COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2020-P-1316

RUSSELL BERRY,
PLAINTIFF-APPELLEE

v.

THE COMMERCE INSURANCE COMPANY,
DEFENDANT-APPELLANT

ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT FOR BRISTOL COUNTY

BRIEF OF DEFENDANT-APPELLANT, THE COMMERCE INSURANCE COMPANY

/s/ Mark C. Darling
Mark C. Darling, Esq.
BBO #114375
Fuller, Rosenberg, Palmer & Beliveau, LLP
339 Main Street
Worcester, MA 01608
(508) 756-6509
mdarling@frpb.com

/s/ Amanda J. Cox
Amanda J. Cox, Esq.
BBO #670186
Modern Law, PLLC
P.O. Box 8128
Worcester, MA 01614
(508) 321-3201
ajcox@modern-law.net

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Defendant-Appellant, The Commerce Insurance Company, hereby states that it is an insurance company duly licensed to do business in the Commonwealth of Massachusetts with a principal office at 211 Main Street, Webster, Massachusetts 01570. It is a wholly owned subsidiary of MAPFRE U.S.A. Corp., which is a publicly traded company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

TREATISES:

STATEMENT OF ISSUE.

Whether Raynham Police Officer Shawn Sheehan was acting within the scope of his employment when his negligent conduct injured fellow Raynham Police Officer Russell Berry at a Raynham Police Department firearms training session at the Department's firing range.

STATEMENT OF CASE.

Injured Raynham Police Officer Russell Berry filed a Complaint against The Commerce Insurance Company ("Commerce") seeking a Declaratory Judgment that Raynham Police Officer Shawn Sheehan was not immune from tort liability under G. L. c. 258, § 2, first par. for an accident that occurred at mandatory firearms training at the Raynham Police Department's town-owned firing range. (RA/8). Commerce insured Officer Sheehan under a personal Massachusetts Automobile Insurance Policy at the time of the accident. (RA/8). Commerce counterclaimed for a declaration that Officer Sheehan was immune from tort liability because he was acting within the scope of his employment with the Raynham Police Department when his negligence caused Officer Berry's injuries. (RA/17).

Both parties moved for summary judgment. (RA/23, RA/64). The Trial Court (Yessayan, J.) granted Officer Berry's Summary Judgment Motion, denied Commerce's Summary Judgment Motion, and entered an order that Commerce is

liable for Officer Berry's injuries because, the Trial Court found, Officer Sheehan was not acting within the scope of his employment. (RA/140-RA/147). Commerce appeals the Order and Judgment for Officer Berry and the Trial Court's denial of its Summary Judgment Motion. (See RA/148).

STATEMENT OF FACTS.

I. Town of Raynham Firearms Training And Qualification.

In June 2017, Officers Sheehan and Berry were both employed by the Town of Raynham as Raynham Police Officers. (RA/51, RA/87, RA/113). Both were patrolmen. (RA/87, RA/113). Each year, the Department requires its officers to attend and pass firearms training. (RA/51, RA/87, RA/116, RA/121). Raynham firearms instructors are responsible for the annual firearms training. (RA/87). The Department pays its firearms instructors to be certified instructors for the Department and pays them for their ongoing training and certification. (RA/52, RA/116).

The Department's firing range is on town-owned property located at 1555 King Phillip Street in Raynham (the "Firing Range"). (RA/51, RA/100, RA/118). To get to the Firing Range, officers have to drive through town-owned property on which the highway department and transfer station also are situated. (RA/52, RA/119).

During all trainings, a sign is posted that reads "Law Enforcement Training," and a flag is flown. (RA/52, RA/90). The weapons and ammunition used during trainings are department-owned and/or issued. (RA/92, RA/99). Most of the weapons and ammunition used during training are kept in the armory at the police station. (RA/117). The remainder of the equipment, called "shoot house supplies," including range targets, stands, signs, tarps, and barricades, are kept in a large, locked Conex storage container that stays at the Firing Range. (RA/52, RA/89, RA/92-RA/93, RA/118-RA/119). The keys for the Conex storage container are kept with the armory keys. (RA/118-RA/119).

During training -- including breaks -- officers are on call for "devastating" and "large scale" incidents, and the Department expects them to respond to "emergency situations" and "major event[s]." (RA/99, RA/123, RA/128). To that end, officers keep a portable police radio on and within earshot during training. (RA/99-RA/100, RA/124). Officers undergoing training and qualification must wear their police duty belts and bulletproof vests. (RA/93, RA/99, RA/126). Some officers receiving training wear their night shift uniform, also known as their battle dress uniform. (RA/126).

Training -- including breaks -- is deemed to be an ordinary part of an officer's schedule. (RA/90). That is, an officer's time at training is either imputed to his or her forty-hour work-week or -- if an officer has already completed forty

hours of work by training day -- as hourly overtime. (RA/90). Officers are credited a minimum of four hours and then credited by the hour thereafter for training. (RA/91, RA/122). The training officers' time is calculated from 8:00 A.M. when they arrive at the police station to pick up weapons and ammunition through the time they log everything back into the armory after training concludes. (RA/122). Instructors remain responsible for the safety of the weapons and ammunition from the time they remove them from the armory to the time they bring them back. (RA/129).

An officer's on-the-clock time is not reduced by amounts spent on break -- whether an officer is at firearms training or on a patrol shift. (RA/94, RA/122-RA/123). This is so regardless of how an officer spends his or her break time. (RA/94, RA/122-RA/123). With respect to breaks, Officer Berry testified as follows:

> Q: [W]hen you're on a regular patrol assignment for the Town of Raynham, off in your cruiser doing your regular duty and you take a lunch break, do you get paid through your lunch break?
>
> A: Yes, you get paid, but how the lunch breaks work, so if you're on a regular patrol, patrolling the town or on regular duty, let's say, you're on a lunch break and a call comes in, say you're having lunch at the station or home, a call comes in, you're still required to go. A fellow officer if there's enough people on and it's not too busy, might say, if you're in the station, finish eating. I'll take that for you. But yeah, while you're on your scheduled assigned shift.

(RA/100-RA/101). When specifically asked about the lunch break at firearms training, Officer Berry testified,

> A: [] I could be free to leave like the other officers to go home or go see my kids. I would be free to leave.
>
> Q: You would be paid for that time anyway?
>
> A: Yes, sir.
>
> Q: Is that true for everyone?
>
> A: Yes, sir.

(RA/94. See RA/128).

In Officer Sheehan's experience as a training instructor, lunch breaks during firearms training are often "working lunch[es]" where officers are simultaneously eating, getting extra instruction, and setting up: "[o]ne of us may be eating while the other one is getting set up. Zeroing them in for a little while. Taking a few bites, put it down." (RA/125, RA/128).

II. Training Day, June 12, 2017.

On June 12, 2017, Officer Berry was one of five Raynham officers undergoing firearms training at the Firing Range. (RA/51, RA/52, RA/87-RA/88).[1] Officer Sheehan was one of three officers conducting the training. (RA/51, RA/52,

[1] The other officers were Robert Smith, Michael Civali, Patrick Leahy, and Daniel Fitch. (RA/87-RA/88, RA/117, RA/151).

RA/88, RA/91, RA/90-RA/94).[2] Officers Sheehan and Berry were both paid overtime pay for firearms training that day. (RA/53, RA/90, RA/122).

Officer Sheehan has served as one of the Department's firearms instructors for seven years and must continue to do so as part of his job requirements. (RA/51-RA/52, RA/116). Raynham pays for Officer Sheehan's training and certifications. (RA/52, RA/116). On June 12, 2017, Officer Sheehan met Officer Henrique at 8:00 A.M. at the police station to get what they needed for the training. (RA/53, RA/117). Starting at that point in time, Officer Sheehan was on duty. (RA/121, RA/122). Officer Sheehan collected ammunition and rifles from the armory and put them in his personal vehicle, a 2005 Ford F150 pickup truck. (RA/53, RA/117-RA/118). He put the rifles in the back seat and the ammunition in the bed of his truck. (RA/53, RA/17-RA/118). Officer Sheehan drove to the Firing Range located about three-and-a-half miles from the station. (RA/53, RA/117-RA/118, RA/119). The training day included the use of new A.R. 15 rifles and "red dot" sights, as well as hand gun qualifications. (RA/53, RA/92, RA/119-120). Officer Sheehan was responsible for oversight of the weapons and ammunition during the day, including during the lunch break. (RA/53, RA/122, RA/129). He was responsible

[2] Officer Edward Riley and John Henrique were the other two officer-instructors. (RA/87-RA/88, RA/113, RA/117). Although Officer Riley had been at the Firing Range in the morning, once he left, Officer Sheehan was in charge. (RA/88, RA/88, RA/93-RA/94).

for returning them to the armory at the end of the training day. (RA/56, RA/122, RA/129).

Once at the Firing Range, Officers Sheehan and Henrique set up for training. (RA/53). Among other tasks, they set up tents over picnic tables for protection from the sun and hung targets. (RA/53, RA/119). They had a portable police radio at the range, positioned within earshot in case a situation arose to which they had to respond. (RA/99-RA/100, RA/123, RA/124, RA/128).

Officer Berry reported to the Firing Range before training began. (RA/91, RA/117). Per protocol, Officer Berry wore his police duty belt and bulletproof vest. (RA/93, RA/99). Officer Berry and the four other officers participated in handgun and rifle qualifications led by Officers Sheehan and Henrique until around lunch time. (RA/89-RA/90, RA/116, RA/117, RA/120). At that point, they took their lunch break. (RA/90, RA/120).

Officer Berry removed his duty belt and bulletproof vest. (RA/93, RA/99). He then sat side saddle at a wooden picnic table near the Conex storage container with Officers Civali and Smith. (RA/93, RA/95). The three officers sat and talked while two other officers -- Officers Leahy and Fitch -- left together to purchase lunch for the five of them. (RA/54, RA/93, RA/95). Officers Sheehan and Henrique also left together to get lunch to bring back to the range. (RA/53, RA/93,

RA/123, RA/125). All officers, including Officers Berry and Sheehan, were paid by Raynham while they were on their lunch break. (RA/54, RA/94, RA/123).

Officers Sheehan and Henrique were away from the Firing Range for about ten minutes. (RA/55-RA/56, RA/123). They did not sign out or go "off the clock." (RA/54, RA/123, RA/125). According to Officer Sheehan, upon their return,

> I pulled in[to] the range, came in a little hot, spinning the rear tires. The truck spun sideways and I applied the brakes and the gravel is soft, the truck slid forward [] striking Officer Berry and pushing the table.

(the "Accident") (RA/123). This is consistent with what Officer Sheehan told the responding officer at the Firing Range right after the Accident. Officer Richard Pacheco stated as follows:

> I [] spoke to the vehicle operator, Shawn Sheehan, who stated that he was pulling into the garage -- the range area intending to park near the picnic table area. He stated that as he entered the area, he was going a little too quick, which caused his truck to slide on the gravel surface. He stated that he applied the brakes and the truck continued to slide into the table pinning Officer Berry's leg between the truck and the table.

(RA/126, RA/154).[3] Officer Sheehan admits that he entered the range "[f]aster than I should have," but denies that it was intentional: "it was never intentional." (RA/124). At Officer Sheehan's deposition, Officer Berry's counsel followed up:

> Q: Just before this happened you said you came in hot. Were your tires spinning on the gravel?
>
> A: Yes, they were.

[3] Officer Sheehan's description also is consistent with witness accounts contained in the police report. (RA/149-RA/151).

Q: Did you actually spin the tires deliberately or was this just an accident because this was gravel and you were coming in a little fast?

A: Gravel coming in fast, but I was -- I came in fast. I pulled in, slowed down, went to speed up going into my parking spot, and the rear end started to come, and obviously, when the truck was facing the picnic table, I applied the brakes, and the truck slid on the gravel.

Q: So you had no intention of driving towards the bench, right?

A: No.

(RA/129).

According to Officer Berry, he observed Officer Sheehan's truck appear to stop, and then he heard rocks or gravel spinning under the tires. (RA/97). He testified that the truck turned and headed towards the picnic table. (RA/95). Officer Berry heard the truck sliding on the rocks or gravel just before it came into contact with him. (RA/95).

III. Post-Accident.

As a result of the Accident, the Department disciplined Officer Sheehan by giving him forty unpaid hours. (RA/57, RA/100, RA/124). Officer Berry applied for and received injured-on-duty benefits from Raynham. (RA/56, RA/97). According to Officer Berry, he received these benefits because he was injured in the course of the performance of his duty for the Raynham Police Department at the time of the Accident. (RA/56, RA/97; Add/61). Claiming Officer Sheehan was not acting within the scope of his employment as a Raynham Police Officer at the

time of the Accident, Officer Berry made a claim against Officer Sheehan to which Officer Sheehan's personal automobile insurance company responded. (RA/12-RA/13, RA/15-RA/16). Commerce denied the claim, asserting that Officer Sheehan is immune from tort liability under G. L. c. 258, § 2, first par. (RA/15-RA/16) (Add/70-Add/71). This suit followed. (RA/148-RA/149).

SUMMARY OF ARGUMENT.

The Trial Court erred when it denied Commerce's Summary Judgment Motion because there is no genuine dispute of material fact that Officer Sheehan was acting within the scope of his employment at the time of the Accident. He is therefore immune from tort liability under G. L. c. 258, § 2, first par. and Commerce is not liable for Officer Berry's injuries. (pp. 19-36).

The Trial Court erred when it allowed Officer Berry's Summary Judgment Motion because it misapplied the three-prong test outlined in Wang Laboratories, Inc. v. Business Incentives, Inc., 398 Mass. 854 (1986) (the "Wang test"). (pp. 37-43).

The Trial Court also erred in allowing Officer Berry's Summary Judgment Motion because it improperly relied on Officer Berry's subjective characterization of Officer Sheehan's negligent operation of his vehicle as "horseplay" which characterization, in any event, does not legally affect whether Officer Sheehan was acting within the scope of his employment at the time of the Accident. (pp. 41-43).

Finally, the Trial Court erred in applying Merlonghi v. U.S., 620 F.3d 50 (2010) and ignoring Wormstead v. Town Manager of Saugus, 366 Mass. 659 (1975). (pp. 43-46).

ARGUMENT.

I. Summary Judgment Should Enter For Commerce Because -- As A Matter Of Law -- Officer Sheehan Was Acting In The Scope Of His Employment At The Time Of The Accident, And He Is Therefore Immune from Tort Liability, Thus Relieving Commerce From Liability For Officer Berry's Injuries.

On appeal, the Court performs a de novo examination of the summary judgment record to determine whether summary judgment is appropriate on any ground appearing in the record. Miller v. Cotter, 448 Mass. 671, 676 (2007), citing Champagne v. Comm'r of Correction, 395 Mass. 382, 386 (1985). Because the Appeals Court reviews the case de novo, "no deference is accorded the decision of the judgment in the trial court." Chambers v. RDI Logistics, Inc., 476 Mass. 95, 99-100 (2016), quoting Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 637 (2012). The Court may consider any ground supporting summary judgment. Miller, 448 Mass. at 676, citing Champagne, 395 Mass. at 386. See, e.g., Altshuler v. Minkus-Whalen, 31 Mass. App. Ct. 937, 938 (1991), citing Packish v. McMurtrie, 697 F.2d 23, 25 n.1 (1st Cir. 1983)(applying Mass. law)("[I]f there are no material issues of fact in dispute and a party is entitled to judgment as a matter

of law, judgment can be entered even though the legal principles relied on by the court may differ from those presented to the court by the parties.").

Here, summary judgment should enter in Commerce's favor as a matter of law because there are no issues of material fact concerning whether Officer Sheehan is immune from liability under G. L. c. 258, § 2, first par. See Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 716 (1991).

G. L. c. 258, § 2, the Massachusetts Tort Claims Act, provides, in pertinent part, as follows:

> Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances.

G. L. c. 258, § 2, first par. (Add/70-Add/71). Also of import here, Section 2 states that

> no . . . public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment.

G. L. c. 258, § 2, first par. (Add/70-Add/71).

In addition to the Tort Claims Act, this case implicates G. L. c. 41, § 111F because Officer Berry applied for and received compensation pursuant to G. L. c. 41, § 111F as a result of the Accident. (Add/58). That statute provides compensation for -- among other specified public employees -- police officers who

are injured "in the performance of [their] dut[ies]." G. L. c. 41, § 111F, first par. (Add/58). Officer Berry, then, was considered to be "in the performance of [his] duty" as a Raynham Police Officer at the time of the Accident.

A. Officer Sheehan Is A Public Employee Entitled To Immunity From Liability Established By The Tort Claims Act.

There is no dispute that as a Raynham Police Officer, Officer Sheehan is a public employee as defined in G. L. c. 258, § 1. (Add/67-Add/68). See Pinshaw v. Metro. Dist. Comm'n, 402 Mass. 687, 692 (1988).

B. Officer Sheehan's Conduct In Operating His Vehicle At The Time Of The Accident Was Negligent.

There is no allegation that Officer Sheehan intentionally struck Officer Berry. Officer Berry's characterization of Officer Sheehan's negligent operation of his vehicle as "horseplay" (RA/102) -- and the Trial Court's adoption thereof (RA/145) -- does not eliminate immunity from liability provided by G. L. c. 258, § 2. (Add/70-Add/71). If, by calling it "horseplay," Officer Berry intends to imply that Officer Sheehan's conduct was grossly negligent, that still does not take it outside the scope of G. L. c. 258, § 2. (Add/70-Add/71). See Monahan v. Methuen, 408 Mass. 381, 391-392 (1990)(public employee immune from claims under Tort Claims Act for gross negligence because claim still qualifies as "negligent or wrongful act or omission" under G. L. c. 258, § 2).

C. The Accident Occurred While Officer Sheehan Was Acting Within The Scope Of His Employment.

Because the Accident involving Officer Berry occurred when Officer Sheehan was "acting within the scope of his [] employment," Officer Sheehan is immune from tort liability, and Commerce is not liable for Officer Berry's injuries. Here, there is no genuine dispute of material fact that Officer Sheehan's negligent operation of his vehicle was committed within the scope of his employment as a Raynham Police Officer, and summary judgment should enter for Commerce.

1. "Scope Of Employment" Is Construed Liberally.

In enacting the Tort Claims Act, the legislature provided that "[t]he provisions of this [Massachusetts Tort Claims] act shall be construed liberally for the accomplishment of the purposes thereof." Howard v. Burlington, 399 Mass. 585, 589-590 (1987), quoting Statute 1978, c. 512, § 18.

> "As a matter of policy, public indemnification of public officials serves in part to encourage public service." To adopt a restrictive view of the scope of employment [] would be inconsistent with the purposes of the statute and would encourage public officials to view their duties in an unreasonably restrictive manner.

Id. quoting Filippone v. Mayor of Newton, 392 Mass. 622, 629 (1984). See Clickner v. Lowell, 422 Mass. 539, 542 (1996)(scope of an employee's employment not narrowly defined); Howard, 399 Mass. at 590-591 (scope of employment "is not construed restrictively"); Pridgen v. Boston Hous. Auth., 364 Mass. 696, 714 n. 10 (1974)(scope of employment not narrowly viewed). See also,

Commonwealth v. Jerez, 390 Mass. 456 (1983)(same). "[I]t is ordinarily the actual and customary, rather than formally described, duties which determine scope of employment." Cohne v. Navigators Specialty Ins. Co., 361 F. Supp. 3d 132, 139 (D. Mass. 2019), quoting Howard, 399 Mass. at 105-106. "The scope of employment test asks the question: is this the kind of thing that, in a general way, employees of this kind do in employment of this kind?" Kansallis Finance Ltd. v. Fern, 421 Mass. 659, 666 (1996).

When construing the phrase "scope of employment" under G. L. c. 258, § 2, Massachusetts courts look to common law principles of vicarious liability, respondeat superior, and agency, all of which analyze whether the employee acts within the scope of his or her employment such that the employer may be held responsible for the employee's conduct. (Add/70-Add/71). Clickner, 422 Mass. at 542. See Doe v. Fournier, 851 F. Supp. 2d 207, 224 (D. Mass. 2012)(common law test for "scope of employment" applied under G. L. c. 258, § 2). See Howard, 399 Mass. at 589-590 (same).

"Under the doctrine of respondeat superior, 'an employer, or master, should be held vicariously liable for the torts of its employee, or servant, committed within the scope of employment.'" Lev v. Beverly Enters.-Mass., 457 Mass. 234, 238 (2010), quoting Dias v. Brigham Med. Assocs., Inc., 438 Mass. 317, 319-320 (2002). See Rego v. Thomas Bros. Corp., 340 Mass. 334, 335 (1960), quoting Levi

v. Brooks, 121 Mass. 501, 505 (1877)("The test of the liability of the master is, that the act of the servant is done in the course of doing the master's work, and for the purpose of accomplishing it.").

> The salient consideration is not the conduct in isolation, but in the context of the [] employment. Conduct falls outside scope of employment where it is "different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master."

Connolly v. Roman Catholic Archbishop, 35 Mass. L. Rep. 517, at 9-10 (2019), quoting Restatement (Second) of Agency, § 228(2) (1958). (Add/117-118).[4]

Wang Laboratories, Inc. sets forth the "scope of employment" test for public employee immunity under G. L. c. 258, § 2. Wang Laboratories, Inc., 398 Mass. at 859. The Wang test asks whether the conduct (1) is the kind the employee is hired to perform, (2) occurs substantially within authorized time and space limits and (3) is motivated in part by a desire to serve the employer. Id. See Clickner, 422 Mass. at 542.

2. At The Time Of The Accident, Officer Sheehan Was Engaged In The Work He Was Hired To Perform.

The first prong of the Wang test asks whether the employee is engaged in "the kind [of work] he is employed to perform." Wang Labs, Inc., 398 Mass. at

[4] While not binding on the Appeals Court, this recent Superior Court case acknowledges the Commonwealth's adoption of the Restatement (Second) of Agency and its current application to the "scope of employment" analysis performed by the Court here.

859, citing Douglas v. Holyoke Mach. Co., 233 Mass. 573, 576 (1919). See Mulford v. Mangano, 418 Mass. 407, 412 (1994)(Court asks "whether [the employee] acted at least in part for a job-related purpose"). Here, Officer Sheehan negligently operated his truck while attempting to park at the Firing Range. The fact that Officer Sheehan committed a tort, however, does not take his conduct outside the scope of his employment.

> Regarding the first prong [of the scope of employment analysis], [w]hen the employee's conduct at issue is a tort, "[t]he question is not whether the employee committed a tort, but whether he was performing the kind of work he was hired to perform when he allegedly committed the tort."

Cohne, 361 F. Supp. 3d at 139, quoting Chase v. U.S. Postal Serv., Civ. A. No. 12-11182-DPW, at 15 (D. Mass. Nov. 4, 2013). (Add/83).

The relevant question, then, is not whether Officer Sheehan's conduct was tortious, but whether the conduct occurred while he was performing work he was hired to perform at the time he committed the tort. See id. at 3-4. At the time of the Accident, Officer Sheehan was engaged in the kind of work he was employed to perform. His Raynham Police Department responsibilities and duties required him to provide firearms instruction, which instruction he was providing on June 12, 2017. (RA/51-RA/52, RA/116).

Officer Sheehan was responsible for the safety of the weapons and ammunition the officers used during training, and he retained that responsibility from the time he took them out of the armory at the police station until the time he

logged them back in and all times in between. (RA/56, RA/121, RA/122, RA/129). At the time of the Accident, Officer Sheehan was returning to the Firing Range with food so that he could engage in a "working lunch" where officers concurrently eat, get extra instruction and set up. (RA/125, RA/128). As Officer Sheehan testified, "[o]ne of us may be eating while the other one is getting set up. Zeroing them in for a little while. Taking a few bites, put it down." (RA/125, RA/128). At the time of the Accident, Officer Sheehan was engaged in "the kind of work" Raynham hired him to perform. See Cohn, 361 F. Supp. 3d at 139.[5]

3. Officer Sheehan's Conduct Occurred Substantially Within The Authorized Time And Space Limits.

The second prong of the Wang test asks whether the conduct "occurs substantially within the authorized time and space limits." Wang Labs, Inc., 398 Mass. at 859, citing Vallayanti v. Armour & Co., 260 Mass. 417, 419-420 (1927). Here, the Accident occurred substantially within the authorized time and space limits as it occurred on the town-owned Firing Range in the middle of the training day. (RA/87, RA/51, RA/56). The Firing Range was subject to the management and control of Raynham. (RA/51, RA/52, RA/100, RA/118). See, e.g., Lee v.

[5] Similarly, Officer Berry was performing his duties at the time of the Accident and he received injured-on-duty benefits from Raynham as a result. (RA/56, RA/97). This is so despite the fact that -- at the moment of impact --Officer Berry was not actively engaged in training, had removed his duty belt and bulletproof vest and was sitting at a picnic table talking with two other officers. (RA/54, RA/93, RA/95, RA/99).

Pelletier, 20 Mass. App. Ct. 915, 916 (1985), and cases cited. The posted sign read "Law Enforcement Training" and the training flag flew. (RA/52, RA/90). At all times, the officers kept their police radio on because they were on call for "devastating" and "large scale" incidents. (RA/99-RA/100, RA/123, RA/124, RA/128). Whether on lunch break or otherwise, all officers -- including Officer Sheehan -- were expected to respond to "emergency situations" and "major event[s]." (RA/99, RA/123, RA/128).

All officers were considered on-the-clock during their lunch break. (RA/94, RA/122-RA/123). That is, an officer's pay for the day was not reduced by the amount of time he or she spent on lunch break. (RA/94, RA/122-RA/123). This was true whether the officer was at firearms training or on a patrol shift. (RA/94, RA/122-RA/123). This also was true irrespective of how an officer spent his or her break time. (RA/94, RA/122-RA/123). Officers did not sign out or go "off the clock" for lunch. (RA/54, RA/123, RA/125). As such, Officer Berry was paid as he sat at a picnic table and talked to Officers Civali and Smith; likewise, Officer Sheehan was paid as he attempted to park his truck at the Firing Range after picking up food with Officer Henrique. (RA/54, RA/93, RA/95, RA/123, RA/125).

4. The "Going And Coming" Rule Is Inapplicable.

Officer Sheehan was still acting substantially within the authorized time and space limits even though the Accident occurred when he was parking his truck at

the Firing Range after picking up lunch. Generally, "[t]ravel to and from home to a place of employment is not considered to be within the scope of employment." Lev, 457 Mass. at 238, citing Mosko v. Raytheon Co., 416 Mass. 395, 399 (1993). Colloquially referred to as the "going and coming" rule, it does not apply here.

> [T]he "going and coming" rule has little, if any, applicability to trips made to and from the central place of work during periods when an employee is either working or on call. Furthermore, numerous cases establish that an employee who has no single, fixed place of business is, for obvious reasons, generally exempt from the "going and coming" rule.

Wormstead v. Town Manager of Saugus, 366 Mass. 659, 666-667 (1975), and cases cited. See Frassa v. Caulfield, 22 Mass. App. Ct. 105, 109-110 (1986). The "going and coming" rule also does not apply to an employee who travels at the direction of his employer. Kelly v. Middlesex Corp., 35 Mass. App. Ct. 30, 33 (1993). When determining whether to apply this exception to the "going and coming" rule, the Court asks whether "at the time of the accident, the employer's purposes had impelled [employee]'s travel." Kelly, 35 Mass. App. Ct. at 33. Here, the Department's mandatory firearms instruction on June 12, 2017 impelled Officer Sheehan's travel to the Firing Range at the time of the Accident.

Accordingly, in Wormstead v. Town Manager of Saugus, the Court held that police officers who continue to perform police functions during lunch breaks are included in the class of "traveling workers" to whom the "going and coming" rule

does not apply. Id. at 238-239.[6] Here, Officer Sheehan was on call for "devastating" and "large scale" incidents and was expected to respond to "emergency situations" and "major event[s]." (RA/99-RA/100, RA/123, RA/124, RA/128). Also, Raynham paid Officer Sheehan for time he spent on break regardless of how he chose to spend it. (RA/54, RA/93-RA/95; RA/122-RA/123, RA/125).[7]

At the time of the Accident, Officer Sheehan was at the Firing Range at the behest of his employer and as an incident of his employment. Consequently, the "going and coming" rule does not apply. The Accident occurred substantially within the authorized time and space limits of Officer Sheehan's employment.

---

[6] Although the exception for an employee who travels at the direction of his employer usually arises in Workers' Compensation cases construing "course of employment," Massachusetts courts also rely on these cases when deciding "scope of employment" matters in tort actions. (Add/63). Kelly, 35 Mass. App. Ct. at 33.

[7] Contrast Lev v. Beverly Enterprises-Mass., where an employee left a work-related meeting at restaurant to travel home. Lev, 457 Mass. at 239. There, the Court found that, at that point, the employee

> was no longer acting on behalf of or under the direction or control of [his employer]. He simply was driving home from a meeting with his supervisor, conduct that, substantively, was no different than traveling home after the completion of his shift at [his regular employment location]. Put another way, [the employee]'s homeward-bound trip from [the restaurant] was not an essential part of his employer's mission.

Id.

5. At The Time Of The Accident, Officer Sheehan Was Motivated By A Purpose To Serve Raynham.

The third and final prong of the Wang test asks whether the conduct "is motivated, at least in part, by a purpose to serve the employer." Wang Labs, Inc., 398 Mass. at 859, citing Donahue v. Vorenberg, 227 Mass. 1, 5 (1917). Here, Officer Sheehan had purchased food and was parking at the Firing Range to continue the firearms instruction. He testified that he often engaged in a "working lunch" where officers would perform training-related tasks and eat at the same time. (RA/125, RA/128). Even if Officer Sheehan was motivated in part by an intention to eat his lunch at the Firing Range, that does not take his conduct outside the scope of his employment.

> As to the third prong, the fact that the predominant motive of the agent is to benefit himself does not prevent the act from coming within the scope of employment as long as the act is otherwise within the purview of his authority.

Cohne, 361 F. Supp. 3d at 139 (internal citations and quotations omitted)(bouncer in scope of employment when he assaulted patron for whom bouncer harbored personal animus). See Chase, supra, at 16 (even if employee who committed tort was "concerned primarily with" his personal interest, third prong of Wang Labs test is met). (Add/84). Officer Sheehan's presence at the Firing Range at the time of the Accident was motivated by a purpose to serve the Raynham Police Department and in furtherance of the Department's interest.

In sum, at the time of the Accident, Officer Sheehan was on town-owned property during the workday in his capacity as a Raynham Police Officer. (RA/51, RA/56, RA/128). Both he and Officer Berry were at the Firing Range for firearms training, on lunch break, receiving overtime pay. (RA/53, RA/90, RA/122). Officer Sheehan's negligent operation of his vehicle occurred within the scope of his employment.

D. Wormstead v. Town Manager of Saugus Is Instructive.

The factual scenario presented here is analogous to that in Wormstead v. Town Manager of Saugus. There, Saugus Police Captain Wormstead was injured in an automobile accident. Wormstead, 366 Mass. at 662-663. Concluding that Wormstead was entitled to injured-on-duty benefits, the Court recited the following pertinent facts:

(1) Saugus Police Department officers must work forty hours a week, and the town pays officers for a forty-hour work week;

(2) Time spent during a lunch period is part of an officer's eight-hour shift and his or her forty-hour work week;

(3) "During his lunch period any officer, including the commanding officer, can go where he pleases [];"

(4) Wormstead was the commanding officer of the night division with a tour of duty from 5 PM to 1 AM;

(5) He was assigned to the station and had charge of the police department during that time;

(6) At 8 PM, Wormstead drove home in his personal automobile to take his lunch break;

(7) He wore civilian clothing other than his uniform trousers;

(8) At his home, Wormstead ate and watched television;

(9) He left to return to the station at 8:30 PM; and

(10) While in route to the police station, Wormstead was involved in an automobile accident.

Id. at 666-667.

Here,

(1) Raynham Police officers work a forty-hour week, and the town pays officers overtime for work performed in excess of forty hours. (RA/90, RA/121-RA/122);

(2) Raynham requires and pays its officers to attend and pass firearms training annually. (RA/51, RA/87, RA/116, RA/121);

(3) Raynham pays Officer Sheehan to conduct firearm instruction and requires him to do so as part of his duties. (RA/51-RA/52, RA/116);

(4) An officer's on-the-clock time is not reduced by amounts spent on break – whether an officer is at firearms training or on a patrol shift. (RA/94, RA/122-RA/123);

(5) During his or her lunch break any officer, including Officer Sheehan, can go where he or she pleases. (RA/94, RA/122-RA/123);

(6) Officer Sheehan was assigned to conduct the firearms training on June 12, 2017 and was considered the officer "in charge" at the time of the Accident. (RA/88, RA/91, RA/93-RA/94);

(7) Officer Sheehan was responsible for oversight of the weapons and ammunition during the day, including during breaks, and was responsible for returning them to the armory at the end of the training day. (RA/56, RA/122, RA/129);

(8) During training – including breaks - officers are on call for "devastating" and "large scale" incidents, and the town expects them to respond to "emergency situations" and "major event[s]." (RA/99, RA/123, RA/128). Consequently, the officers keep a portable police radio on and within earshot during training. (RA/99-RA/100, RA/124);

(9) During the lunch break, Officer Sheehan drove his truck to pick up food and bring it back to the Firing Range. (RA/54, RA/93, RA/123, RA/125);

(10) During this lunch break, all officers – including Officer Sheehan - were being paid. (RA/54, RA/93, RA/123);

(11) While attempting to park his truck at the Firing Range on town-owned property, Officer Sheehan struck Officer Berry, who was seated at a picnic table also taking his break. (RA/55, RA/56, RA/95-RA/96, RA/123, RA/126);

(12) Like Wormstead, Officer Sheehan wore civilian clothing. (RA/58, RA/99, RA/126); and

(13) Like Wormstead, Officer Sheehan was operating his personal vehicle at the time of the Accident. (RA/58-RA/59, RA/123).

The Wormstead Court concluded that Captain Wormstead's accident occurred in the performance of his duty as a police officer under G. L. c. 41, § 111F. (Add/58). Wormstead, 366 Mass. at 667. In so concluding, the Court found it "particularly pertinent" that the accident occurred during a period

> (1) for which [Wormstead] was being paid, (2) when he was on call, and (3) while he was engaged in activities consistent with and helpful to the accomplishment of police functions.

Id. at 664. All three of those factors are present here.

The Wormstead Court analyzed whether the accident occurred in the performance of Wormstead's duties pursuant to G. L. c. 41, § 111F, first par. (Add/58). Similarly, here, the Court must determine whether the Accident occurred

in Officer Sheehan's "scope of employment" under G. L. c. 258, § 2, first par. (Add/70-Add/71).[8] Despite different nomenclature, in this case at least, it is a difference without a distinction. That is, when the two standards are parsed out, they are extremely similar, and when those standards are applied to the facts at hand, the outcomes should be the same.

By way of explanation, the first prong of the Wang test is satisfied if the employee is engaged in "the kind [of work] he is employed to perform." Wang Labs, Inc., 398 Mass. at 859, citing Douglas, 233 Mass. at 576. The Wormstead Court found it important that the accident occurred while Wormstead was "engaged in activities with and helpful to the accomplishing of police functions." Wormstead, 366 Mass. at 666. The second prong of the Wang test is satisfied if the accident "occurs substantially within the authorized time and space limits." Wang Labs, Inc., 398 Mass. at 859, citing Vallayanti, 260 Mass. at 419-420. The Wormstead Court pointed to the fact that the accident occurred during Wormstead's working hours, when he was on call, and for which he was receiving pay. Wormstead, 366 Mass. at 665. The third prong of the Wang test is satisfied when the employee's conduct "is motivated, at least in part, by a purpose to serve the employer." Wang Labs, Inc., 398 Mass. at 859, citing Donahue, 227 Mass. at 5.

[8] Interestingly, the legislature used the phrase "acting in the performance of [] duty" when defining "acting within the scope of his office or employment" for those in the military. G. L. c. 258, § 1. (Add/66).

The Wormstead Court stated that even though Captain Wormstead was returning to the police station after having lunch at his home at the time of the accident, he was not pursuing "some purpose entirely his own." Wormstead, 366 Mass. at 666, citing Chapman's Case, 321 Mass. 705, 708-711 (1947). Stated another way, at the time of the accident, Wormstead's conduct was motivated by a purpose to serve not only himself, but also his employer. Finally, Wormstead applied the exception to the "going and coming rule" for "traveling workers," stating that

> a police officer, although he may have a primary place of duty, is engaged in a somewhat peripatetic occupation…[s]ince a police officer can serve in some capacity anywhere in a community [].

Id. at 667. As previously noted, this exception is applicable not only when the analysis involves "performance of duty" under G. L. c. 41, § 111F (as in Wormstead) but also applies to the "scope of employment" test under G. L. c. 258, § 2 (as here). (Add/58, Add/70-Add/71).

Consequently, for the same reasons the Wormstead Court concluded that Captain Wormstead was in the "performance of his duty," (and as detailed in sections I(C)(1)-(5) herein), this Court should conclude that Officer Sheehan was within the "scope of his employment" at the time of the Accident. The Trial Court erred when it concluded the opposite and denied Commerce's Summary Judgment Motion. The Trial Court's decision and order should be reversed.

II. The Trial Court Erred In Granting Officer Berry's Summary Judgment Motion Because Officer Sheehan Is Personally Immune From Liability Pursuant To The Tort Claims Act And His Personal Automobile Insurance Policy From Commerce Is Not Required To Pay For Officer Berry's Injuries.

Conversely, both the "scope of employment" test under G. L. c. 258, § 2 and application of Wormstead -- individually and in combination -- require a finding that Officer Berry did not establish, as a matter of law, that Officer Sheehan's act in parking his truck at the Firing Range was outside the scope of his employment. (Add/70-Add/71). See Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989).

On appeal, the Court reviews de novo the Trial Court's "legal determination that an employee acted outside the scope of his employment." Merlonghi, 620 F.3d at 54. Because Officer Sheehan is entitled to summary judgment for the reasons outlined in sections I(C)(1)-(5), Officer Berry is not. Additionally, the Trial Court erred in granting summary judgment to Officer Berry because it (a) failed to properly apply the Wang factors to the facts of this case, (b) erroneously applied Merlonghi v. U.S., 620 F.3d 50 (2010) to the facts of this case and (c) improperly excluded Wormstead from its analysis.

A. The Trial Court Failed To Properly Apply The Wang Test To The Facts Of This Case.

Here, the Trial Court found that Officer Sheehan's conduct exceeded the scope of his employment at the time of the Accident because the act resulting in Officer Berry's injury was not "in furtherance of [the police department]'s work."

(RA/143-RA/145; Add/54-Add/56, quoting Clickner, 422 Mass. 539). In so concluding, the Trial Court cited the following reasons:

1. Officer Sheehan left training "to run a personal errand that was not of benefit to the [Department];"
2. There was "a clear and purposeful break in [Officer Sheehan's] employment" which negates the fact that "[his] actions did take place within the authorized time and space limits of his employer [sic];"
3. Officer Sheehan was not wearing Department-identifying clothing;
4. He was not on call to respond to ordinary incidents;
5. Officer Sheehan "delegated his responsibilities" to oversee the equipment to other officers; and
6. The Accident occurred because Officer Sheehan was engaged in "horseplay" with his coworkers.

(RA/145; Add/56). These six findings manifest an improper application of the Wang factors to the facts of this case.

As to the Trial Court's first finding, the Trial Court found that Officer Sheehan left "to run a personal errand that was not of benefit to his employer." (RA/145; Add/56). The "scope of employment" test, however, encompasses conduct that occurs even when the employee's primary motive is to benefit himself rather than his employer. "The fact that the predominant motive of the agent is to

benefit himself does not prevent the act from coming within the scope of his employment." Wang, 398 Mass. at 859-860. As outlined in section I(C)(5), even if Officer Sheehan was motivated in part by an intention to purchase lunch to eat at the Firing Range, his dual purpose -- to bring food back to the Firing Range to continue firearms instruction -- satisfies the Wang test's third prong.

The Trial Court's second finding, that there was "a clear and purposeful break in [Officer Sheehan's] employment" implicates the second prong of the Wang test. (RA/145; Add/56). Contrary to the Trial Court's conclusion, however, Officer Sheehan's conduct did substantially occur within authorized time and space limits. See Wang Labs, Inc., 398 Mass. at 859, citing Vallayanti, 260 Mass. at 419-420. At the time of the Accident, Officer Sheehan was on town-owned property, at the Firing Range, during the workday, in his capacity as a Raynham Police Officer firearms instructor, being paid, bringing food back for a "working lunch." (RA/51, RA/53, RA/56, RA/90, RA/122, RA/128). This places Officer Sheehan substantially -- if not entirely -- within the authorized time and space limits of his employment. Furthermore, like Captain Wormstead, Officer Sheehan belongs to the class of "traveling workers" to which the "going and coming" rule does not apply. See Wormstead, 366 Mass. at 238-239. This is equally so whether the facts are analyzed as being within "scope," "performance," or "course" of one's employment. See Kelly, 35 Mass. App. Ct. at 33. Raynham's mandatory firearms

instruction on June 12, 2017 impelled Officer Sheehan to be at the Firing Range at the time of the Accident. See, e.g., id. Moreover, at the time of the Accident, Officer Sheehan was "in a place helpful to his employer," to wit, the town-owned Firing Range on firearms training day. Cp. Clickner, 422 Mass. at 543.

The Trial Court points to its last four findings to support its conclusion that Officer Sheehan was not engaged in "the kind [of work] he [was] employed to perform" at the time of the Accident. See Wang Labs, Inc., 398 Mass. at 859, citing Douglas, 233 Mass. at 576. Like Captain Wormstead, Officer Sheehan was not wearing his Police Department uniform when the Accident occurred. (RA/126). As in Wormstead, this does not mean that the Accident did not occur while Officer Sheehan was performing work he was hired to perform. Officer Berry was in the performance of his duties at the time of the Accident despite the fact that he, too, was wearing comfortable, causal clothing and had "geared down," removing his duty belt and bulletproof vest for his lunch break. (RA/93, RA/99).

Similarly, it is of negligible if any consequence that Officer Sheehan was on call to respond to serious rather than ordinary incidents. (RA/145; Add/56). The pertinent consideration is that Officer Sheehan was responsible for responding to certain calls and kept a portable police radio on and within earshot for that purpose.

(RA/99-RA/100, RA/123, RA/124, RA/128).[9] This is no different than the situation in Wormstead where the officer's lunch break could be interrupted if something "technical" came up or if, for example, he was called to the scene of a robbery to make an arrest. See Wormstead, 366 Mass. at 662.

The fact that the weapons and ammunition Officer Sheehan brought to the Firing Range remained there during the lunch break also is immaterial to whether the Accident occurred within the scope of Officer Sheehan's employment. There is no dispute that Officer Sheehan was responsible for oversight of the weapons and ammunition during the day, including during the lunch break. (RA/53, RA/56, RA/122, RA/129). He remained responsible for the safety of the weapons and ammunition from the time he removed them from the armory to the time he brought them back and all times in between. (RA/53, RA/56, RA/122, RA/129).[10]

Finally, the Trial Court's conclusion that Officer Sheehan was not furthering Raynham's work because he "was engaged in 'horseplay'" at the time of the

[9] Despite their prior testimony to the contrary, Officers Berry and Sheehan testified that none of the officers at the range were "on call". (RA/101, RA/128). The example they were asked about, however, was an ordinary incident, specifically a report of a shoplifter at Walmart, which training participants would not have been called to attend. (RA/101, RA/128).

[10] No doubt if anything happened to the weapons or ammunition during the ten minutes Officer Sheehan was away from the Firing Range, he would be the individual held accountable by his employer. Indeed, Officer Sheehan's employer did reprimand him for his tortious conduct in the happening of the Accident at the Firing Range, (RA/57, RA/100, RA/124), further affirmation that Officer Sheehan was acting within the scope of his employment at that time.

Accident is erroneous. (RA/145; Add/56).[11] There is no allegation that Officer Sheehan intentionally caused the Accident. At worst, Officer Sheehan's operation of his truck was grossly negligent – tortious conduct that is still within the scope of G. L. c. 258, § 2. (Add/70-Add/71). See Monahan, 408 Mass. at 391-392. The character of the tort itself is not the driving factor in determining scope. See, e.g., Connolly, 35 Mass. L. Rep. at 9-10 ("The salient consideration is not the conduct in isolation, but in the context of the [] employment."). (Add/117-118).

Assuming arguendo that Officer Sheehan was engaged in horseplay at the time of the Accident, this is an unsound reason to deny Officer Sheehan the protection afforded by the Tort Claims Act. Employers do not hire employees to commit torts as part of their employment. Essentially, Officer Berry seeks to strip Officer Sheehan of the Tort Claims Act's immunity by arguing that the Raynham Police Department did not hire Officer Sheehan to joke around with other officers. Massachusetts Courts have consistently rejected similar arguments. See, e.g., Chase, Civ. A. No. 12-11182-DPW, at 15 (rejecting argument that first prong not satisfied because "[employee] was not hired to humiliate employees who are injured on the job")(Add/83); Int. Bd. of Police Officers, Local 433 v. Memorial

[11] To the extent Officer Berry's characterization of Officer Sheehan's conduct as "horseplay" is material to the outcome of his Summary Judgment Motion, which Commerce denies, the Trial Court failed to view the facts in the light most favorable to Commerce, and, at the very least, there is a genuine dispute of fact concerning that characterization. (RA/61).

Press, Inc., 31 Mass. App. Ct. 138, 140-141 (1991)(rejecting argument that newspaper employee acted outside the scope of employment when he surreptitiously altered an advertisement); Pinshaw, 402 Mass. at 694-695 (rejecting argument that officer's "private counter-attack or personal vendetta" in obtaining criminal complaint against individual who filed an ultimately successful civil rights lawsuit against him occurred outside scope of employment).

The Trial Court here erred by accepting and relying on Officer Berry's subjective characterization of Officer Sheehan's conduct as "horseplay" to conclude that Officer Sheehan's conduct was outside the scope of his employment.

B. Merlonghi v. U.S. Is Not Analogous To This Case.

The Trial Court looked to Merlonghi v. U.S. in determining that Officer Sheehan was acting "in the furtherance of his own agenda," outside the scope of his employment at the time of the Accident. (RA/145; Add/56, citing Merlonghi, 620 F.3d at 55). That case, however, is entirely distinguishable, and the Trial Court should not have applied its reasoning or conclusion to the facts of this case.

In Merlonghi, a public employee was driving a government vehicle home from work when he engaged in a verbal altercation with Merlonghi, who was riding a motorcycle. Merlonghi, 620 F.3d at 52, 56. The employee proceeded to swerve his vehicle back and forth towards Merlonghi, who did the same. Id. The employee then took out his revolver and pointed it at Merlonghi. Id. Eventually,

the employee swerved hard and struck Merlonghi. Id. at 53. The employee did not inform his office or the police about the accident, and he personally paid to repair the vehicle in New Hampshire even though his employer had a policy of repairing damaged government vehicles. Id. The employee testified that he "wasn't inside the scope of [his] employment [;] it wasn't really a direct result." Id. A jury later convicted the employee of -- among other crimes -- aggravated assault and battery by means of a dangerous weapon. Id.

The Merlonghi Court concluded that the employee was not acting within the scope of his employment because (1) he was not traveling to a work assignment, (2) he engaged in a car chase while driving home from work, (3) he "endanger[ed] the public by unholstering his gun, making threatening gestures, and driving the vehicle in a dangerous manner," (4) his actions did not occur within his office "or at a location to which he was dispatched for an assignment" and (5) his conduct was "related to personal travel and a personal confrontation." Id. at 56-57.

Here, the Trial Court described Officer Sheehan's operation of his truck as "a similar use of his motor vehicle" as that of the employee in Merlonghi. (RA/145; Add/56). The Trial Court's comparison is entirely misplaced. Unlike the employee in Merlonghi, Officer Sheehan was traveling to a work assignment, and the Accident occurred "at a location to which he was dispatched for an assignment." Cp., id. at 57. Most importantly, Officer Sheehan's negligent

operation of his vehicle -- even if characterized as horseplay -- is wildly incommensurable to the conduct of the employee in Merlonghi -- who engaged in a car chase, pointed his gun at another motorist, and swerved and struck Merlonghi. There was evidence in Merlonghi that the employee intended to hurt a civilian, the employee was convicted on three criminal counts, including assault and battery. Id. at 53. There simply is no comparison to the facts at hand, and the Trial Court erred in making one.

C. The Trial Court Erroneously Excluded Wormstead From Its Analysis.

The Trial Court dismissed Wormstead as inapposite because it "involved worker's compensation analysis, not…tort liability." (RA/143). That was a mistake. As a preliminary matter, Wormstead involves G. L. c. 41, § 111F, which provides compensation for firefighters and police officers injured on duty. (RA/144; Add/55). Just as G. L. c. 152, § 26's course of employment" analysis provides some guidance concerning what constitutes "performance of employment" under G. L. c. 41, § 111F, Di Gloria v. Chief of Police of Methuen, 8 Mass. App. Ct. 506, 511 (1979), Wormstead guides the Court's "scope of employment" analysis here. That is, as outlined in sections I(D) and II(A) and not herein duplicated, the performance/course analysis performed in Wormstead is indistinguishable from the scope analysis in this case. Likewise, the controlling

facts in Wormstead are the same as those presented here. Consequently, the outcomes should be the same. The Trial Court erred in concluding otherwise.

CONCLUSION.

There is no genuine dispute of material fact that Officer Sheehan was acting within the scope of his employment when his negligent operation of his truck caused the Accident. The summary judgment record presents more than sufficient evidence to satisfy all three prongs of the Wang test. Officer Sheehan is therefore immune from tort liability under G. L. c. 258, § 2, and Commerce is not liable for Officer Berry's injuries.

The gravamen of Officer Berry's position is that he was working at the time of the Accident and Officer Sheehan was not. Officer Berry submits this to be true even though at the time of the Accident both officers were on their lunch break, on town-owned property, at department-required firearms training, being paid overtime, and required to respond to serious situations to which they were alerted by police radio. To manufacture a difference where there is none, Officer Berry contends that Wormstead is inapplicable because G. L. c. 41, § 111F uses the term "performance" and G. L. c. 258, § 2 uses the term "scope." He argues that Officer Sheehan's operation of his vehicle was negligent, but because it was "horseplay," Officer Sheehan is not entitled to G. L. c. 258, § 2's immunity provision for negligent and grossly negligent conduct. Officer Berry maintains that they had to

have the police radio on and within earshot and respond to emergencies, but argues that they were not technically "on call." These amount to distractions irrelevant to the substantive analysis under Wang, and they do not alter the conclusion that the Accident occurred in the scope of Officer Sheehan's employment with the Town of Raynham Police Department. Under G. L. c. 258, § 2. Officer Sheehan is immune from suit, and Commerce cannot be held liable for Officer Berry's injuries.[12]

Commerce requests that this Court (1) vacate the Trial Court's allowance of Officer Berry's Summary Judgment Motion, (2) reverse the Trial Court's denial of Commerce's Summary Judgment Motion, and (3) remand the case to the Trial Court with an order that judgment enter for Commerce and a finding enter that Commerce is not liable for Officer Berry's injuries.

[12] The undisputed facts required the Trial Court to conclude as a matter of law that Officer Sheehan was in the scope of his employment and immune from tort liability. If the Trial Court disagreed and found that horseplay was evidence that Officer Sheehan was outside the scope of his employment, this became a disputed question of fact. There is evidence a fact finder could weigh against this. Therefore, the Trial Court should have denied both motions and held a jury trial. See Lawrence v. Cambridge, 422 Mass. 406, 410 (1996). If this Court finds that the characterization of Officer Sheehan's negligence as horseplay is relevant to the analysis of whether Officer Sheehan was in the scope of his employment at the time of the Accident, Commerce requests that the Court vacate the Trial Court's allowance of Officer Berry's Summary Judgment Motion and remand the case to the Trial Court for trial. See Barnes v. Metro. Hous. Assistance Program, 425 Mass. 79, 87 (1997).

RESPECTFULLY SUBMITTED, January 22, 2021,

Defendant-Appellant, The Commerce Insurance Company,

/s/ Mark C. Darling
Mark C. Darling, Esq.
BBO #114375
Fuller, Rosenberg, Palmer & Beliveau, LLP
339 Main Street
Worcester, MA 01608
(508) 756-6509
mdarling@frpb.com

/s/ Amanda J. Cox
Amanda J. Cox, Esq.
BBO #670186
Modern Law, PLLC
P.O. Box 8128
Worcester, MA 01614
(508) 321-3201
ajcox@modern-law.net

ADDENDUM
TABLE OF CONTENTS

SUMMARY JUDGMENT
MASS. R. CIV. P. 56

#10

Trial Court of Massachusetts
The Superior Court

DOCKET NUMBER
1873CV00998

Marc J. Santos, Clerk of Court
Bristol County

CASE NAME
Berry, Russell
vs.
The Commerce Insurance Company

COURT NAME & ADDRESS
Bristol County Superior Court - New Bedford
441 County Street, 1st floor
New Bedford, MA 02740

JUDGMENT FOR THE FOLLOWING PLAINTIFF(S)
Berry, Russell

BRISTOL SS SUPERIOR COURT
FILED
SEP 28 2020
MARC J SANTOS, ESQ.
CLERK/MAGISTRATE

JUDGMENT AGAINST THE FOLLOWING DEFENDANT(S)
The Commerce Insurance Company

This action came before the Court, Hon. Raffi N Yessayan, presiding, upon Motion for Summary Judgment of the plaintiff named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the plaintiff is entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

that The Commerce Insurance Company is liable for the plaintiff's injuries.

DATE JUDGMENT ENTERED
09/28/2020

CLERK OF COURTS/ ASST. CLERK
X

COPIES MAILED
9/11/2020 JL

#9

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1873CV00998

BRISTOL SS SUPERIOR COURT
FILED
SEP 10 2020
MARC J SANTOS, ESQ.
CLERK/MAGISTRATE

RUSSELL BERRY,
Plaintiff,

vs.

THE COMMERCE INSURANCE COMPANY,
Defendant.

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case arises out of a dispute between the plaintiff, Russell Berry, who was injured by his work colleague Shawn Sheehan, and the defendant, Commerce Insurance Company ("Commerce"), who insures Mr. Sheehan. The defendant contends that when Mr. Sheehan injured the plaintiff, Mr. Sheehan was engaging in activities within the scope of his employment as a public employee; accordingly, it moves for summary judgment on the grounds that the Massachusetts Tort Claims Act, G. L. c. 258, § 2, bars recovery from public employees when injuries arise from actions performed under the scope of their public employment. The plaintiff contends that Commerce is liable for the plaintiff's injuries as the injuries are a result of Mr. Sheehan's actions beyond the scope of his employment; accordingly, he now cross-moves for summary judgement. For the reasons that follow, the plaintiff's motion for summary judgment is **ALLOWED** and the defendant's motion is **DENIED**.

BACKGROUND

The following is derived from the parties' consolidated statement of undisputed material facts.

Commerce issued a Massachusetts Automobile Insurance Policy on Mr. Sheehan's automobile, a 2005 Ford truck. The plaintiff and Mr. Sheehan are both police officers at the Raynham Police Department (Department) in the Town of Raynham (Town).

On June 12, 2017, Mr. Sheehan, a certified firearms instructor, facilitated a training for the Department with his fellow officer, John Henrique. He conducted the training session at the Department's firearms range, located at 1555 King Phillip Street in Raynham. The firing range is on Town-owned property and has been at this location for most of Mr. Sheehan's fourteen-year tenure as an officer. At the firing range, there is a "Conex" storage container used to store targets, tarps, signs, barricades, and other items used at the range. There are high berms used as backstops. During the training, a sign is posted and reads "Law Enforcement Training" and a flag is blown.

The plaintiff attended this training session, which was mandatory as part of his employment with the Department. All officers must attend and pass firearms training annually.

Mr. Sheehan received training to serve as the Department's firearms instructor. He has performed in this role for the Department for about seven years. The Department pays for Mr. Sheehan's training and certifications. Mr. Sheehan must maintain his certifications as part of his job requirements.

At about 8 A.M., Mr. Sheehan and Mr. Henrique met at the police station to gather what they needed for the training. They obtained ammunition and rifles from the station armory. Mr. Sheehan put the rifles and ammunition in his personal vehicle. He put the rifles in the backseat and the ammunition in the bed of the pickup truck. He then used his vehicle to convey the rifles and ammunition to the firing range, located about three-and-a-half miles from the station. The training that day included training on the use of new A.R. 15 rifles and "red dot" sights, as well as hand gun qualifications.

Upon arrival at the firing range, the officers set up tents over picnic tables for protection from the sun. They hung targets. The Department paid the plaintiff overtime while at the firing range. He was paid for eight hours in total. The Department also paid Mr. Sheehan overtime while conducting the training session. After the morning session concluded, the officers broke for lunch. The plaintiff stayed at the firing range while other officers left for sandwiches for the group. Mr. Sheehan left to purchase lunch at a nearby store.

The officers wore comfortable clothing and their duty belts while participating in the training at the range. They did not wear any uniforms or any other Department-identifying clothing. Mr. Sheehan did not wear his duty belt or any special clothing. He drove his personal vehicle to buy himself lunch. He was not obligated by his employer to leave the range and return. The Town did not provide lunch. Mr. Sheehan left the firing range for about ten minutes. During this time, other officers, including the plaintiff, watched over the rifles and ammunition brought to the range by Mr. Sheehan. Mr. Sheehan, however, remained ultimately responsible for oversight of the rifles and ammunition during the day, including the lunchbreak. He was responsible for returning them to the armory at the end of the training day.

The Town paid both the plaintiff and Mr. Sheehan while they took their lunchbreak. During the training and the lunch, the officers would have left to respond to a call only if "something devastating" and "on a large scale" occurred, like a "mass shooting at a school." Otherwise, for ordinary on-call duties, the officers would not respond.

During the lunchbreak, the plaintiff sat side-straddle on the picnic table located on the opposite side of the Conex trailer on the range-side of the trailer, not on the access road, and on the opposite side of the parking area.

Upon his return to the range, Mr. Sheehan stopped his vehicle, then sped up, spinning rocks or gravel. He turned his truck and headed for the picnic table where the plaintiff sat. Mr. Sheehan then struck the plaintiff, injuring his lower leg. Mr. Sheehan drove his vehicle on the opposite side of the Conex trailer, not on the access road, and on the opposite side of the parking area. He testified that he intended to park toward the back of the container, where some officers park. Upon entering the range, he testified that he came "too fast" and was driving "faster than I should have." The plaintiff sustained a crushing injury to his left leg with compartment syndrome and extensive pretibial tissue loss resulting in ulceration. The plaintiff's medical bills exceed $130,000.00. As a result of the plaintiff's injuries, he received benefits under G. L. c. 41, § 111F in response to his claim that he was injured in the course of the performance of his duty to the Town's Department

that day. The Department disciplined Mr. Sheehan as a result of the accident. He was suspended for five days.

The plaintiff demanded Mr. Sheehan's $100,000.00 automobile policy limit through the defendant.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper where no genuine issues of material fact exist and where the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating that no genuine issue of material fact exists for any relevant issue and that the moving party is entitled to judgment as a matter of law. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting evidence negating an essential element of the non-moving party's case or by demonstrating that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. See *Flesner* v. *Technical Comm'n Corp.*, 410 Mass. 805, 809 (1991). Once this burden is satisfied, the party opposing summary judgment must allege specific facts establishing the existence of a genuine issue of material fact in order to escape summary judgment. See *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 711 (1991). While the court views the evidence in the light most favorable to the non-moving party, it does not weigh the evidence, determine witness credibility, or make its own findings of fact. *Attorney Gen.* v. *Bailey*, 386 Mass. 367, 370–371 (1982).

B. Analysis

To establish liability, the claimant must show that the injury did not arise from an act within the public official's scope of employment. See *Clickner* v. *Lowell*, 422 Mass. 539, 542 (1996). "The . . . test considers whether the act was in furtherance of the employer's work." *Id.* Applying this standard, the court concludes that the plaintiff has established, as a matter of law, that the act

resulting in the plaintiff's injury did not arise from Mr. Sheehan's scope of employment and that the defendant is therefore liable.

The defendant contends that, although it was the insurer of the vehicle involved in the plaintiff's injury, Mr. Sheehan was an employee of the Town at the time of the accident and, therefore, the defendant is immune from liability for the plaintiff's injuries under the Massachusetts Tort Claims Act, G. L. c. 258, § 2. "The Massachusetts Tort Claims Act provides in part that public employers shall be liable for injuries caused by the negligence of any public employee while acting in the scope of his office or employment. G.L. c. 258, § 2." *Clickner*, 422 Mass. at 541. The defendant relies on a series of workers' compensation cases to support its contention that Mr. Sheehan's actions arose within the scope of his employment. See, i.e., *Mulford* v. *Mangano*, 418 Mass. 407 (1994) (court unable to grant motion for summary judgement on coworker's immunity under the Workers' Compensation Act from liability where injury arose during mixed purpose event); *Wormstead* v. *Town Manager of Saugus*, 366 Mass. 659 (1975) (plaintiff's injury arose under scope of employment for workers' compensation purposes). These cases, however, are inapposite to the facts at hand, as they "involved worker's compensation analysis, not . . . tort liability," as the plaintiff here claims. *Clickner*, 422 Mass. at 852 n.4.

The correct standard by which the court may determine whether Mr. Sheehan acted within the scope of his employment when he injured the plaintiff is whether the action furthered his employer's interests. "Factors to be considered include whether the conduct in question is of the kind the employee is hired to perform, whether it occurs within authorized time and space limits, and whether it is motivated, at least in part, by a purpose to serve the employer." *Id.* at 542. See also *Merlonghi* v. *U.S.*, 620 F.3d 50 (2010) (relying on *Clickner* analysis in determining public employee's actions outside scope of employment where employee threatened and hit civilian with his vehicle).

Mr. Sheehan's actions did not further the interests of his employer. Here, Mr. Sheehan elected to leave the training to run a personal errand that was not of benefit to his employer.[1] He delegated his responsibilities to other officers when he left. Upon his return, he used his personal vehicle to engage in "horse play" with his coworkers, at which time he lost control of his vehicle and seriously injured the plaintiff. In a similar use of his motor vehicle, a public employee was considered acting outside the scope of his employment when he chose to operate his vehicle at a high speed and with disregard for the safety of those around him. See *Merlonghi*, 620 F.3d at 55. There, the court considered the public employee to have acted "in the furtherance of his own agenda" and, therefore, not within the scope of his employment. *Id.*

Mr. Sheehan's actions did take place within the authorized time and space limits of his employer; however, his having left the premises and relinquished his work responsibilities during his departure presents a clear and purposeful break in his employment that day. Mr. Sheehan wore no Department-identifying clothing while he was out, and he would not have responded to any calls unless a "devastating" incident took place. Even if the court considers this to be "on call," that fact alone is not dispositive. See *Clickner*, 422 Mass. at 542 (even where officer on call, he acted outside scope of employment where he caused vehicular accident en route to station).

Finally, Mr. Sheehan's "horse play" in using his motor vehicle to rapidly approach his officers was not motivated by a purpose to serve his employer. No evidence has been submitted to show how Mr. Sheehan's operating his vehicle in such an obviously unsafe manner was motivated to serve the Department. In fact, the Department suspended Mr. Sheehan after the incident—an unlikely result had any imaginable inference that Mr. Sheehan believed this behavior would have served the Department been apparent.

---

[1] The defendant cites *Wormstead*, 633 Mass. at 666, in arguing that, given "the nature of police work, it is undoubted of benefit to a town to have an officer relax for a short period in the middle of a shift." In addition to *Wormstead*'s being an inapt comparison to the analysis at hand—as discussed, *Wormstead* is a workers' compensation case—the court considers this reasoning unavailing as, unlike the officer in *Wormstead*, the officers here were not engaged in a regular duty shift. Rather, they were participating in a training that had a relaxed nature, reflected, for example, by the officers' relaxed dress code.

Given these facts, Mr. Sheehan acted outside the scope of his employment when he struck the plaintiff with his personal vehicle during his lunchbreak at a Department-facilitated firearms training. He is therefore not immune, under G. L. c. 258, § 2,[2] from the plaintiff's recovery efforts. Accordingly, the defendant is liable for the actions of its insured, Mr. Sheehan.

ORDER

For the foregoing reasons it is hereby **ORDERED** that the plaintiff's motion for summary judgment is **ALLOWED** and the defendant's motion for summary judgment is **DENIED**.

Raffi N. Yessayan
Justice of the Superior Court

DATED: September 10, 2020

[2] Similarly, the defendant argued that the exclusivity portion of the Massachusetts Tort Claims Act bars recovery. See *Monahan* v. *Methuen*, 408 Mass. 381 (1990) (firefighter receiving workers' compensation benefits unable to recover additional damages from his employer). There, the plaintiff was unable to recover workers' compensation benefits as well as state an independent cause of action in tort against the same governmental entity. Here, the plaintiff has received workers' compensation benefits as he was on duty and paid overtime during his lunch, and he seeks to recover against Mr. Sheehan personally, whose actions that caused the plaintiff's injuries were not within the scope of his governmental employer, not his public employer

ALM GL ch. 41, § 111F

Current through Chapters 1-251 and the November ballot measures of the 2020 Legislative Session of the 191st General Court.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE VII CITIES, TOWNS AND DISTRICTS (Chs. 39 - 49A) > TITLE VII CITIES, TOWNS AND DISTRICTS (Chs. 39 — 49A) > Chapter 41 Officers and Employees of Cities, Towns and Districts (§§ 1 — 133)

§ 111F. Leave Without Loss of Pay for Certain Incapacitated Police Officers and Fire Fighters; Indemnification of Cities, Towns, Fire and Water Districts.

Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, or a police officer or fire fighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for any period after such police officer or fire fighter has been retired or pensioned in accordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city, town or district determines that such incapacity no longer exists. All amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, the regular compensation of such police officer or fire fighter. This section shall also apply to

any member of a fire department who is subject to the provisions of chapter one hundred and fifty-two if he is injured at a fire and if he waives the provisions of said chapter. This section shall also apply to any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the Massachusetts military reservation fire department and members of the 104th fighter wing fire department and, for the purposes of this section, the Massachusetts Port Authority, the Massachusetts military reservation and the Barnes Air National Guard Base shall be fire districts.

Where the injury causing the incapacity of a firefighter or police officer for which he is granted a leave without loss of pay and is paid compensation in accordance with the provisions of this section, was caused under circumstances creating a legal liability in some person to pay damages in respect thereof, either the person so injured or the city, town or fire or water district paying such compensation may proceed to enforce the liability of such person in any court of competent jurisdiction. The sum recovered shall be for the benefit of the city, town or fire or water district paying such compensation, unless the sum is greater than the compensation paid to the person so injured, in which event the excess shall be retained by or paid to the person so injured. For the purposes of this section, "excess" shall mean the amount by which the total sum received in payment for the injury, exclusive of interest and costs, exceeds the amount paid under this section as compensation to the person so injured. The party bringing the action shall be entitled to any costs recovered by

him. Any interest received in such action shall be apportioned between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively, inclusive of interest and costs. The expense of any attorney's fees shall be divided between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively.

Whoever intentionally or negligently injures a firefighter or police officer for which he is granted a leave without loss of pay and is paid compensation in accordance with the provisions of this section shall be liable in tort to the city, town or fire or water district paying such compensation for all costs incurred by such city, town or fire or water district in replacing such injured police officer or firefighter which are in excess of the amount of compensation so paid.

Notwithstanding the provisions of this section, section 100 or any other general or special law to the contrary, any city, town or district that accepts this paragraph may establish and appropriate amounts to a special injury leave indemnity fund for payment of injury leave compensation or medical bills incurred under this section or said section 100, and may deposit into such fund any amounts received from insurance proceeds or restitution for injuries to firefighters or police officers. The monies in the special fund may be expended, with the approval of the chief executive officer and without further appropriation, for paying expenses incurred under this section or said section 100, including, but not limited to, expenses associated with paying compensation other than salary to injured firefighters or police

officers and providing replacement services for the injured firefighters or police officers, in lieu of or in addition to any amounts appropriated for the compensation of such replacements. This section shall also apply to any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the Massachusetts military reservation fire department, members of the 104th fighter wing fire department and members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 and, for the purposes of this section, the Massachusetts Port Authority, the Massachusetts Military Reservation, the Barnes Air National Guard Base and the Devens Regional Enterprise Zone established pursuant to said chapter 498 shall be fire districts.

The presumption established in section 94B of chapter 32 shall apply in determining eligibility for leave without loss of pay under this section when such leave is taken: (i) by a person serving in a position covered by both this section and said section 94B of said chapter 32; and (ii) as a result of a disabling condition of cancer identified in said section 94B of said chapter 32.

History

1952, 419; 1958, 266; 1961, 218; 1964, 149; 1977, 646, § 2; 1990, 313; 2008, 308, § 9; 2014, 48, § 5; 2014, 313, 8; 2016, 218, § 60, effective November 7, 2016; 2017, 161, § 8, effective October 15, 2017; 2018, 148, § 3, effective October 18, 2018.

ALM GL ch. 41, § 111F

Annotated Laws of Massachusetts

End of Document

ALM GL ch. 152, § 26

Current through Chapters 1-251 and the November ballot measures of the 2020 Legislative Session of the 191st General Court.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE XXI LABOR AND INDUSTRIES (Chs. 149 - 154) > TITLE XXI LABOR AND INDUSTRIES (Chs. 149 — 154) > Chapter 152 Workers' Compensation (§§ 1 — 86)

§ 26. Payments; Presumption of Employment; Extraterritoriality.

If an employee who has not given notice of his claim of common law rights of action under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer or self-insurer, as hereinafter provided; provided, that as to an injury occurring without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it. For the purposes of this section any person, while operating or using a motor or other vehicle, whether or not belonging to his employer, with his employer's general authorization or approval, in the performance of work in connection with the business affairs or undertakings of his employer, and whether within or without the commonwealth, and any person who, while engaged in the usual

course of his trade, business, profession or occupation, is ordered by an employer, or by a person exercising superintendence on behalf of such employer, to perform work which is not in the usual course of such work, trade, business, profession or occupation, and while so performing such work, receives a personal injury, shall be conclusively presumed to be an employee, and if an employee while acting in the course of his employment receives injury resulting from frost bite, heat exhaustion or sunstroke, without having voluntarily assumed increased peril not contemplated by his contract of employment, or is injured by reason of the physical activities of fellow employees in which he does not participate, whether or not such activities are associated with the employment, such injury shall be conclusively presumed to have arisen out of the employment.

If an employee is injured by reason of such physical activities of fellow employees and the department finds that such activities are traceable solely and directly to a physical or mental condition resulting from the service of any of such fellow employees in the armed forces of the United States, the entire amount of compensation that may be found due shall be paid by the insurer, self-insurer or self-insurance group; provided, however, that upon an order or pursuant to an approved agreement of the department, the insurer, self-insurer or self-insurance group shall be reimbursed by the state treasurer from the trust fund established by section sixty-five for all amounts of compensation paid under this section.

History

1911, 751, II, § 1; 1927, 309, § 3; 1930, 205; 1931, 170; 1937, 370, § 1; 1943, 302; 1943, 529, § 8; 1945, 623, § 1; 1955, 174, § 5; 1973, 855, § 1; 1986, 662, § 26; 1991, 398, § 40.

End of Document

ALM GL ch. 258, § 1

Current through Chapters 1-251 and the November ballot measures of the 2020 Legislative Session of the 191st General Court.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES (Chs. 246 - 258E) > TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES (Chs. 246 — 258E) > Chapter 258 Claims and Indemnity Procedure for the Commonwealth, its Municipalities, Counties and Districts and the Officers and Employees Thereof (§§ 1 — 14)

§ 1. Definitions.

As used in this chapter the following words shall have the following meanings:—

"Acting within the scope of his office or employment", acting in the performance of any lawfully ordered military duty, in the case of an officer or soldier of the military forces of the commonwealth.

"Executive officer of a public employer", the secretary of an executive office of the commonwealth, or in the case of an agency not within the executive office, the attorney general; the adjutant general of the military forces of the commonwealth; the county commissioners of a county; the mayor of a city, or as designated by the charter of the city; the selectmen of a town or as designated by the charter of the town; and the board, directors, or committee of a district in the case of the public employers of a district, in the case of the Massachusetts Bay Transportation Authority, its general

manager and rail and transit administrator, and, in the case of any other public employer, the nominal chief executive officer or board.

"Public attorney", the attorney who shall defend all civil actions brought against a public employer pursuant to this chapter. In the case of the commonwealth he shall be the attorney general; in the case of any county he shall be the district attorney as designated in sections twelve and thirteen of chapter twelve; in the case of a city or town he shall be the city solicitor or town counsel, or, if the town has no such counsel, an attorney employed for the purpose by the selectmen; in the case of a district he shall be an attorney legally employed by the district for that purpose; and, in the case of the Massachusetts Bay Transportation Authority, the attorney shall be the general counsel. A public attorney may also be an attorney furnished by an insurer obligated under the terms of a policy of insurance to defend the public employer against claims brought pursuant thereto.

"Public employee", elected or appointed, officers or employees of any public employer, whether serving full or part-time, temporary or permanent, compensated or uncompensated, and officers or soldiers of the military forces of the commonwealth. For purposes of this chapter, the term "public employee" shall include an approved or licensed foster caregiver with respect to claims against such caregiver by a child in the temporary custody and care of such caregiver or an adult in the care of such caregiver for injury or death caused by the conduct of such caregiver; provided, however, that such

conduct was not intentional, or wanton and willful, or grossly negligent. For this purpose, a caregiver of adults means a member of a foster family, or any other individual, who is under contract with an adult foster care provider as defined and certified by the division of medical assistance.

"Public employer", the commonwealth and any county, city, town, educational collaborative, or district, including the Massachusetts Department of Transportation, the Massachusetts Bay Transportation Authority, any duly constituted regional transit authority and the Massachusetts Turnpike Authority and any public health district or joint district or regional health district or regional health board established pursuant to the provisions of section twenty-seven A or twenty-seven B of chapter one hundred and eleven, and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof including a local water and sewer commission including a municipal gas or electric plant, a municipal lighting plant or cooperative which operates a telecommunications system pursuant to section 47E of chapter 164, department, board and commission, which exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Port Authority, or any other independent body politic and corporate. With respect to public employees of a school committee of a city or town, the public employer for the purposes of this chapter shall be deemed to be said respective city or town.

"Serious bodily injury", bodily injury which results in a permanent disfigurement, or loss or impairment of a bodily function, limb or organ, or death.

History

1978, 512, § 15; 1980, 151; 1980, 315, § 1; 1981, 179; 1981, 403; 1983, 537; 1992, 343, § 5; 1993, 110, § 227; 1993, 467; 1998, 459, §§ 1, 2; 2000, 12, § 9; 2009, 25, §§ 123-125; 2009, 120, § 22A; 2012, 132, §§ 3, 4.

End of Document

ALM GL ch. 258, § 2

Current through Chapters 1-251 and the November ballot measures of the 2020 Legislative Session of the 191st General Court.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES (Chs. 246 - 258E) > TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES (Chs. 246 — 258E) > Chapter 258 Claims and Indemnity Procedure for the Commonwealth, its Municipalities, Counties and Districts and the Officers and Employees Thereof (§§ 1 — 14)

§ 2. Scope of Liability of Public Body or Officer; Remedies.

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of $100,000; provided, however, that all claims for serious bodily injury against the Massachusetts Bay Transportation Authority shall not be subject to a $100,000 limitation on compensatory damages. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public

employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter. Failure to provide such reasonable cooperation on the part of a public employee shall cause the public employee to be jointly liable with the public employer, to the extent that the failure to provide reasonable cooperation prejudiced the defense of the action. Information obtained from the public employee in providing such reasonable cooperation may not be used as evidence in any disciplinary action against the employee. Final judgment in an action brought against a public employer under this chapter shall constitute a complete bar to any action by a party to such judgment against such public employer or public employee by reason of the same subject matter.

Notwithstanding that a public employee shall not be liable for negligent or wrongful acts as described in the preceding paragraph, if a cause of action is improperly commenced against a public employee of the commonwealth alleging injury or loss of property or personal injury or death as the result of the negligent or wrongful act or omission of such employee, said employee may request representation by the public attorney of the commonwealth. The public attorney shall defend the public employee with respect to the cause of action at no cost to the public employee; provided, however, that the public attorney determines that the public employee was acting within the scope of his office

or employment at the time of the alleged loss, injury, or death, and, further, that said public employee provides reasonable cooperation to the public employer and public attorney in the defense of any action arising out of the same subject matter. If, in the opinion of the public attorney, representation of the public employee, under this paragraph would result in a conflict of interest, the public attorney shall not be required to represent the public employee. Under said circumstances, the commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the public employee in his defense of the cause of action; provided, however, that the same conditions exist which are required for representation of said employee by the public attorney under this paragraph.

History

1978, 512, § 15; 1984, 279, § 1; 2009, 120, § 23.

End of Document

Chase v. United States Postal Serv.

United States District Court for the District of Massachusetts

November 4, 2013, Decided; November 4, 2013, Filed

CIVIL ACTION NO. 12-11182-DPW

Reporter

2013 U.S. Dist. LEXIS 157592 *; 2013 WL 5948373

ROBERT CHASE, Plaintiff, v. UNITED STATES POSTAL SERVICE, MICHAEL KING and THE UNITED STATES, Defendants.

Subsequent History: Findings of fact/conclusions of law at, Judgment entered by Chase v. United States Postal Serv., 2016 U.S. Dist. LEXIS 25147 (D. Mass., Mar. 1, 2016)

Counsel: [*1] For Robert Chase, Plaintiff: Lori A Jodoin, LEAD ATTORNEY, Rodgers, Powers & Schwartz LLP, Boston, MA.

For United States Postal Service, Michael King, United States of America, As sole defendant on Counts III, IV, and V., Defendants: Christine J. Wichers, LEAD ATTORNEY, United States Attorney's Office, Boston, MA.

Judges: DOUGLAS P. WOODLOCK, UNITED STATES DISTRICT JUDGE.

Opinion by: DOUGLAS P. WOODLOCK

Opinion

MEMORANDUM AND ORDER

Plaintiff Robert Chase brings this action against defendants United States Postal Service ("USPS") and its employee supervisor Michael King, alleging violations of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2611 *et seq.*, and various intentional torts arising out of the termination of his employment by USPS.

Specifically, Mr. Chase asserts claims for (1) interference with his use of the FMLA, in violation of 29 U.S.C. § 2615; (2) retaliation for taking FMLA leave, in violation of 29 U.S.C. § 2615; (3) intentional interference with advantageous business relations; (4) intentional infliction of emotional distress; and (5) defamation. The defendants have moved for summary judgment as to all counts. For the reasons set forth below, I will grant the defendants' motion for summary judgment [*2] as to all claims except those for FMLA retaliation by the USPS and Mr. King.

I. BACKGROUND

A. Facts

Viewing the evidence in the light most favorable to the plaintiff, the record before me discloses the following.

1. The Plaintiff's Work and Leave History

Robert Chase began working as a letter carrier for USPS in 1997. Mr. Chase worked at several other locations before transferring to the Brookline, Massachusetts Post Office in 2002 or 2003. Throughout his fourteen year career with USPS, Mr. Chase's work performance was satisfactory or above. He was punctual, reliable and attentive to his job, and prior to the events giving rise to this lawsuit, he was never disciplined nor subject to any corrective action.

Mr. Chase's brother, Michael Chase ("Michael"), began working as a letter carrier in 1998, and transferred to the Brookline Post Office sometime between 2003 and 2005.

Defendant Michael King has worked for USPS since 1988. He served in the position of manager at the Brookline Post Office from February 2005 until February 2011, and therefore was the Chase brothers' manager at all times relevant to this lawsuit. Mr. King admitted in his deposition that he did not have any issue with Mr. Chase's [*3] job performance as a letter carrier.

In September 2006, Mr. Chase injured his knee on the job and was out of work for about a week. [1] In November 2006, a few months after Mr. Chase returned to work, Mr. King got on the public address system at the Brookline Post Office and said: "Will Bob Mr. Chase, the injury fraud specialist, please report to the office." After making the announcement and off of the public address system, Mr. King laughed. The Chief Shop Steward (union representative) for the Brookline Post Office, Joseph DeMambro, witnessed this incident. Mr. DeMambro regarded Mr. King's action as inappropriate. According to Mr. DeMambro, over one-hundred employees and potentially some postal customers may have heard the announcement.

On July 21, 2010, Mr. Chase was involved in a motor vehicle accident while on duty. Mr. Chase's vehicle was parked when it was struck by another vehicle driven by an elderly woman who had fallen asleep at the wheel. Mr. King responded to the scene and observed the severity of the accident. Mr. King later testified in his deposition that upon seeing the damage to the vehicles, he expected that Mr. [*4] Chase would have been injured. The other driver died as a result of the accident. Mr. Chase was treated at the hospital and released the same day, having been diagnosed with a sprained shoulder and damaged rotator cuff.

According to Mr. DeMambro, Mr. King pressured him to encourage Mr. Chase not to file a worker's compensation claim so that the injury would not show up in the statistics for the Brookline branch; these were statistics on which Mr. King's job performance, pay, and bonuses were measured. [2] Shortly after his injury, Mr. Chase nevertheless

---

[1] This period of leave was not designated as FMLA leave.

submitted a claim for worker's compensation leave and benefits, which was approved.

For the first forty-five days after his injury, Mr. Chase was paid by USPS. Beginning September 7, 2010, Mr. Chase received workers' compensation benefits, which amounted to two-thirds his salary plus health insurance. Mr. Chase also applied for leave under the FMLA to run concurrently [*5] with his worker's compensation leave. His request was granted retroactive to the date of his injury. Mr. King received a copy of Mr. Chase's FMLA approval notice. The twelve weeks of FMLA leave to which Mr. Chase was entitled for calendar year 2010 expired on October 12, 2010. When the new year began, he became eligible to take as much as another twelve weeks of FMLA leave. The twelve weeks of FMLA leave to which Mr. Chase was entitled in 2011 expired no later than March 26, 2011. With respect to this second period of FMLA leave, Mr. King did not know it had been designated as such.

Mr. King frequently expressed his concern to Mr. DeMambro over how the statistics for the branch and for himself were negatively impacted by injured employees out on medical leave and workers' compensation. Mr. King also told Mr. DeMambro several times that he wanted to avoid having to explain injuries during calls with the district Postmaster because they were several hours long and were "pure torture." Mr. Chase contends that Mr. King held a preconceived notion that employees who were injured on the job or required medical leave were faking their conditions or injuries or that they were liars, and that [*6] Mr. King

---

[2] For purposes of summary judgment, the defendants accept as true that Mr. DeMambro asked Mr. Chase not to file a worker's compensation claim, but deny that Mr. King pressured Mr. DeMambro to do so. The defendants also deny that injury statistics affected Mr. King's compensation.

would frequently withhold sick pay from employees in violation of collective bargaining agreements.

When Mr. Chase came into the Brookline branch to file his injury paperwork at the end of July or beginning of August 2010, Mr. King made another announcement over the loudspeaker directed at Mr. Chase. Mr. King announced: "There's a job posted on the bulletin board for an injury compensation specialist since you're the biggest fraud when it comes to injuries." There was in fact a job posted on the bulletin board for an "injury compensation specialist." The announcement was heard by Mr. Chase's co-workers and possibly by postal customers in the lobby. On another occasion, Mr. King asked Mr. DeMambro whether Mr. Chase was giving advice to a co-worker who had been injured on the job, expressing his belief to Mr. DeMambro that Mr. Chase was the "biggest fraud when it comes to workers' comp."

2. Mr. Chase's Criminal Proceedings and Related USPS Action

On September 18, 2010, Brookline police arrested Mr. Chase and his brother Michael for possession of cocaine with intent to distribute. The arrest occurred at Michael's apartment. Neither Mr. Chase nor Michael was on-duty at the time of [*7] the arrest.

The police report indicates that police visited Michael's apartment to investigate a possible incident of domestic abuse involving Michael and his girlfriend. Officers knocked on the apartment door and Michael let them in. Once inside, officers observed Mr. Chase walk over to a table in the middle of the apartment (which was only 500 square feet) and grab a clear plastic baggie filled with a substance believed to be

cocaine. One of the officers ordered Mr. Chase to move away from the table and drop the baggie. Mr. Chase pointed to the baggie and said "That's his" (presumably referring to his brother Michael). Another officer indicated to Michael that he believed the substance in the bag to be cocaine. Michael denied the bag belonged to him, and denied that there were any more drugs in the apartment. Michael declined to consent to a search of the apartment.

After placing both men under arrest, officers recovered $387 and a straw of the variety commonly used to ingest narcotics, both of which were located next to the sink. Michael appeared to be under the influence of cocaine but, in an interview with police, denied that he had possessed or consumed any cocaine.

Police later [*8] executed a search warrant at the apartment and recovered a safe located in a closet that was emitting a narcotic odor (detected by a drug-sniffing canine), as well as a plate located inside a kitchen drawer containing what appeared to be lines of cocaine. Inside the safe, officers found several small bags of pills, a clear bag containing approximately twelve grams of a substance believed to be cocaine, a clear bag containing blue powder, and a digital scale. [3] As a result of his arrest, Mr. Chase was charged with possession of cocaine with intent to distribute, in violation of Mass. Gen. Laws ch. 94C, § 32A (a), and conspiracy to violate the drug laws, in violation of Mass. Gen. Laws ch. 94C, § 40. Michael was charged separately.

Shortly thereafter, Mr. King became aware that Mr. Chase and his brother Michael had been arrested. Mr. King searched the internet and

[3] Although Mr. Chase purports to dispute the accuracy of the police report, he does not explain in what respects he disagrees with the report, nor does he offer any competing version of the events leading to his arrest.

found a *Brookline Tab* article reporting the arrest and the fact that Mr. Chase and his brother were letter carriers [*9] in Brookline. The article reported details contained in the police report, including that Mr. Chase had allegedly grabbed a plastic bag containing what was believed to be cocaine off the table, and that there was nearly $400 and other drug-related paraphernalia found at the scene. After the article was published, a postal customer called Mr. King to ask if her mail was safe. Mr. King asked the USPS Office of the Inspector General to obtain a copy of the police report, which Mr. King read.

Mr. King stated in his deposition that after reading the *Brookline Tab* article and the police report, he was concerned with the seriousness of the crimes with which Mr. Chase and his brother were charged, and the negative publicity the incident generated for the Brookline Post Office. In response, Mr. King made the decision to place Michael Chase on emergency off-duty status in accordance with the applicable collective bargaining agreement between USPS and the letter carriers' union. Mr. King did not take similar action with respect to Mr. Chase, although the parties dispute whether this decision was due to the fact that Mr. Chase was on workers' compensation leave at the time and was therefore already [*10] off-duty. However, because Mr. Chase was not placed on emergency off-duty status, he, unlike his brother, was allowed in the Brookline Post Office and on postal premises.

During the fall and early winter of 2010, Mr. Chase frequently visited the Brookline Post Office to submit injury paperwork, discuss union matters, and communicate with Mr. King. Mr. Chase and Mr. King had many conversations about the arrest, and Mr. King continued to pressure Mr. Chase to return to work even after the arrest. On one occasion, Mr.

King told Mr. Chase that he would "sic Jeff Powers from [the Office of the Inspector General]" on Mr. Chase if he did not get himself medically cleared to return to work, and on another, Mr. King said: "I really need you. I'm four people down." Mr. Chase contends that when he explained his side of the story concerning the arrest, Mr. King believed his explanation that he did not use drugs, and agreed that the charges against him were baseless and would or should be dismissed. Mr. King only stopped communicating with Mr. Chase about returning to work following a December 2010 phone call in which Mr. King told Mr. Chase "go fuck yourself" after Mr. Chase contacted him for help [*11] with an issue related to his medical leave.

In the ensuing months, Mr. King monitored the criminal cases against the Chase brothers, both of which were repeatedly continued. Mr. King testified in his deposition and contends in this action that eventually he felt that he could no longer continue waiting for the criminal case against Mr. Chase to resolve, because USPS requires that personnel actions be taken within a reasonable amount of time after the underlying events. On January 13, 2011, Mr. King sent Mr. Chase a letter scheduling a pre-disciplinary interview ("PDI"), [4] "in regard to your arrest concerning drug related activities," for January 18, 2011. Central to his allegations in this lawsuit, Mr. Chase disputes that Mr. King's decision to commence the process of terminating him in January 2011, five months after his arrest, was genuinely motivated by concern stemming from that arrest. Rather, Mr. Chase alleges that Mr. King used

[4] Although there is some dispute over the exact nature or purpose of the PDI, both parties acknowledge that the PDI is the first step in the formal discipline process, and that [*12] Mr. King frequently referred to it as an employee's "day in court."

the drug arrest as pretext to terminate him for taking protected FMLA leave.

At Mr. Chase's request, the PDI was conducted over the telephone, with Mr. Chase, Mr. King, and Mr. DeMambro participating. Mr. Chase was asked about the circumstances surrounding his arrest but generally declined to answer, citing advice of his criminal counsel. [5]

Following the PDI, and purportedly due to the seriousness of the criminal charges pending against Mr. Chase, the negative publicity surrounding the Brookline Post Office as a result the arrest, and Mr. Chase's refusal to answer questions in his PDI, Mr. King sought and received approval from his supervisor, William Downes, to remove Mr. Chase for unacceptable conduct. On January 28, 2011, Mr. King sent a memorandum to the Postal Service's Office of Labor Relations asking them to prepare a notice [*13] of removal for Mr. Chase for "Failure to Perform Duties in a Satisfactory Manner." Mr. King referenced Mr. Chase's arrest and refusal to answer questions at his PDI.

The removal notice, which was dated February 1, 2011, and signed by Mr. King, stated that Mr. Chase would be removed for "Failure to Perform Your Duties in a Satisfactory Manner," specifically citing Mr. Chase's arrest and refusal to answer questions during his PDI. The notice stated: "Your actions in this matter are considered to be very serious," and cited two specific policies in the USPS Employee Labor Relations Manual: Section 665.25 (Illegal Drug Sale, Use, or Possession)) and Section 665.16 (Behavior and Personal Habits). [6] The

---

[5] Mr. Chase disputes that the questions and his answers at the PDI were accurately recorded, but does not explain in what ways the record is incorrect. Mr. Chase further alleges that prior to the PDI, he had already met with Mr. King to discuss the police report with him, and spoken with him over the telephone concerning the arrest several times since September 2010.

notice explained that Mr. Chase would be removed on March 3, 2011, or later if his union filed a grievance on his behalf.

3. Grievance and Arbitration Proceedings

In response to the notice of removal, Mr. Chase's union filed a grievance under the collective bargaining agreement, alleging that his removal was without just cause. As part of the grievance process, Mr. Chase was asked to submit a statement. In response, Mr. Chase submitted a statement that referred all questions about his criminal case to his attorney, and asserted only that "any allegation regarding potential criminal activity is completely unfounded."

After the grievance was rejected, Mr. Chase's union told him [*15] that it had worked out a deal with USPS in which Mr. Chase could accept a fourteen-day suspension in lieu of his removal if his brother Michael - who also had been issued a notice of removal and for whom the union also was pursuing a grievance - were to resign. The union recommended that Mr. Chase accept the offer. Michael, however, refused to resign, and Mr. Chase rejected the offer. The parties dispute

---

[6] Those sections state as follows:

> **665.25 Illegal Drug Sale, Use, or Possession:** The Postal Service will not tolerate the sale, possession or use of illegal drugs, while on duty or on postal premises. Employees found to be engaged in these activities are subject to discipline, including removal and/or criminal prosecution where appropriate.
>
> **665.16 Behavior and Personal Habits:** [*14] Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service.

whether Mr. King had any involvement in the decision to make this offer.

On August 31, 2011, the conspiracy charge against Mr. Chase was dropped, the possession with intent to distribute charge was reduced to simple possession, and Mr. Chase was placed on pre-trial probation, subject to random drug testing, for one year.

An arbitration hearing was conducted on September 16, 2011 to determine whether Mr. Chase's notice of removal had been issued for "just cause." The only evidence Mr. Chase presented to the arbitrator concerned the disposition of his criminal case, although he may have misrepresented that the charges had been "dropped" or "dismissed." During the arbitration, a representative for the Postal Service, Michael DeMatteo, made a statement along the lines of: "Don't let Mr. [*16] Chase fool you; he has been living a great, tax free life while the rest of us have to come to work. For all he [presumably, Mr. Chase] knows, all his paperwork is fraudulent." [7] On September 30, 2011, the arbitrator issued a written decision upholding Mr. Chase's removal. The arbitrator specifically found that USPS had shown by clear and convincing evidence that Mr. Chase had possessed a Class B illegal drug, which violated a reasonable and equitably enforced USPS disciplinary rule.

Mr. Chase's termination from USPS became effective on September 30, 2011. As of the date of his termination, Mr. Chase had not yet returned to work from his accident. In his deposition, Mr. Chase testified that

---

[7] The parties dispute the intended meaning of this statement. Mr. Chase claims it evidences USPS' intent to terminate him because of his injury leave. The defendants counter that it was "a response to an income-related misrepresentation by [Mr. Chase] during the arbitration proceeding." The hearing was not transcribed or recorded.

the earliest he was physically able to return to work (with some limitations on activity) was November 8, 2012.

B. Procedural History

Mr. Chase commenced this action in June [*17] 2012, alleging that the defendants, through Mr. King, used Mr. Chase's drug arrest as a pretext to terminate him for taking protected FMLA leave. In addition, Mr. Chase seeks to hold Mr. King liable for defamation and intentional infliction of emotional distress arising from statements Mr. King made suggesting Mr. Chase was faking his injuries and fraudulently taking medical leave, as well as intentional interference with advantageous business relations for allegedly discharging Mr. Chase after he refused to procure his brother's resignation.

In August 2012, the Attorney General of the United States certified that Mr. King had acted within the scope of his employment for purposes of the non-FMLA intentional torts (Counts III-V), and the United States substituted itself as the sole defendant pursuant to 28 U.S.C. § 2679(d)(1) as to those counts. Defendants then moved to dismiss Count III (intentional interference) and Count V (defamation) on the grounds that Mr. King was acting within the scope of his employment with respect to those claims, and the that Federal Tort Claims Act does not waive sovereign immunity for either tort. Defendants also moved to dismiss Count IV (intentional infliction [*18] of emotional distress) on the ground that Mr. Chase failed to exhaust administrative remedies as required under the FTCA for that claim. For his part, the individual defendant, Mr. King, moved to dismiss Counts I and II, arguing that public employees may not be held individually liable for violations of

the FMLA. I denied the motions to dismiss in order to address the issues presented therein on a summary judgment record. Now before me are motions by the defendants for summary judgment against all counts.

II. STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A 'genuine' issue is one that could be resolved in favor of either party, and a 'material fact' is one that has the potential of affecting the outcome of the case." *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 19 (1st Cir. 2004).

The burden is on the nonmoving party "to point to specific facts demonstrating that there is, indeed, a trialworthy issue." *Id.* To survive a motion for summary judgment, [*19] the nonmoving party "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court must view "the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor," *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990), in order to determine "whether the evidence presents a sufficient disagreement ... or ... is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

III. ANALYSIS

A. FMLA claims (Counts I and II)

The FMLA, 29 U.S.C. § 2601 *et seq.*, grants two distinct types of rights to eligible employees: "prescriptive" rights and "proscriptive" rights. *Hodgens v. General Dynamics Corp.*, 144 F. 3d 151, 159-160 (1st. Cir. 1998).

Among the prescriptive rights it creates are that eligible employees "shall be entitled" to up to twelve weeks of unpaid leave per calendar year when the employee has "a serious health condition that makes [him or her] unable to perform the functions of [his or her] position." 29 U.S.C. § 2612(a)(1)(D). [*20] "Following a qualified absence, the employee is entitled to return to the same position or an alternate position with equivalent pay, benefits, and working conditions, and without loss of accrued seniority." *Hodgens*, 144 F.3d at 159 (citing 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.100(c)). The First Circuit has observed that "[t]hese rights are essentially prescriptive, 'set[ting] substantive floors' for conduct by employers, and creating 'entitlements for employees.'" *Hodgens*, 144 F.3d at 159 (citing *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712-12 (7th Cir. 1997). "As to these rights therefore, the employee need not show that the employer treated other employees less favorably, and an employer may not defend its interference with the FMLA's substantive rights on the ground that it treats all employees equally poorly without discriminating." *Id.* To meet his or her burden in an interference with a substantive

prescriptive rights claim, a plaintiff need only show an entitlement to the disputed leave, no showing as to employer intent is required. *Colburn v. Parker Hannifin/Nichols Portland Div.*, 429 F.3d 325, 331 (1st Cir. 2005). "The issue is simply whether the employer provided [*21] its employee the entitlements set forth in the FMLA - for example, a twelve-week leave or reinstatement after taking a medical leave." *Hodgens*, 144 F.3d at 159.

The proscriptive rights of the FMLA expressly protect employees against retaliation for invoking their prescriptive rights. *Hodgens*, 144 F.3d at 159 (citing 29 U.S.C. § 2615(a)(1) & (2); 29 C.F.R. § 825.220 (1997)). 29 U.S.C. § 2615(a)(1) provides: "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(2) further provides: "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." This means that employers are prohibited from "us[ing] the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." *Hodgens*, 144 F.3d at 160 (quoting 29 C.F.R. § 825.220(c)).

Where an employee alleges violations of the proscriptive rights under the FMLA, "the employer's motive is relevant, and the issue is whether the employer took the adverse action because [*22] of a prohibited reason or for a legitimate non-discriminatory reason." *Hodgens*, 144 F.3d at 160. In such cases, the First Circuit has adopted a familiar framework to analyze "the tricky issue of motivation;" this framework is analogous to that used in cases involving other types of

discrimination, such as discrimination under Title VII of the Civil Rights Act of 1964. *Id.; see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (discrimination under Title VII); *DeNovellis v. Shalala*, 124 F.3d 298, 308 (1st Cir. 1997) (discrimination under ADEA); *Katz v. City Metal Co.*, 87 F.3d 26, 30 n.2 (1st Cir. 1996) (discrimination under ADA).

Under the framework first articulated in *McDonnell Douglas*, a plaintiff employee bears the initial burden of adducing sufficient evidence to establish a prima facie case of discrimination or retaliation. *McDonnell Douglas*, 411 U.S. at 802; *Hodgens*, 144 F.3d at 160. If the employee does so, the burden then shifts to the employer "'to articulate some legitimate, non-discriminatory reason for the employee's [termination],' sufficient to raise a genuine issue of fact as to whether it discriminated against the employee." *Hodgens*, 144 F.3d at 160 (quoting [*23] *McDonnell Douglas*, 411 U.S. at 802). The employer must, through the introduction of admissible evidence, provide an explanation that is legally sufficient to justify a judgment for the employer. *Id.* (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). "If the employer's evidence creates a genuine issue of fact, the presumption of discrimination drops from the case, and the plaintiff retains the ultimate burden of showing that the employer's stated reason for terminating him was in fact a pretext for retaliating against him for having taken protected FMLA leave." *Id.* Even where the employer has successfully shifted the burden back to the employee, "evidence and inferences that properly can be drawn from the evidence presented during the employee's prima facie case may be considered in determining whether the employer's explanation is pretextual." *Id.* (citing *St.*

Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)).

To make out a prima facie case for FMLA-based retaliation, the employee must demonstrate that (1) he availed himself of a protected right under the FMLA; (2) he was adversely affected by an employment decision; and (3) there is a causal connection [*24] between the employee's protected activity and the employer's adverse employment action. *Hodgens*, 144 F.3d at 160, (citing *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997))

In practice, the distinction between claims alleging interference with the substantive rights provided under the FMLA, and claims alleging retaliation for exercising those rights, is not always clear. *See Colburn*, 429 F.3d at 330-32. The ambiguity derives, at least in part, from the fact "there is no clear demarcation in § 2615 between what is 'interference' and what is 'discrimination,' and the terms overlap in some situations." *Id. See, e.g. Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 143-47 & n.9 (3d Cir. 2004); *Bachelder v. Am. W. Airlines*, 259 F.3d 1112, 1124 n.10 (9th Cir. 2001). [8]"[C]ourts have disagreed about whether 'interference' refers to a category of claims separate and distinct from those involving retaliation, or whether it describes a group of unlawful actions, of which retaliation is a part." *Colburn*, 429 F.3d at 331 (citing *Bachelder*, 259 F.3d at 1124 & n.10).

---

[8] As the First Circuit has explained, § 2615(a)(1) expressly prohibits actions by "any employer to interfere with, restrain [*25] or deny the exercise of" the rights created under the FMLA. *Colburn*, 429 F.3d at 331. Although § 2615(a) makes no reference to "retaliation," the First Circuit has interpreted that section, and more specifically the interpretive regulation accompanying it, as "unambiguously" creating a cause of action for retaliation. *Id.* at 331 (citing C.F.R. §825.220(c)).

As the First Circuit has acknowledged, "[t]he term 'interference' may, depending on the facts, cover both retaliation claims . . . and non-retaliation claims." *Colburn*, 429 F.3d at 331 (citing *Hodgens*, 144 F.3d at 159-60 & n.4; *Conoshenti*, 364 F.3d at 142-43). Given the disparate standards of proof applied to the two types of claims, the distinction is not merely academic. *See id.* at 330-32. The First Circuit, however, has made clear that the question whether a FMLA-based claim is properly treated as an interference-type or retaliation/discrimination-type claim does not turn on which statutory section is pled, but rather "on the nature of the facts and the theory of the case." *Id.* at 331.

Turning to the complaint, it is clear that Mr. Chase pleads claims for both interference (Count I) and retaliation (Count II), arising from the [*26] same set of facts. I will address those claims in turn.

1. Interference Claim (Count I)

Mr. Chase claims that his substantive, prescriptive rights under the FMLA were unlawfully interfered with when USPS issued the notice of removal on February 1, 2011, during his 2011 FMLA leave period. The parties do not dispute that Mr. Chase was on FMLA-protected leave on February 1, 2011. However, the parties do dispute whether the issuance of the notice of removal constitutes an interference with or deprivation of his right to take twelve weeks of FMLA leave in 2011, given that he was not actually terminated until September 30, 2011 (well after his twelve weeks expired). I need not resolve this question.

By Mr. Chase's own admission, he was not physically able to return to work until at least November 8, 2012, more than a year after his termination and well after the expiration of his 2011 FMLA leave period. Accordingly, Mr. Chase's interference claim must fail, because USPS was under no obligation to reinstate him where he remained injured and "unable to perform an essential function of [his] position" following the expiration of his FMLA leave period. *Colburn*, 429 F.3d at 332 (citing C.F.R. §825.214(b)) [*27] ("plainly correct" to dismiss interference claim of employee who was fired while on FMLA leave, where employee testified in deposition that he was unable to return to work until well after expiration date of FMLA leave). The defendants are therefore entitled to summary judgment on Count I.

2. Retaliation Claim (Count II)

As to Mr. Chase's claim that he was discharged in retaliation for taking protected FMLA leave, the defendants argue that they are entitled to summary judgment because no reasonable trier of fact could conclude that Mr. Chase was terminated because he took FMLA leave, particularly where an arbitrator ruled that USPS had just cause to terminate him arising from his drug arrest. The defendants concede that Mr. Chase has made out a prima facie case of FMLA retaliation, but argue that they have shifted the burden back to Mr. Chase by producing evidence of a legitimate, non-retaliatory reason - his drug arrest - for terminating Mr. Chase. Mr. Chase does not contest that he bears the burden, and devotes the bulk of his argument attempting to demonstrate pretext.

a. Causation Standard

I address at the outset a dispute that has arisen regarding the type of causation a plaintiff [*28] must show to prove an FMLA retaliation claim. The defendants contend that Mr. Chase must prove that he would not have been terminated *but for* his taking protected FMLA leave, while Mr. Chase appears to contend that he need only demonstrate that his taking of FMLA leave was a "motivating factor" in the decision to terminate him. This dispute stems, at least in part, from a Supreme Court decision last term, *University of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533, 186 L. Ed. 2d 503 (2013), holding that Title VII retaliation claims "must be proved according to traditional principles of but-for causation . . . [which] requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Id.* Because the framework for analyzing FMLA retaliation claims is adopted from the Title VII arena, *see Hodgens*, 144 F.3d at 160, the defendants argue that following *Nassar*, plaintiffs alleging FMLA retaliation must establish but-for causation.

The handful of courts that have had the occasion to consider the impact of *Nasser* on FMLA retaliation claims have generally avoided answering the question, with none concluding that *Nassar* changed the [*29] causation standard for FMLA retaliation claims. *See Ion v. Chevron USA, Inc.*, 731 F.3d 379, 2013 U.S. App. LEXIS 19761, 2013 WL 5379377 at *7 n.11 (5th Cir. Sept. 26, 2013) (concluding genuine issue of material fact existed regardless of which standard were to be applied); *Chaney v. Eberspaecher NA*, 955 F. Supp. 2d 811, 2013 U.S.

Dist. LEXIS 94534, 2013 WL 3381437 at *1 n.1 (E.D. Mich July 8, 2013) (stating "the *Nassar* decision, while informative, did not change any applicable standards [in FMLA cases]); *see also Ford v. Berry Plastics Corp.*, 2013 U.S. Dist. LEXIS 138948, 2013 WL 5442355 at *10 n.8 (D. Md. Sept. 27, 2013) (noting that even if *Nasser* applied to FMLA claims, a plaintiff at the summary judgment stage is "not required to conclusively establish the causal connection required to ultimately prevail.").

The *Nassar* holding derives from what the Court felt was a "deliberate" "structural choice[]" by Congress to distinguish Title VII status-based discrimination claims, in which the plaintiff alleges the employer discriminated against him because of his protected status, and Title VII retaliation claims, in which the plaintiff alleges that the employer retaliated against him for complaining of discriminatory treatment. *See Nassar*, 133 S. Ct. at 2529. Previously, in *Price Waterhouse v. Hopkins*, the [*30] Supreme Court had interpreted Title VII's prohibition regarding discrimination "against any individual . . . *because of* race, color, religion, sex, or national origin," to require a plaintiff to show only that "one of the prohibited traits was a 'motivating' or 'substantial factor' in the employer's [adverse] decision." 490 U.S. 228, 258, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (emphasis added). Following that decision, Congress passed the Civil Rights Act of 1991, 105 Stat. 1071, which amended Title VII to (among other things) codify the "motivating factor" standard from *Price Waterhouse*. *See Nassar*, 133 S.Ct. at 2526.

The Supreme Court decided in *Nassar*, however, that when Congress codified that standard, it was incorporated only into the section

prohibiting status-based discrimination, 42 U.S.C. §2000e-2(m), and *not* into the section prohibiting retaliation, 42 U.S.C. §2000e-3(a). *Id.* at 2526-2527. Accordingly, the Court concluded that in the absence of an indication that the "motivating factor" standard was intended to apply to retaliation claims, the ordinary meaning of the phrase "because," as it appears in the anti-retaliation provision, compels the conclusion that "Title VII retaliation claims require proof that [*31] the desire to retaliate was the but-for cause of the challenged employment action." *Nassar*, 133 S. Ct. at 2528. [9]

On the one hand, the Supreme Court's decision in *Nassar* appears to rest on Title VII's statutory scheme (and [*32] that of the ADEA at issue in *Gross*) and the specific text of its retaliation provision. In contrast, as the Fifth Circuit observed, "[t]he relevant provision of the FMLA uses the word 'for' in lieu of the phrase 'because of,' the language contained in both the Title VII provision at issue in *Nassar* . . . and the ADEA provision at issue in *Gross*." *Ion*, 2013 U.S. App. LEXIS 19761, 2013 WL 5379377 at *7 n.11.

The United States Department of Labor has interpreted this provision to prohibit employers from "us[ing] the taking of FMLA leave *as a negative factor* in employment actions." 29 C.F.R. § 825.220 (c) (emphasis added); *see Ion*, 2013 U.S. App. LEXIS 19761, 2013 WL 5379377 at *7

---

[9] The Supreme Court reached this result in a somewhat circular fashion. It first concluded in *Gross v. FBL Financial Servs.*, Inc. 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009), that because the "motivating-factor" standard was not an "organic part of Title VII," it could not be read into the section of the Age Discrimination and Employment Act ("ADEA") prohibiting discrimination based on age, *see* 29 U.S.C. § 623(a)(1), and accordingly, that section's use of the familiar "because of" language mandated proof of but-for causation. *See Nassar*, 133 S.Ct. at 2527-28 (citing *Gross*, 557 U.S. at 176, 178 n.5). Then, in *Nassar*, the Court concluded that, "[g]iven the lack of any meaningful difference between the text in [Title VII's anti-retaliation provision] and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Id.* at 2528 (citing *Gross*, 557 U.S. at 176).

n.11. However, the Supreme Court in *Nassar* expressly declined to grant deference to "longstanding agency views" of the Equal Employment Opportunity Commission that Title VII retaliation claims were subject to a motivating-factor causation standard. *See Nassar*, 133 S. Ct. at 2533.

The *Nassar* Court also hinted at policy-based underpinnings for its decision, observing that "[t]he proper interpretation and implementation of [the Title VII provision at issue] and its causation standard have central importance to the fair and responsible allocation of resources in the judicial [*33] and litigation systems. This is of particular significance because claims of retaliation are being made with ever increasing frequency." *Id.* at 2531.

Finally, and perhaps most importantly, the Supreme Court in *Nassar* observed that "[i]n the usual course", "causation in fact . . . is a standard requirement of any tort claim . . . includ[ing] federal statutory claims of workplace discrimination," and "this standard requires the plaintiff to show 'that the harm would not have occurred' in the absence of - that is, but for - the defendant's conduct. *Nassar*, 133 S. Ct. at 2522-25 (quoting Restatement of Torts §§ 431 and 432).

For several reasons then, it is not entirely clear that the Supreme Court would distinguish the FMLA's retaliation provision based on its use of "for" instead of "because of," or defer to agency interpretations of that provision. *See id.* at 2547 (Ginsburg, J., dissenting) ("Indeed, the Court appears driven by a zeal to reduce the number of retaliation claims filed against employers.").

When the First Circuit decided *Hodgens* in 1998, it could hardly have foreseen that its general analogy between FMLA and Title VII claims should incorporate the nuanced, bifurcated causation [*34] analysis developed by the Supreme Court over a decade later in *Nassar.* In fact, even following the establishment of the "motivating factor" standard by *Price Waterhouse*, it appears that the First Circuit regarded but-for causation and mixed-motive causation to be essentially the same in the context of employment discrimination cases. *See Tatro v. Kervin*, 41 F.3d 9, 18 (1st Cir. 1994) (observing "This Circuit has consistently applied a 'but for' standard in mixed motive employment discrimination cases" and stating that, in an analogous § 1983 action, "plaintiff need only show that the officer's intent or desire to curb the expression was the *determining* or *motivating* factor in making the arrest, in the sense that the officer would not have made the arrest 'but for' that determining factor."). In short, the First Circuit, at least before *Nassar*, seems to have collapsed "motivating factor" causation into "but-for" causation."

More recently, however, The First Circuit in *Palmquist v. Shinseki*, 689 F.3d 66, 77 (1st Cir. 2012), held that but-for causation applies to retaliation claims under the Rehabilitation Act, 29 U.S.C. §§ 701-796. Although *Palmquist* was issued almost one year prior [*35] to *Nassar*, much of its analysis appears to anticipate *Nassar.* The take-away from *Palmquist*, as with *Nassar*, is that if Congress intended a "motivating-factor" causation standard to apply to a particular statutory discrimination or retaliation claim, it would have explicitly written that standard into the statute. *See Palmquist*, 689 F.3d at 73-74, 76. Where instead, the Rehabilitation Act adopted its causation standard from the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-

12213, and the ADA uses the word "because," normal but-for causation will apply. *Palmquist*, 689 F.3d at 73. The fact that Congress contemporaneously amended Title VII and the ADA in 1991, but chose to insert the "motivating factor" language into only one section of Title VII, and not at all in the ADA, further compels this result. *Id.; see Nassar* 133 S. Ct. at 2529. As to the FMLA, which was enacted in 1993, two years after the amendment of Title VII and the ADA, the same argument could easily be made.

Here, I find, even after considering *Nassar, Palmquist* and the prospects for the development of more rigorous distinctions between "motivating factor" and "but-for" causation in their wake, that irrespective [*36] of which standard is to be applied, Mr. Chase has adduced sufficient evidence to survive summary judgment on his retaliation claim. The evidence in the summary judgment record, when viewed in the light most favorable to Mr. Chase, is sufficient to permit a reasonable trier of fact to conclude that Mr. King made the decision to terminate Mr. Chase for reasons that had nothing to do - except pretextually - with his arrest, but rather in retaliation for taking leave - leave that the defendants do not dispute was protected by the FMLA. In short, the record before me would permit, but does not necessarily compel, the conclusion that Mr. Chase would not have been terminated but for retaliation against him for his making use of his FMLA prescriptive rights.

b. Evidence of Pretext

The First Circuit has observed that "where a plaintiff in a discrimination case makes out a prima facie case and the issue becomes

whether the employer's stated nondiscriminatory reason is a pretext for discrimination, courts must be 'particularly cautious' about granting the employer's motion for summary judgment." *Hodgens*, 144 F.3d at 167 (quoting *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 928 (1st Cir. 1983). [*37] That said, "summary judgment is not 'automatically preclude[d]' even in cases where elusive concepts such as motive or intent are at issue." *Id.* (quoting *DeNovellis*, 124 F.3d at 306. Yet, where the non-moving party has produced more than "conclusory allegations, improbable inferences, and unsupported speculation," trial courts "should use restraint where discriminatory animus is in issue." *Id.* (internal quotations omitted). Irrespective of whether because of the lack of jury trial I may ultimately become the fact finder in this dispute, [10]my role in summary judgment practice "is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The First Circuit has recognized that "one way an employee may succeed is to show 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [*38] for its action that a reasonable factfinder could rationally find them unworthy of credence and [with or without additional evidence and inferences properly drawn therefrom] infer that the employer did not act for the asserted non-discriminatory reasons.'" *Hodgens*, 144 F.3d at 168 (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)).

---

[10] The FMLA does not provide a right to a jury trial against the federal government. *See Davis v. Henderson*, 2000 U.S. App. LEXIS 31946, 2000 WL 1828476 at *2 (6th Cir. Dec. 4, 2000); *Steinhardt v. Potter*, 326 F. Supp. 2d 449, 450-453 (S.D.N.Y. 2004).

Of particular relevance here, "[s]tatements by supervisors carrying the inference that the supervisor harbored animus against protected classes of people or conduct are clearly probative of pretext . . . even if that inference is not the only one that could be drawn from the comment." *Hodgens*, 144 F.3d at 171 (and cases cited). Mr. Chase has produced ample evidence of statements made by Mr. King suggesting that Mr. King harbored animus against employees taking injured leave, particularly for injuries that he viewed as illegitimate or exaggerated, and that he felt that Mr. Chase was a flagrant offender in this regard. In conjunction with the evidence that Mr. King repeatedly asked Mr. Chase to return to work even *after* learning of the details of his arrest and during the pendency of his criminal case, the timing of Mr. King's decision to [*39] initiate the discharge process - nearly five months after Mr. Chase's arrest and while Mr. Chase continued to be absent from work - would warrant a trier of fact weighing the credibility of the witnesses to conclude that Mr. King was simply fed up with Mr. Chase's leave-taking, which included a lengthy period of FMLA leave, and decided to use the arrest as an excuse to fire him. [11]

Also in support of his claim of pretext, Mr. Chase has offered evidence regarding three [*40] other employees, supervised by Mr. King, who were arrested on drug related charges but who were not terminated. The defendants argue that none of the three is a valid comparator because one "fell on his sword, admitting that he committed the crime he was

---

[11] I have not ignored the fact, which is undisputed, that Mr. King did not know that Mr. Chase's leave was administratively re-designated as FMLA leave beginning on January 1, 2011. The obvious significance of this fact is that it means Mr. King did not know Mr. Chase was on FMLA leave at the time he initiated discharge proceedings against him in February, 2011. While this fact certainly makes it a closer case, I do not think that it prevents a rational trier of fact from nonetheless concluding that Mr. King made the decision to terminate Mr. Chase in retaliation for taking the earlier period of FMLA leave, particularly where the timing of the discharge is not the sole factor on which Mr. Chase relies to demonstrate pretext.

charged with, admitting his drug addiction, and begging the Postal Service for help," and the other two did not have their arrests publicized and the charges against them were dismissed. [12] Given the defendants' contentions that Mr. Chase's termination was solely a result of his drug arrest, [13] and in light of the fact that Mr. King's perspective on Mr. Chase's drug arrest is alleged to have changed abruptly for reasons having nothing to do with that arrest, I find this evidence provides additional support for Mr. Chase's FMLA retaliation claim. [14]

---

[12] To the extent Mr. Chase has sought to offer evidence of additional comparators who were not supervised by Mr. King, I have not considered this evidence in reaching my decision regarding summary judgment. Given the broad discretion that Mr. Chase admits Mr. King had in making disciplinary decisions, I do not find postal employees who worked for managers other than Mr. King or those whose [*41] disciplinary actions were not reviewed by Mr. King's supervisor, William Downes, to be valid comparators. See *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15 (1st Cir. 1999). In this connection, however, I have authorized additional discovery in anticipation of trial regarding comparative sanctions for drug issues among those whose disciplinary actions were subject to review by Mr. Downes.

[13] I note that although the record is replete with suggestions - particularly in the form of arch statements made by Mr. King - that Mr. Chase was faking or exaggerating his injuries, or otherwise gaming the system, the defendants do not challenge whether Mr. Chase had a qualifying injury or whether his injury leave in the relevant periods was FMLA-protected. This is thus not a case where the plaintiff employee was fired after an investigation revealed cause to believe that the employee was overstating the medical condition for which he was taking FMLA leave. *See Colburn*, 429 F.3d at 327-329. Nor is it a case where the defendant contends the plaintiff employee was terminated for taking non-FMLA protected medical absences in addition to FMLA protected absences (even though Mr. Chase did in fact [*42] do this). *See Hodgens*, 144 F.3d at 165, 171-172. The defendants have maintained throughout that Mr. Chase was terminated as a result of his arrest and the ensuing criminal charges. Therefore, the legitimacy of Mr. Chase's injury or his continuing inability to work is not directly relevant to any issues surrounding his retaliation claim.

[14] The defendants argue that, where, in their view, I must apply but-for causation to the retaliation claim, Mr. Chase cannot possibly prove that he would not have been terminated but for his taking FMLA leave, given that a labor arbitrator already decided USPS had just cause to terminate him arising from his drug arrest. Putting aside the defendants collateral estoppel argument, which I believe is misplaced, I note that, even if a rigorous version of but-for causation is the correct standard to apply, the question would be not whether the defendants *could* have terminated Mr. Chase solely on the basis of his drug arrest, but rather whether, in fact, they did. *See Nassar*, 133 S. Ct. at 2525. *See generally McDonnell Douglas*, 411 U.S. at 804 (employer may not use an ostensibly legitimate reason for an adverse action as a pretext for discrimination that is [*43] prohibited by statute). To be sure, in some FMLA retaliation cases, the proffered reason for the termination will be legitimate grounds for termination because it was the actual motivation behind the decision to terminate. But there is a genuine issue of material fact in this case whether that is what happened here.

3. Individual Liability of Mr. King under the FMLA

Mr. King has moved to dismiss Counts I and II against him in his individual capacity, arguing that the FMLA does not provide for individual liability for public employees who otherwise qualify as "employers" under the statute. Neither the Supreme Court nor the First Circuit has considered the issue, and the circuits that have considered it are split. The Third, Fifth and Eighth Circuits have concluded that a public employee may be held individually liable under the FMLA, *see Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012); *Modica v. Taylor*, 465 F.3d 174, 188 (5th Cir. 2006); *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002), while the Sixth and Eleventh Circuits have reached the opposite conclusion, *see Mitchell v. Chapman*, 343 F.3d 811, 829 (6th Cir. 2003); *Wascura v. Carver*, 169 F.3d 683, 686 (11th Cir. 1999).

Judge [*44] Tauro, the only Judge of this district to my knowledge who has considered the issue, agreed with those circuits that have imposed individual liability on public employees. *See Mason v. Mass. Dep't of Envt'l Prot.*, 774 F. Supp. 2d 349, 363 (D. Mass. 2011). Judge Tauro notes that the majority of district courts considering the issue have also held that the FMLA does impose individual liability on public officials. *See id.* at 361-62 & n.106 (surveying decisions).

Under the FMLA, only an "employer" may be sued by an aggrieved employee and held liable. 29 U.S.C. § 2617(a)(1) & (2). The issue before me thus largely revolves around the definition of "employer" under the FMLA, and whether that definition includes a supervisor employed by a public entity. That definition reads as follows:

(4) Employer.

(A) In general.

The term "employer"-

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes-

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; [*45] and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency.

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

29 U.S.C. § 2611(4).

Although the FMLA's definition of "employer" is certainly not a model of clarity and the interpretation given by the minority of courts that support the defendants is not entirely illogical, I agree with the

thoroughly reasoned opinion of Judge Tauro in *Mason* rejecting the minority interpretation and find that the majority position among the courts is more persuasive. *See Mason*, 774 F. Supp. 2d at 362-66.

Ultimately, the language of the statute itself provides the most convincing answer. The statute plainly includes in the definition of employer "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." § 2611(4)(A)(ii)(I). The statute further includes public agencies as employers. § 2611(4)(A)(iii). [*46] Therefore, if a public employee "acts, directly or indirectly, in the interest of an employer," he satisfies the definition of employer under the FMLA, and becomes subject to liability in his individual capacity. *Modica*, 465 F.3d at 184; *Darby*, 287 F.3d at 681 (definition of employer under FMLA "plainly includes persons other than the employer itself. We see no reason to distinguish employers in the public sector from those in the private sector.").

B. Intentional Torts (Counts III-V)

The defendants seek summary judgment as to Counts III-V, which allege that Mr. King committed the torts of intentional interference with advantageous business relations, intentional infliction of emotional distress, and defamation, on the grounds that Mr. King was acting within the scope of his employment with respect to all three alleged torts. Accordingly, they argue, the United States was properly substituted for Mr. King, and the counts must be dismissed because, with respect to Counts III and V, the United States has not waived its sovereign immunity from suit; and, with respect to Count IV, although

the FTCA waives sovereign immunity for claims of intentional infliction of emotional distress, this [*47] court has no jurisdiction because Mr. Chase failed to exhaust administrative remedies. [15] Mr. Chase concedes that if Mr. King was indeed acting within the scope of his employment, then judgment must enter as to Counts III-V.

Where a plaintiff asserts that a defendant acted outside the scope of his [*48] employment despite the Attorney General's certification to the contrary, the plaintiff bears the burden of proof. *Davric Maine Corp. v. United States Postal Serv.*, 238 F.3d 58, 66 (1st Cir. 2001). Because state law controls whether a federal employee acts within the scope of his employment, I apply Massachusetts law to this issue. *Id.*

Under Massachusetts law, an employee's conduct falls within the scope of his employment if (1) "it is the kind he is employed to perform;" (2) "it occurs substantially within the authorized time and space limits;" and (3) "it is motivated, at least in part, by a purpose to serve the employer." *Wang Labs, Inc. v. Business Incentives, Inc.*, 398 Mass. 854, 501 N.E.2d 1163, 1166 (Mass. 1986) (and cases cited). *See* Restatement (Second) of Agency § 228. The Supreme Judicial Court has observed that the scope of a public employee's employment under G. L. c. 258, § 9 (the state analogue to the FTCA) is determined by general respondeat superior principles and "is not construed restrictively."

---

[15] Before a plaintiff may file suit under the FTCA, he must first file an administrative tort claim with the relevant federal agency within two years after the claim accrues. *See* 28 U.S.C. §§ 2401(b) and 2675(a). Then he must file suit within six months after the agency denies the administrative claim. *See id. at* 2401(b). Satisfying these requirements is a jurisdictional prerequisite to suit under the FTCA and is "strictly enforced." *Roman-Cancel v. United States*, 613 F.3d 37, 41 (1st Cir. 2010); *see Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002). Compliance with the requirements is a "condition of the United States' waiver of sovereign immunity," and accordingly, failure to comply is a "fatal defect." *Velez-Diaz v. United States*, 507 F.3d 717, 720 (1st Cir. 2007). Mr. Chase concedes that he has not satisfied the requirements of §§ 2401(b) and 2675(a) with respect to Count IV.

Howard v. Town of Burlington, 399 Mass. 585, 506 N.E.2d 102, 105-06 (Mass. 1987).

Mr. Chase concedes that the second prong of the *Wang* test is satisfied, where all the relevant conduct clearly took place [*49] while Mr. King was on duty at the post office. Additionally, while he technically does not concede the first prong of the Wang test, Mr. Chase offers only the bald assertion that "[Mr. King] was not hired to humiliate employees who are injured on the job," and merely cites to two Massachusetts Superior Court cases offering limited or no support for his argument. Mr. Chase's argument on this point fails. With respect to the first prong, "it is ordinarily the actual and customary, rather than formally described, duties which determine scope of employment." *Howard*, 506 N.E.2d at 105-106. The question is not whether the employee committed a tort, but whether he was performing the kind of work he was hired to perform when he allegedly committed the tort. *See Mangino v. United States*, 2006 U.S. Dist. LEXIS 49007, 2006 WL 2033196 (D. Mass. July 19, 2006).

In rejecting a similar argument in *Mangino*, where the plaintiff argued that the defendant doctors were not hired to alter medical records fraudulently, Judge O'Toole observed that "of course, though employers rarely authorize persons to [commit torts], nevertheless the law clearly recognizes employer liability for the [torts] of its employees." 2006 U.S. Dist. LEXIS 49007, [WL] at *3. As in *Mangino*, [*50] where the defendants' job duties included maintaining medical records, the question here is not whether Mr. King was hired to humiliate his employees, but whether his "actual and customary" job duties included making announcements over the public address system and

communicating with employees regarding their injury status. *See id.; see also Davric*, 238 F.3d at 67 (applying Maine scope-of-employment test, which is identical to Massachusetts law, and finding postal supervisor acted within scope of employment when he made defamatory statement that Postal Service had rejected plaintiff-owned property as site for new postal facility because plaintiff was linked to organized crime and "maybe even Jimmy Hoffa could be buried" there).

As to the third prong of the *Wang* test, the question is whether Mr. King's conduct was "motivated, at least in part, by a purpose to serve the employer." *Wang*, 501 N.E.2d at 1166. The question is not, as Mr. Chase variously characterizes it, whether Mr. King "did not act in the best interests of his employer," or whether "his motives were pure." Rather, Mr. Chase must prove that Mr. King acted "from purely personal motives in no way connected with the employer's [*51] interest." *Pinshaw v. Metropolitan Dist. Comm'n*, 402 Mass. 687, 524 N.E.2d. 1351, 1356 (Mass. 1988) (quoting *W. Prosser & W. Keeton, Torts* 506 (5th ed. 1984)). Put another way, "[t]he fact that the predominant motive of the [employee] is to benefit himself does not prevent the act from coming within the scope of employment as long as the act is otherwise within the purview of his authority." *Wang*, 501 N.E.2d at 1163.

Here, even when viewing all facts and drawing all reasonable inferences in the light most favorable to Mr. Chase, it would be impossible for a reasonable trier of fact to conclude that Mr. King was not motivated at least in part, by a purpose to serve his employer when he committed the alleged torts. Mr. King may have harbored a personal animus against injured employees, particularly Mr. Chase, and might even have been

concerned primarily with how the injury statistics for the Brookline branch would affect his performance reviews and compensation.

Ultimately, however, it is clear that he acted, at least in part, from a desire to protect the interests of his employer against an employee who, in his view, was taking advantage of the system. It does not matter that Mr. King may have acted [*52] loutishly and/or overzealously in his pursuit of these interests, by allegedly defaming the plaintiff (Count V), inflicting emotional distress upon him (Count IV), or by attempting improperly to procure his and his brother's termination (Count III). *See, e.g. Davric*, 238 F.3d at 67 (individual defendant's "avalanche of derogatory comments" and "series of highly defamatory charges" directed at plaintiffs and "made in a very angry fashion" not outside scope of employment even if not endorsed by employer); *Aversa v. United States*, 99 F.3d 1200, 1211 (1st Cir. 1996) (under New Hampshire law and the Restatement, statements of government employee were within scope of employment even when they plainly were not authorized); *see also Restatement (Second) of Agency*, § 230 (action may fall within scope of employment even if "forbidden, or done in a forbidden manner").

Because Mr. King was acting within the scope of his employment with respect to the allegations contained in Counts III-V, and because Mr. Chase concedes that such a finding is fatal to those claims, and given that his conceded failure to exhaust remedies with respect to Count IV is also fatal to that count, summary judgment shall [*53] enter in favor of the defendants on Counts III-V.

V. CONCLUSION

For the reasons set forth more fully above, I GRANT defendants' motion for summary judgment as to Count I and Counts III-V, and DENY the motion as to Count II, the FMLA retaliation claim, with respect to Mr. King and the USPS.

/s/ Douglas P. Woodlock

DOUGLAS P. WOODLOCK

UNITED STATES DISTRICT

End of Document

Connolly v. Roman Catholic Archbishop

Superior Court of Massachusetts, At Norfolk

May 18, 2019, Decided

Opinion No.: 142447, Docket Number: 1782CV1126, 1882CV1119

Reporter

2019 Mass. Super. LEXIS 65 *; 35 Mass. L. Rep. 517

Dan Connolly v. Roman Catholic Archbishop of Boston, a Corporation Sole et al.[1];Paul Connolly v. Roman Catholic Archbishop of Boston, a Corporation Sole et al.[2]

Judges: [*1] Elaine M. Buckley, Justice of the Superior Court.

Opinion by: Elaine M. Buckley

Opinion

MEMORANDUM OF DECISION AND ORDER ON MOTIONS TO DISMISS

[1] Missionary Society of St. Columban; Father Tim Mulroy, Director of the U.S. Region of the Missionary Society of St. Columban; Father Arturo Aguilar, Jr., Vicar General, Missionary Society of St. Columban; Father John Burger, Vice-Director, U.S. Region of the Missionary Society of St. Columban; Father Brendan O'Sullivan; John Does 1 through 5; and Richard Roes 1 through 10.

[2] Missionary Society of St. Columban; Father Tim Mulroy, Director of the U.S. Region of the Missionary Society of St. Columban; Father Arturo Aguilar, Jr., Vicar General, Missionary Society of St. Columban; Father John Burger, Vice-Director, U.S. Region of the Missionary Society of St. Columban; Father Brendan O'Sullivan; John Does 1 through 5; and Richard Roes 1 through 10.

These consolidated actions seek redress for sexual abuse allegedly committed by the late Father Brian Gallagher on the plaintiffs, brothers Dan and Paul Connolly, as young boys. The plaintiffs claim defendants Roman Catholic Archbishop of Boston, a corporation sole, (RCAB); Missionary Society of St. Columban (Columban Fathers); and others are liable, under several tort theories, for the abuse so alleged.

The matter is before the Court now on motion to dismiss filed pursuant to Mass.R.Civ.P. 12(b)(6) by both RCAB and Columban Fathers (hereinafter sometimes, defendants). The defendants move to dismiss the counts pleaded against them, respectively, for vicarious liability and ratification with respect to Gallagher's alleged conduct, and breach of fiduciary duty.[3] After hearing, each motion is allowed in part and denied in part.

1. Background

The plaintiffs identify the following facts as material to the claims at issue.[4]

Gallagher was ordained as a Columban Fathers' priest in 1952 in Ireland, his home country, and remained a Columban Fathers' priest

---

[3] Specifically at issue are the following: in Dan Connolly's First Amended Complaint and in Paul Connolly's Complaint are, as alleged against RCAB, Count I (vicarious liability for conduct of Gallagher), Count II (ratification), and Count VI (breach of fiduciary duty); and, as alleged against Columban Fathers, Count VIII (vicarious liability for conduct of Gallagher), Count IX (ratification); and Count XIII (breach of fiduciary duty).

Columban Fathers had also moved to dismiss the vicarious liability counts pleaded against it in Count XVI of each plaintiff's operative complaint, but both plaintiffs have since dismissed those respective counts pursuant to Mass.R.Civ.P. 41(a)(1)(i).

[4] Under rule 12, the Court accepts well-pleaded factual allegations, including facts alleged upon "information and belief," as true. See, e.g., *Polay v. McMahon*, 468 Mass. 379, 382, & 383 n.5, 10 N.E.3d 1122 (2014). The Court expressly declines to consider the materials, as outside of the pleadings, which the plaintiffs offered at the motion hearing.

until his death on November 5, 2014. From approximately [*2] 1953 to 1973, Gallagher was assigned by Columban Fathers to serve in various positions in Japan. The plaintiffs allege, upon "information and belief," that Gallagher sexually abused many minor boys while ministering for the Columban Fathers. The plaintiffs also allege, upon "information and belief," that Columban Fathers transferred Gallagher out of Japan because of his sexual abuse of young boys there.

In 1973, Columban Fathers transferred Gallagher to the United States. The plaintiffs allege that, prior to that year, the Columban Fathers, including certain yet to be identified individuals, "were aware or reasonably should have been aware" of Gallagher's serial sexual abuse of young boys.

Beginning in or about 1973, Columban Fathers assigned Gallagher to a residence house/seminary it owned and operated in the town of Milton, Massachusetts (Columbans' Milton House or Milton House). The Columbans' Milton House was used primarily to house members of the Columban Fathers located in the area. The plaintiffs allege, upon "information and belief," that Gallagher was in charge of the Milton House.

With the permission of Gallagher, in 1976 RCAB assigned Father Paul Shanley to the Columbans' Milton [*3] House location as his residency and ministry position. Shanley, under the auspices of RCAB, established the Exodus Center there as a retreat for "troubled homosexual" men, where they could receive counseling and lodging. Individuals who have identified as sexual abuse victims of Shanley allege he sexually abused them at RCAB's Exodus Center during that time period. Shanley was later criminally convicted of sex abuse of minor boys.

RCAB was responsible for the hiring, training, retention, assignment, and supervision of priests who were its employees "and/or agents" and who served as priests at the Archdiocese of Boston (Archdiocese) churches and other facilities within the Archdiocese. The plaintiffs allege that, in or about the same time period Gallagher and the Columban Fathers allowed RCAB and Shanley to operate the Exodus Center, RCAB and/or the Columban Fathers authorized or allowed Gallagher to represent himself as a priest and/or chaplain "and/or agent" of the Archdiocese, to wear the clerical clothing and vestments of a Roman Catholic priest, to say Masses and administer the sacraments recognized by the Roman Catholic Church, to teach and counsel its parishioners, including minors, [*4] on behalf of the Archdiocese, and otherwise to exercise the rights, duties, privileges and responsibilities of a priest and/or chaplain of the Archdiocese.

During this period, St. Mark's Parish in the Dorchester section of the city of Boston was a Catholic parish of the Archdiocese. It was also Shanley's home parish and one with which he was "well-connected." Gallagher was assigned by the Columban Fathers and/or RCAB to serve as a priest of St. Mark's Parish, or was permitted to act as if he had been so assigned. Gallagher often said Mass there, performed other priestly duties there, and/or at other churches or rectories of the Archdiocese nearby.

During this period, St. Joseph's Nursing Care Center in Dorchester was a nursing care facility maintained by RCAB. The Columban Fathers and/or RCAB assigned Gallagher to be the chaplain at this facility or permitted him to act as if he had been so assigned.

The plaintiffs allege RCAB and Columban Fathers granted Gallagher and other priests "extraordinary" power and control over parishioners, and particularly over children such as the plaintiffs. RCAB and Columban Fathers allegedly "cloaked" Gallagher "in an aura of credibility, plausibility [*5] and legitimacy as a priest who could be trusted around children and contributed to empowering [him] to commit acts of sexual abuse against children." According to the plaintiffs, by "aiding in the agency" of Gallagher, RCAB and Columban Fathers "imbued" him "with unchecked power to sexually abuse Catholic boys."

At relevant times during this period, each of the plaintiffs was a minor child living with their parents in Dorchester. They and their families were active members of St. Mark's Parish, where the plaintiffs and their other brothers were altar servers. Each plaintiff and his siblings attended the St. Mark's Parish elementary school, and their mother worked in the rectory of St. Mark's Parish. At relevant times, two of the plaintiffs' other brothers had jobs as dishwashers at St. Joseph's Nursing Cate Center. Gallagher, in his capacity as a priest of St. Mark's Parish and/or as the chaplain of St. Joseph's Nursing Care Center, was a regular visitor to the plaintiffs' family home.

In or about 1973-1975, Gallagher sexually assaulted Paul Connolly; the assaults included rape.

In or about 1976, in the kitchen of the plaintiffs' family home, Gallagher isolated Dan Connolly and sexually [*6] assaulted him by putting his hands down Dan's pants, and fondling his genitalia and repeatedly inserting his fingers into Dan's rectum. During this same period, Gallagher isolated Dan in the backyard of the plaintiffs' home and sexually assaulted him in the same manner. During this same period,

Gallagher took Dan into Gallagher's parked car and sexually assaulted him. Dan was in the back seat with no pants or shirt on. Gallagher was in the front seat with his penis and testicles exposed. Gallagher reached back and touched Dan. During this same period, Gallagher took Dan alone into a basement and sexually assaulted him. Gallagher tied Dan's hands and wrists with wires and took Dan's pants off.

The plaintiffs allege, on "information and belief," that at the time of Shanley's assignment to the Exodus Center, RCAB was aware, "or reasonably should have been aware," that he was a sex abuser of young boys, because, starting in 1967, RCAB had received numerous reports concerning sex abuse of minors perpetrated by Shanley. The plaintiffs additionally allege, on "information and belief," that certain yet to be identified individuals, employees "or agents" of RCAB, were aware, "or reasonably should [*7] have been aware," that Gallagher was sexually abusing young boys while he was assigned to and performing ministry positions at St. Mark's Parish and St. Joseph's Nursing Care Center. The plaintiffs further allege, on "information and belief," that certain yet to be identified individuals, employees "or agents" of Columban Fathers were aware, "or reasonably should have been aware," that Gallagher was sexually abusing young boys while he was assigned to the Columbans' Milton House and working in ministry positions at St. Mark's Parish and St. Joseph's Nursing Care Center.

2. Discussion

The standard of review governing the defendants' motions is well settled. In considering a motion to dismiss under Mass.R.Civ.P. 12(b)(6), the Court accepts as true the facts alleged in the complaint, "as well as any favorable inferences that reasonably can be drawn from

them," *Polay v. McMahon*, 468 Mass. 379, 382, 10 N.E.3d 1122 (2014), quoting *Galiastro v. Mortgage Elec. Registration Sys., Inc.*, 467 Mass. 160, 164, 4 N.E.3d 270 (2014), but disregards "legal conclusions cast in the form of factual allegations," *id.*, quoting *Leavitt v. Brockton Hosp., Inc.*, 454 Mass. 37, 39 n.6, 907 N.E.2d 213 (2009). For a claim to survive a rule 12(b)(6) motion, the allegations of fact, when taken as true, must reasonably permit the inference that the defendant is liable for the misconduct so claimed. See *Polay v. McMahon, supra*.

In their respective operative pleadings, the plaintiffs have asserted substantively [*8] identical claims as each other, including as to the counts at issue here for vicarious liability and ratification with respect to the alleged actions of Gallagher, and for breach of fiduciary duty. With modest factual differences, those counts also allege substantively identical claims against the defendants. The Court therefore considers them together, and addresses them in turn.

a. Counts I & VIII (Vicarious Liability)

In Counts I and VIII of their respective complaints, each of the plaintiffs alleges claims against RCAB and Columban Fathers on a theory that they each were vicariously liable for Gallagher's tortious conduct. As the Supreme Judicial Court has explained, "[l]iability on those grounds 'is the proposition that an employer, or master, should be held vicariously liable for the torts of its employee, or servant, committed within the scope of employment.'" *Petrell v. Shaw*, 453 Mass. 377, 384, 902 N.E.2d 401 (2009), quoting *Dias v. Brigham Med. Assocs.*, 438 Mass. 317, 319-20, 780 N.E.2d 447 (2002). The plaintiffs in part claim Gallagher committed sexual assaults against them "while acting

within the scope of his employment" with both RCAB and Columban Fathers. The Court disagrees.

While the complaints do allege that Gallagher committed sexual assaults while employed by, or otherwise acting as an agent of, [*9] the defendants, there is no factual basis in the complaints from which reasonably to infer this tortious conduct fell within "the scope" of that employment or agency, as the plaintiffs argue. Indeed, courts in Massachusetts and elsewhere consistently have rejected substantively identical claims. See, e.g., *Petrell v. Shaw*, *supra*, and cases cited. After all, "[t]he scope of employment test asks the question: is this the kind of thing that in a general way employees of this kind do in employment of this kind." *Kansallis Fin. Ltd v. Fern*, 421 Mass. 659, 665, 659 N.E.2d 731 (1996).

To be sure, unauthorized conduct, or even an intentional tortious or criminal action, does not, for that reason, necessarily fall outside the scope of employment, see Restatement (Second) of Agency §231 (1958) ("An act may be within the scope of employment although consciously criminal or tortious"), but some alignment must exist between the challenged conduct and the purpose of the employment or interests of the employer, see, e.g., *id.*, and cases cited, see also, e.g., *McIntyre ex rel. Estate of McIntyre v. United States*, 545 F.3d 27, 45-47 (2008) (FBI agent's leak of informant's identity); *Maimaron v. Commonwealth*, 449 Mass. 167, 176, 865 N.E.2d 1098 (2007) (police officer's violation plaintiff's civil rights through committing torts of assault and battery and false arrest). The salient consideration is not the conduct in isolation, but in the context of the agency or employment. [*10] Conduct falls outside scope of employment where it is "different in

kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency §228(2) (1958); *Doe v. Purity Supreme, Inc.*, 422 Mass. 563, 568, 664 N.E.2d 815 (1996), quoting from *Wang Labs., Inc. v. Business Incentives, Inc.*, 398 Mass. 854, 859, 501 N.E.2d 1163 (1986); *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 408 Mass. 393, 404, 558 N.E.2d 958 (1990). The factual content of the plaintiffs' complaints does not reasonably permit inferring any sort of congruence between the rape and other sexual assaults Gallagher allegedly committed and the purpose of his employment as a priest and chaplain, or other interests of RCAB or Columban Fathers.

The plaintiffs' resort to "apparent agency" and "aided-in-agency" theories of establishing vicarious liability is unavailing, and for essentially the same reasons.

In regard to the former, the plaintiffs are correct that liability may be vicariously imposed upon a principal where "the authority is only apparent," *Kansallis Fin. Ltd. v. Fern, supra* at 665. Under settled law, apparent authority "results from conduct by the principal which causes a third person reasonably to believe that a particular person . . . has authority to . . . make representations [or otherwise act as the principal's] agent." *Hudson v. Massachusetts Prop. Ins. Underwriting Ass'n*, 386 Mass. 450, 457, 436 N.E.2d 155 (1982) (first omission in original), quoting from W.A. Seavey, Agency §8D, at 13 (1964). See *Kansallis Fin. Ltd. v. Fern, supra*. Accordingly, "[a]pparent authority [*11] is not established by the putative agent's words or conduct, but by those of the principal," *Rubel v. Hayden, Hardin & Buchanan, Inc.*, 15 Mass. App. Ct. 252, 255, 444 N.E.2d 1306

(1983), "at the time" of the relevant transaction or representation. See *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 745, 729 N.E.2d 1113 (2000).

However, as observed by the Supreme Judicial Court, "there is little fairness in saddling the principal with liability for acts that a reasonable third party would not have supposed were taken on the principal's behalf," *Kansallis Fin. Ltd. v. Fern*, *supra*. And, on the facts alleged by the plaintiffs here, no reasonable person could have so supposed that the rape and other sexual assaults Gallagher is claimed to have committed on young boys were acts taken on behalf of RCAB or Columban Fathers. No case holding cited by the plaintiffs is to the contrary.

The plaintiffs' aided-in-agency theory presents a closer question, but still falls short on the facts alleged. The plaintiffs base this theory on section 219 of the Second Restatement of Agency, *supra*. In relevant part, under section 219(2)(d), a master may be "subject to liability for the torts of his servants acting outside the scope of their employment," if "the servant . . . was aided in accomplishing the tort by the existence of the agency relation."[5] The plaintiffs point out that some courts have upheld the imposition of vicarious liability on an employer under this Restatement [*12] section, under particular circumstances, for, e.g., sexual assaults committed outside the scope of the employee's employment. See *Spurlock v. Townes*, 2016- NMSC 014,

[5] Although the defendants apparently are correct that no Massachusetts court has expressly recognized this theory or adopted this Restatement section, "[n]o litigant is automatically denied relief solely because he presents a question on which there is no Massachusetts judicial precedent," *George v. Jordan Marsh Co.*, 359 Mass. 244, 249, 268 N.E.2d 915 (1971). That said, for the reasons discussed *infra*, it is problematic to apply this Restatement principle, in the particular factual circumstances alleged in this case.

2016- NMSC 014, 368 P.3d 1213, 1217 (N.M. 2016), citing and quoting *Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1199 (Alaska 2009) (in case of corrections officer's assault of female inmates, observing that aided-in-agency principle may apply to extend vicarious liability, "where an employee has by reason of his employment substantial power or authority to control important elements of a vulnerable tort victim's life or livelihood").

However, those authorities are not persuasive for two reasons. First, there is conflicting authority in various jurisdictions whether to adopt section 219(2)(d) at all, and, if so, how and to what extent, see, e.g., *Peña v. Greffet*, 110 F.Sup.3d 1103, 1119-20 (D.N.M. 2015), citing cases. Indeed, there is considerable doubt as to the continuing viability of this doctrine, given that its drafters "abandon[ed it] . . . altogether" in the Third Restatement of Agency. See *id.* at 1115-19 (discussing Restatements). Second, well-reasoned appellate authority has rejected application of section 219(2)(d) in cases involving similar claims of sexual abuse of children by a religious official. See, e.g., *Doe v. Newbury Bible Church*, 182 Vt. 174, 175, 933 A.2d 196 (2007) (answering negative to the certified question: "is a church subject to vicarious liability for the tortious acts of its pastor under the Restatement [Second] of Agency §219[2][d] if [*13] the pastor was allegedly 'aided in accomplishing the tort by the existence of the agency relation' with the church?") Of note, the *Doe v. Newbury Bible Church* decision, *supra*, expressly distinguished cases, such as that relied upon by the plaintiffs here, where vicarious liability had been imposed under section 219(2)(d) for the actions of a law enforcement officer. See *id.* at 178-80 (unlike police officer, church pastor is not public actor for whom policy reasons support imposition

of liability, does not have authority equivalent to police power, and is not perpetrator with respect to whom victim is "uniquely isolated from the protections of the rule of law").

In sum, the plaintiffs have failed to state facially plausible claims against these defendants based upon the pleaded vicarious liability theories in Counts I and VIII. Those counts therefore must be dismissed pursuant to Mass.R.Civ.P. 12(b)(6).

a. Counts II & IX (Ratification)

In Counts II and IX of the operative complaints, the plaintiffs claim that RCAB and Columban Fathers, respectively, alternatively are vicariously liable under the theory that they ratified Gallagher's tortious conduct. "It is a well-established principle that an employer is not only liable for torts committed [*14] by its servants acting within the scope of their employment but, 'by ratification may become responsible for such acts when committed in excess of their authority.'" *Pinshaw v. Metropolitan Dist. Comm'n*, 33 Mass.App.Ct. 733, 735, 604 N.E.2d 1321 (1992), quoting *White v. Apsley Rubber Co.*, 194 Mass. 97, 99, 80 N.E. 500 (1907); *Petrell v. Shaw, supra* at 384 n.5. The plaintiffs argue that such liability should be vicariously imposed here, citing their allegations to the effect that each defendant was, or should have been, aware of sexual abuse in its parishes, "especially those where Father Shanley operated," including the Columbans' Milton House. Again, the Court is constrained to disagree.

The fundamental problem with this argument is that liability for ratification of an act is imposed only where a defendant knew or should have known of the specific act in question. In *Petrell v. Shaw*, for instance, the Supreme Judicial Court rejected the theory of liability

based upon ratification because, as here, no reasonable inference could be drawn to suggest that the defendant bishop of the diocese "ratified [the parish rector's] conduct *after being made aware* of the allegation of [such conduct]." 453 Mass at 384 n.5 (emphasis supplied). Here, the plaintiffs allege RCAB and Columban Fathers were aware of sexual abuse of children in parishes prior to 1973 generally, and perhaps also of Gallagher's [*15] alleged conduct while in Japan, and of Shanley's conduct, but there is no allegation either defendant was made aware of Gallagher's alleged sexual assaults of these plaintiffs specifically, and then failed to make further inquiry or "disavow the unauthorized conduct," *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 18, 679 N.E.2d 191 (1987).[6] In addition; each plaintiff expressly states in his respective complaint that he "did not tell anyone" of the alleged abuse "until 2016."

Counts II and IX accordingly must be dismissed pursuant to Mass.R.Civ.P. 12(b)(6).

c. Counts VIII and XIII (Breach of Fiduciary Duty)

In Counts VIII and XIII of their complaints, the plaintiffs claim RCAB and Columban Fathers, respectively, are liable for having breached fiduciary duties they each owed the plaintiffs. The defendants argue that those counts must be dismissed on the basis that the factual allegations in the complaints fail to establish the existence of a cognizable fiduciary duty. According to the defendants, the holding in *Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 867

[6] The Court has not overlooked the representations the plaintiffs' counsel made at the motion hearing that the plaintiffs have since obtained information which could show such specific awareness of the sexual abuse of the plaintiffs by Gallagher, as well as the defendants' concomitant failure to address same. The Court cannot consider such information under rule 12(b)(6).

N.E.2d 300 (2007) (*Maffei*), precludes the plaintiffs' fiduciary breach claims, on the basis that the operative complaints here also allege a relationship between the plaintiffs and RCAB and Columban Fathers, "based on no more than their shared religious affiliation," which, Supreme Judicial [*16] Court held, "provides no basis to support liability in a civil context," *Petrell v. Shaw*, *supra*, at 383, citing *Maffei*, *supra*. The Court disagrees.

A fiduciary duty may be created by law, or the fiduciary relationship may "arise from the nature of the parties' interactions." *Doe v. Harbor Sch., Inc.*, 446 Mass. 245, 252, 843 N.E.2d 1058 (2006). Because circumstances that may give rise to fiduciary relationships are thus "so varied," courts have expressly declined to formulate a definition "that could be uniformly applied in every case." *Id.*, quoting *Warsofsky v. Sherman*, 326 Mass. 290, 292, 93 N.E.2d 612 (1950). "As a general matter, however, a fiduciary duty arises in a context where 'one reposes faith, confidence, and trust in another's judgment and advice.'" *Id.*, quoting from *Fassihi v. Sommers, Schwartz, Silver, & Tyler, P.C.*, 107 Mich.App. 509, 515, 309 N.W.2d 645 (1981).

While there is scant Massachusetts case law directly on point, decisions from outside the Commonwealth support inferring the existence plaintiffs' claimed fiduciary relationship with the defendants. For instance, in *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, a former parishioner accused his former priest of sexual abuse when the parishioner was a teenager, and alleged claims *inter alia* for breach of fiduciary duty against the defendant Diocese. 196 F.3d 409, 413-16 (2d Cir. 1999) (*Martinelli*). A jury returned a verdict for the plaintiff on that claim, and, in affirming that determination, the Federal Court

of [*17] Appeals agreed that, "irrespective of the duties of the Diocese to its parishioners generally, the jury could reasonably have found that the Diocese's relationship with [the plaintiff] . . . was of a fiduciary nature," based on the particular evidence that established "his ties to [the priest] and the Diocese's knowledge and sponsorship of that relationship." *Id.* at 429.[7] While, to be sure, the specific evidence adduced at trial in that case differed from the facts alleged here, there also are material similarities—including a special relationship of trust and confidence, not just between the plaintiff and the priest but, between the plaintiff and diocese—that imbue the fiduciary duty claims pleaded here with legal plausibility sufficient to survive a motion to dismiss. See *id.* at 430. In addition, the court in *Martinelli* held that the First Amendment did not bar courts deciding such secular civil disputes involving religious institutions, since the claim was brought under State law, and not church law, and a jury would not be required to resolve any disputed religious issues. See *id.* at 430-32.

Similarly, and drawing upon the holding in *Martinelli*, the Federal District Court in *Doe v. Norwich Roman Catholic Diocesan Corp.*—a case [*18] involving a teenage girl's sexual abuse by a priest—held the plaintiff alleged sufficient facts "to indicate a unique situation that support[ed] a fiduciary duty claim" against Norwich Roman Catholic Diocesan Corporation and St. Columba Church to survive a motion to dismiss. 309 F.Sup.2d 247 (D.Conn. 2004). Specifically, the court found

---

[7] The evidence included the abused boy's considerable involvement with church activities, the Diocese's knowledge of the priest's history of, and predilection for, sexually abusing young boys, the Diocese's knowledge that the priest's activities put him in close contact with such boys, the boy's regard for the priest as spiritual and moral authority, and the boy's parents' allowance of the boy to participate with the priest and others in activities because the parents trusted the priest "inasmuch as he was a priest." See *Martinelli, supra* at 429-30.

a fiduciary relationship could be inferred based upon allegations that the plaintiff had participated in activities sponsored by those defendants and consulted with the priest for spiritual and religious counseling, as those defendants had encouraged; the priest had attended dinners at the plaintiff's family home; those defendants had encouraged the priest to involve himself in the activities in which the plaintiff participated, as well as to have interaction with church members; and those defendants knew or should have known that the priest had impermissibly engaged in a sexual relationship prior to his assignment to the church. See *id.* at 252-53.

And, drawing upon both those decisions, the Federal District Court in *Lewis v. Bellows Falls Congregation of Jehovah's Witnesses*, 95 F.Sup.3d 762 (D.Vt. 2015) (*Lewis*)—a case brought by a former congregant against a church, a minister, and others, alleging the minister had sexually abused the congregant when she was a child—dismissed the [*19] plaintiff's breach of fiduciary duty claims, but held that, to state a facially plausible claim for breach of fiduciary duty in an amended complaint, the plaintiff would have to plead facts supporting (1) the "particulars of [her] ties" to the minister and the defendant church, and (2) the church's "knowledge and sponsorship of that relationship." *Id.*, at 766, quoting *Martinelli*, 196 F.3d at 429 (alteration in *Lewis*).

The defendant's reliance upon *Maffei* broadly to preclude the existence of any fiduciary duty flowing from them to the plaintiffs is misplaced. As courts have held in more factually similar cases, under State civil law and without offending the First Amendment, a plaintiff claiming sexual abuse as a minor by a priest (or similar religious authority figure) may allege a cognizable breach of fiduciary duty claim against

a defendant church, diocese, or other such entity, upon sufficiently alleging the "particulars of [the plaintiff's] ties" to the priest and the associated defendant religious entity, and (2) the defendant. entity's "knowledge and sponsorship of that relationship." As the plaintiffs argue, their respective complaints contain sufficient factual allegations which, taken as true, reasonably support inferring those [*20] components of a plausible fiduciary duty claim.

Counts VIII and XIII accordingly must not be dismissed pursuant to Mass.R.Civ.P. 12(b)(6).

ORDER

It therefore is ORDERED that:

1. in Norfolk County Superior Court Civil Action No. 1782CV01126, (a) the motion to dismiss filed by defendant Roman Catholic Archbishop of Boston, a corporation sole, (RCAB), (paper no. 27.0) be, and hereby is, *ALLOWED in part* and *DENIED in part*, and (b) the motion to dismiss filed by Missionary Society of St. Columban (Columban Fathers), (paper no. 28.0) be, and hereby is, *ALLOWED in part* and *DENIED in part*;

and therefore further ORDERED that:

in Norfolk County Superior Court Civil Action No. 1884CV00690, (a) the motion to dismiss filed by RCAB (paper no. 15.0) be, and hereby is, *ALLOWED in part* and *DENIED in part*, and (b) the motion to dismiss filed by Columban Fathers (paper no. 16.0) be, and hereby is, *ALLOWED in part* and *DENIED in part*.

Elaine M. Buckley

Justice of the Superior Court

DATED: 5-18-19

End of Document

CERTIFICATE OF COMPLIANCE

I, Amanda J. Cox, Esq., counsel for the Defendant-Appellant, The Commerce Insurance Company, hereby certifies that the foregoing brief complies with all of the rules of court and appellate procedure that pertain to the filing of briefs, including, but not limited to, Mass. R. A. P. 16, 18, 20, 21, and 27.1. Specifically, the principal brief is produced in the proportionally spaced font, Times New Roman, 14 point, and is less than 11,000 as required by Mass. R. A. P. 20(a)(2) and (a)(4)(B), as amended, 465 Mass. 1601 (2010). Text is double-spaced except that argument headings, footnotes, and indented quotations are single-spaced as required by Mass. R. App. P. 20(a)(4)(B) and (a)(4)(C), as amended, 465 Mass. 1601 (2010). Margins are 1-inch top, bottom, left, and right, as required by Mass. R. App. P. 20(a)(4)(A), as amended, 465 Mass. 1601 (2010). The brief contains all information required by Mass. R. App. P. 16(a), as amended, 428 Mass. 1603 (1999), and 20(a)(6)(B), as amended, 465 Mass. 1601 (2010). This Brief follows the Officer of the Reporter of Decisions Style Manual (2020-2021) and the Uniform System of Citation where referred to by the Style Manual or when the Style Manual is silent on a given matter.

/s/ Amanda J. Cox

Dated: January 22, 2021

Certificate of Service

I, Amanda J. Cox, do hereby certify that on this day I did serve on all counsel of record this Brief of the Defendant-Appellant, The Commerce Insurance Company and accompanying Appendix electronically on William J. Raymond, Keches Law Group, 2 Lakeshore Center, Bridgewater, MA 02324, wraymond@kecheslaw.com, counsel for the Plaintiff-Appellee, Russell Berry

Dated: January 22, 2021

/s/ Amanda J. Cox
Amanda J. Cox