suffolk county, seeking appropriate injunctive relief against such respondent, including orders or decrees restraining and enjoining him from selling, renting or otherwise making unavailable to the complainant any housing accommodations or public accommodations with respect to which the complaint is made, pending the final determination of proceedings under this chapter. An affidavit of such notice shall forthwith be filed in the clerk's office. The court shall have power to grant such temporary relief or restraining orders as it deems just and proper. The case in support of the complaint shall be presented before the commission by one of its attorneys or agents or by an attorney retained by the complainant, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case except when necessary to decide an appeal to the full commission; and the aforesaid endeavors at conciliation shall not be received in evidence. If an investigating commissioner determines that probable cause exists to

credit the allegations of a complainant that a respondent has refused to sell, rent or lease, or to negotiate in the sale, rental, or leasing of, housing accommodations or commercial space and if he determines that such respondent is a nonresident of the commonwealth and cannot be personally served with process in the commonwealth, such investigating commissioner may file a petition in equity in the nature of an in rem proceeding seeking appropriate injunctive relief against such property with respect to which a complaint has been made, including orders or decrees restraining and enjoining any sale, rental, lease, or other disposition of such property which would render it unavailable to the complainant pending the final determination of proceedings under this chapter. Such commissioner shall send by registered mail, with return receipt requested, a copy of such petition to the last address of such respondent known to the commissioner. An affidavit of compliance herewith, and the respondent's return receipt or other proof of actual notice, if received, shall be filed in the case on or before the return day of the process or within such further time as the court may allow. A copy of the order or decree of the court running against such property of a nonresident respondent shall be recorded in the registry of deeds in the county wherein such housing accommodations or commercial space is located, and a copy of such order or decree shall be attached in a conspicuous place to the property which has been the subject of a complaint under section four by the sheriff of the county wherein such property is located, or by his authorized agent or employee. Any person purchasing housing accommodations or commercial space, subsequent to the recording of the order or decree in the registry of deeds, shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property which has been the subject

of an order or decree of the superior court. Any person renting or leasing housing accommodations or commercial space subsequent to the attachment of a copy of an order or decree referred to above by the sheriff of the county wherein such property is located or by his authorized agent or employee shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed at the request of any party. If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful practice as defined in section four or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this chapter or of said clause (e) of said section thirty-two or

said sections ninety-two A, ninety-eight and ninety-eight A, and including a requirement for report of the manner of compliance. Such cease and desist orders and orders for affirmative relief may be issued to operate prospectively. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant. A copy of its order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursuant to this section must be so filed within 300 days after the alleged act of discrimination. The institution of proceedings under this section, or an order thereunder, shall not be a bar to proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, nor shall the institution of proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, or a judgment thereunder, be a bar to proceedings under this section.

If upon all the evidence at any such hearing the commission shall find that a respondent has engaged in any such unlawful practice relative to housing or real estate or violated clause (e) of said section thirty-two it may, in addition to any other action which it may take under this section, award the petitioner damages, which damages shall include, but shall not be limited to, the expense incurred by the petitioner for obtaining

alternative housing or space, for storage of goods and effects, for moving and for other costs actually incurred by him as a result of such unlawful practice or violation. Any person claiming to be aggrieved by such an award of damages may, notwithstanding the provisions of section six and within ten days of notice of such award, bring a petition in the municipal court of the city of Boston or in the district court within the judicial district of which the respondent resides, addressed to the justice of the court, praying that the action of the commission in awarding damages be reviewed by the court. After such notice to the parties as the court deems necessary, it shall hear witnesses, review such action, and determine whether or not upon all the evidence such an award was justified and thereafter affirm, modify or reverse the order of the commission. The decision of the court shall be final and conclusive upon all the parties as to all matters of fact.

If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent:

(a) in an amount not to exceed $10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice;

(b) in an amount not to exceed $25,000 if the respondent has-been adjudged to have committed one other discriminatory practice during the 5–year period ending on the date of the filing of the complaint; and

(c) in an amount not to exceed $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory practices during the 7–year period ending on the date of the filing of the complaint. Notwithstanding the aforesaid provisions, if the acts constituting the

discriminatory practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory practice, then the civil penalties set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory practice occurred.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXI LABOR AND INDUSTRIES

Chapter 151B UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Section 9 CONSTRUCTION AND ENFORCEMENT OF CHAPTER; INCONSISTENT LAWS; EXCLUSIVENESS OF STATUTORY PROCEDURE; CIVIL REMEDIES; SPEEDY TRIAL; ATTORNEY'S FEES AND COSTS; DAMAGES

Section 9. This chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply, but nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth relating to discrimination; but, as to acts declared unlawful by section 4, the administrative procedure provided in this chapter under section 5 shall, while pending, be exclusive; and the final determination on the merits shall exclude any other civil action, based on the same grievance of the individual concerned.

Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, but not later

than three years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred if the unlawful practice involves residential housing. The petitioner shall notify the commission of the filing of the action, and any complaint before the commission shall then be dismissed without prejudice, and the petitioner shall be barred from subsequently bringing a complaint on the same matter before the commission. Any person claiming to be aggrieved by an unlawful practice relative to housing under this chapter, but who has not filed a complaint pursuant to section five, may commence a civil action in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred; provided, however, that such action shall not be commenced later than one year after the alleged unlawful practice has occurred. An aggrieved person may also seek temporary injunctive relief in the superior, housing or probate court within such county at any time to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the commission.

An action filed pursuant to this section shall be advanced for a speedy trial at the request of the petitioner. If the court finds for the petitioner, it may award the petitioner actual and punitive damages. If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust. The commission shall, upon the filing of any complaint with it, notify the aggrieved person of his rights under this section.

Any person claiming to be aggrieved by a practice concerning age discrimination in employment made unlawful by section four may bring a civil action under this section for damages or injunctive relief, or both, and shall be entitled to a trial by jury on any issue of fact in an action for damages regardless of whether equitable relief is sought by a party in such action. If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the provisions of said section four. The provisions set forth in the first, second and third paragraphs shall be applicable to such complaint or action to the extent that such provisions do not conflict with the provisions set forth in this paragraph.

CERTIFICATE OF COMPLIANCE WITH APPEALS COURT RULES

I, Benjamin C. Rudolf, hereby certify pursuant to Mass. R. App. P. 16(k) that to the best of my understanding the foregoing memorandum complies with the rules of this Court that apply to the filing of briefs, including but not limited to Rules 16(a)(13); 16(e); 18; 20; and 21. The brief complies with the length limit of Rule 20 because it was prepared in Courier New 12-point, a monospaced font, and in total contains less than fifty pages and less than 11,000 total words. The brief was prepared using Microsoft Word Version 2206, the latest available version with updates.

/s/ Benjamin C. Rudolf
Benjamin C. Rudolf

Dated: July 12, 2022

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(e)(1) and 16(a)(15), I hereby certify that on this day I caused copies of the foregoing document, including the Addendum thereto, and the Record Appendix to be served via First-class mail and email to the following counsel of record, who represent all the other parties in the case:

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Dated: July 12, 2022