

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 6, AFL-CIO

and

JOHN F. MURPHY

Case No. SUPL-14-3628

Date Issued: June 30, 2023

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Michael A. Feinberg, Esq. – Representing OPEIU, Local 6
Luke Liacos, Esq.
Lynn T. Alexis, Esq.

Luke Rosseel, Esq. – Representing John F. Murphy
John T. Martin, Esq.

HEARING OFFICER'S AMENDED SUPPLEMENTARY DECISION ON COMPLIANCE¹

SUMMARY

1 The issue in this matter is whether the Office and Professional Employees
2 International Union, Local 6 (Union, Local 6, or Respondent) complied with an order to
3 make John F. Murphy (Murphy or Charging Party)² whole for the loss of compensation
4 he suffered as a direct result of his termination from the Massachusetts Trial Court (Trial

¹ The Hearing Officer amends the original decision pursuant to the Errata that issued on June 30, 2023.

² On September 1, 2021, John F. Murphy died. On November 24, 2021, the Worcester Probate and Family Court (Probate and Family Court) issued an order appointing Colin B. Murphy as the personal representative for Murphy's estate.

1 Court or Employer), effective May 14, 2013, and as a result of the Union's subsequent
2 unlawful conduct. For the reasons explained below, I find that the Union has failed to
3 show by a preponderance of the evidence that it has complied with the order.

4 STATEMENT OF THE CASE

5 **Procedural History**

6 On April 9, 2014, Murphy filed a Charge of Prohibited Practice (Charge) with the
7 Department of Labor Relations (DLR), alleging that the Union had engaged in prohibited
8 practices within the meaning of Section 10(b)(1) of Massachusetts General Laws,
9 Chapter 150E (the Law). On August 25, 2015, Murphy filed another charge, alleging a
10 separate violation of Section 10(b)(3)³ of the Law. Pursuant to Section 11 of the Law
11 and Section 15.05 of the DLR's Rules, a DLR investigator investigated the Charge on
12 September 15, 2015. Ten days later, on September 25, 2015, the investigator issued a
13 Complaint of Prohibited Practice (Complaint), alleging that the Union had violated
14 Section 10(b)(1) of the Law by filing an untimely grievance on Murphy's behalf. On
15 October 22, 2015, the Union filed its Answer to the Complaint.

16 I conducted six days of hearing into the Complaint on May 23, July 8, 11 and 25,
17 and August 17 and 18, 2016, at which I afforded the parties a full opportunity to be
18 heard, to examine and cross-examine witnesses, and to introduce evidence. I issued a
19 decision on August 25, 2017, which the Union appealed to the Commonwealth

³ Murphy withdrew his Section 10(b)(3) allegation at the investigation on September 15, 2015.

1 Employment Relations Board (CERB) on August 31, 2017. On March 21, 2018, the
2 CERB affirmed the decision and ordered the Union to take the following action:

3 1. Cease and desist from:

4
5 a) Failing to advance grievances to arbitration within contractual time
6 limits;

7
8 b) Otherwise interfering with, restraining, or coercing any employee in
9 the exercise of their rights guaranteed under the Law.

10
11 2. Take the following affirmative action necessary to effectuate the
12 purposes of the Law:

13
14 a) Make Murphy whole for the loss of compensation he suffered as a
15 direct result of his termination from the Trial Court effective on May 14,
16 2013. The Union's obligation to make Murphy whole includes the
17 obligation to pay interest on all compensation owed due at the rate
18 specified in M.G.L. c. 231, Section 6I, compounded quarterly.⁴

19
20 b) Immediately post signed copies of the attached Notice to
21 Employees in conspicuous places where notices to bargaining unit
22 employees are customarily posted, including all places in the Trial
23 Court, and including electronic postings if the Union customarily
24 communicates to members via intranet or e-mail. The Notice to
25 Employees shall be signed by a responsible elected Union Officer and
26 shall be maintained for a period of at least thirty (30) consecutive
27 days thereafter. Reasonable steps shall be taken by the Union to
28 assure that the Notice is not altered, defaced or covered by any other
29 material. If the Union is unable to post copies of the Notice in all
30 places where notices to bargaining unit employees are customarily

⁴ Footnote 20 of the CERB's order stated that "Section 2(a) of the Hearing Officer's Order did not include an order to pay interest on all money due, which is a standard part of all CERB make-whole orders, including orders against unions." OPEIU, Local 6, 44 MLC 196, 201, SUPL-14-3628 (March 21, 2018) (citing Massachusetts Teachers Association and Anthony Swiercz, 39 MLC 233, 239, MUPL-08-4631 (Feb. 28, 2013); AFSCME, Council 93 and Richard Allen Bettuchy, 32 MLC 85, 89, MUPL-02-4331 (Oct. 14, 2005); AFSCME, Council 93 and Charles W. Bigelow, 20 MLC 1271, SUPL-2553 (H.O. Nov. 24, 1993), aff'd, 22 MLC 1329, 1335 (Dec. 29, 1995)). Accordingly, the CERB modified Section 2(a) of that order to include remedial, statutory interest.

1 posted in the Trial Court, the Union shall immediately notify the
2 Executive Secretary of the DLR in writing, so that the DLR can request
3 the Trial Court to permit the posting.

4 c) Notify the DLR in writing within thirty (30) days from the date of the
5 Order of the steps taken by the Union to comply with this Order.
6

7 The Union filed a Notice of Judicial Appeal on March 22, 2018. On April 19,
8 2018, the Union also filed a Motion to Stay the CERB's order, which Murphy opposed
9 on April 26, 2018. The CERB allowed the Union's Motion to Stay on July 5, 2018. On
10 April 19, 2018, Murphy filed a Limited Notice of Appeal Regarding Interest Rate, and
11 also filed a Motion for Reconsideration of the Interest Rate, which the CERB denied on
12 July 5, 2018. On December 27, 2019, the Massachusetts Court of Appeals affirmed the
13 CERB's decision and order.

14 On January 23, 2020, the Union notified the DLR that, by January 20, 2020, it
15 had posted on its website the Notice to Employees required by Section 2(b) of the
16 CERB's order. On March 6, 2020, the parties filed a Joint Request for Backpay
17 Compliance Hearing, seeking assistance to calculate the monetary amount of the make
18 whole remedy, and also seeking a determination into the appropriate amount of that
19 remedy. After two DLR mediation sessions on April 16 and 30, 2020, the parties were
20 unable to reach an agreement. On June 5, 2020, the DLR issued a Notice of
21 Compliance Hearing.

22 **1. The Motions**

23 On May 1, 2020, the DLR assigned the case to me to preside over the
24 compliance hearing. On May 14, 2020, the Union filed a Motion for New Hearing Officer,
25 which Murphy opposed on May 20, 2020. The DLR denied that motion on May 26,

1 2020. On May 13, 2020, the Union filed a Motion for Discovery, which Murphy opposed
2 on June 5, 2020, and which I denied on July 23, 2020.

3 On September 17, 2020, the Union filed a Motion in Limine to preclude certain
4 evidence related to health insurance. Murphy filed an opposition to that motion on
5 September 23, 2020; and, on October 1, 2020, I denied the motion. On September 20,
6 2020, the Union filed a second Motion in Limine to preclude certain evidence related to
7 sick time and vacation time, which Murphy opposed on September 23, 2020. On
8 October 1, 2020, I denied the second motion. On September 21, 2020, the Union filed a
9 third Motion in Limine to preclude certain evidence related to interest on retirement
10 buyback benefits, which Murphy opposed on September 23, 2020. I denied the third
11 motion on October 1, 2020. On September 25, 2020, Murphy filed a fourth Motion in
12 Limine to exclude certain documents and witness testimony, and the Union filed its
13 opposition to that motion on September 30, 2020. I denied the fourth motion on October
14 6, 2020.

15 On September 25, 2020, the Union filed an Emergency Motion to Postpone the
16 Hearing. Although Murphy opposed that motion on September 28, 2020, I allowed it
17 later that same day. On September 28, 2020, Murphy also filed a Motion to Amend
18 Interest Rate, which the Union opposed on October 2, 2020, and which I denied on
19 October 8, 2020. On October 6, 2020, the Union filed a Motion for an In-Person
20 Hearing, which Murphy opposed on October 13, 2020. The DLR denied that motion on
21 October 13, 2020.

1 **2. The Subpoenas**

2 Between September 3, 2020 and February 2, 2021, the parties requested—and I
3 issued—nine subpoenas and seven subpoenas duces tecum. On September 9, 2020,
4 Murphy filed a Motion to Vacate and Revoke a subpoena duces tecum that I issued on
5 September 3, 2020. The Union filed its opposition to that motion on September 14,
6 2020. On September 14, 2020, I conducted a hearing to determine the appropriateness
7 of the disputed subpoena duces tecum; and subsequently, on September 18, 2020, I
8 issued a ruling denying the motion. On September 23, 2020, the Trial Court filed a
9 Motion to Quash another subpoena duces tecum that I issued on September 16, 2020.
10 While the Union filed an opposition to the Trial Court's motion on September 25, 2020,
11 Murphy did not file a written response. I conducted a hearing into the appropriateness of
12 that disputed subpoena duces tecum on September 28, 2020; and on October 5, 2020, I
13 allowed the Trial Court's Motion to Quash, in part, and denied it, in part.

14 **3. The Compliance Hearing and Post-Hearing Briefs**

15 I conducted eight days of hearing into whether the Union had complied with the
16 CERB's order on October 16, November 13 and 16, December 16 and 18, 2020,
17 January 6, and February 16 and 17, 2021.⁵ At the end of the eighth hearing day, I
18 closed the record. By an assented-to motion filed on March 29, 2021, the parties

⁵ I conducted the hearing remotely pursuant to the Governor's teleworking directive to executive branch employees.

1 requested a change to the post-hearing brief schedule, which the DLR granted on that
2 same date. The Union and Murphy filed their post-hearing briefs on April 5 and 19,
3 2021, respectively. On April 30, 2021, the Union filed a reply brief.⁶

4 **4. The Postmortem Filings**

5 As noted previously, Murphy died on September 1, 2021. On September 17,
6 2021, the Respondent filed a “Motion for Leave to File Supplemental Backpay
7 Compliance Post Hearing Brief to Address the Effects of the Charging Party’s Death on
8 His Claims for Damages” (Motion for Leave). On September 17, 2021, the Charging
9 Party filed a Motion for Time to Respond to Respondent’s Motion for Leave, which the
10 DLR allowed on September 20, 2021.⁷ On October 1, 2021, the Charging Party filed its
11 Response to the Motion for Leave (Response), in which it requested a stay pending the
12 appointment of a personal representative for Murphy’s estate (Request for Stay). On
13 October 5, 2021, the Respondent filed a reply to the Charging Party’s Response and

⁶ At the end of the last hearing day on February 17, 2021, the parties agreed to file non-contemporaneous post-hearing briefs. Specifically, the Union agreed to file its brief on a date certain and Murphy agreed to file his brief 10 days later as a “reply.” By e-mail on February 18, 2021, the Union requested a revocation of the agreement to file non-contemporaneous briefs and the imposition of a contemporaneous briefing schedule pursuant to 456 CMR 13.15(2) and 456 CMR 12.02(2). By e-mail later that day, Murphy opposed the request. After considering the totality of circumstances, including the procedural and substantive histories of this case, I denied the Union’s request for revocation but permitted it to file a reply brief within 10 days’ receipt of Murphy’s brief, pursuant to 456 CMR 13.15(4). Responding to a subsequent inquiry from the Union on April 23, 2021, I later informed the parties that the Union could file its reply brief on April 30, 2021 rather than April 29, 2021, because April 19, 2021 was a holiday.

⁷ By email on September 20, 2021, the Respondent stated that it did not object to the Charging Party’s request for a 14-day extension to respond to the Respondent’s Motion for Leave.

1 Request for Stay.

2 On October 15, 2021, the DLR allowed the Request for Stay and directed the
3 Charging Party to file a status update by November 15, 2021, concerning the
4 appointment of a personal representative for Murphy's estate. On November 12, 2021,
5 the Charging Party filed its First Status Update, requesting an extension of the stay. On
6 November 22, 2021, the DLR allowed the request for an extension and directed the
7 Charging Party to file a second status update by December 13, 2021. On December 10,
8 2021, the Charging Party filed a Motion to Substitute Party, Lift Stay, and Set Briefing
9 Schedule (Motion to Substitute). On December 17, 2021, the DLR allowed the Motion to
10 Substitute. On December 17, 2021, the DLR also allowed the Respondent's September
11 17, 2021 Motion for Leave, directed the Respondent to file its supplemental brief by
12 January 7, 2022, and directed the Charging Party to file its reply brief by January 14,
13 2022.

14 On January 7, 2022, the Respondent filed a Supplemental Backpay Compliance
15 Post-Hearing Brief and Motion to Dismiss⁸ Pursuant to G.L. c. 228, §1. On January 14,
16 2022, the Charging Party filed its Opposition to Respondent's Motion to Dismiss.

17 STIPULATIONS OF FACT

18 1. At the time of his termination, Mr. Murphy was a Family Law Facilitator for the
19 Massachusetts Trial Court ("Trial Court") and a member of OPEIU, Local 6.

⁸ In its Motion, the Union argues that dismissal is warranted because Murphy's "claim does not survive his death" pursuant to the "Survivor Statute" at G.L., c. 228 §1. For the reasons discussed below, I deny the Union's Motion to Dismiss in its entirety.

- 1 2. Respondent OPEIU, Local 6 is an employee organization within the meaning of
2 M.G.L. Ch. 150E, §1 of the [L]aw and OPEIU, Local 6 is the exclusive collective
3 bargaining representative for all employees employed by the Trial Court.
4
- 5 3. On May 14, 2013, Mr. Murphy was terminated from his position as a Family Law
6 Facilitator with the Trial Court.
7
- 8 4. On April 9, 2014, Mr. Murphy filed a Charge of Prohibited Practice with the
9 Department of Labor Relations ("DLR") alleging OPEIU, Local 6 breached its
10 duty of fair representation.
11
- 12 5. On November 7, 2014, the DLR deferred the Charge to arbitration.
13
- 14 6. On July 16, 2015, the arbitrator issued a decision denying the grievance as
15 procedurally not arbitrable because of a timeliness issue.
16
- 17 7. On July 22, 2015, the DLR re-opened the Charge filed by Mr. Murphy.
18
- 19 8. On September 25, 2015, the DLR issued a Complaint of Prohibited Practice.
20
- 21 9. On May 5, 2016, Mr. Murphy filed a complaint in the United States District Court
22 for the District of Massachusetts (hereinafter "[c]omplaint"), Worcester Division,
23 entitled [sic] John F. Murphy v. Commonwealth of Massachusetts - Executive
24 Office of the Trial Court, Harry Spence, Court Administrator of the Massachusetts
25 Trial Court and Stephen G. Abraham, Case No. 4:16-CV-40051-TSH with
respect to his termination.
- 26 10. On October 4, 2019, the [c]omplaint was resolved by way of a Settlement
27 Agreement and Release between the Parties and a stipulated dismissal with the
28 United States District Court, District of Massachusetts, Worcester Division.
- 29 11. On May 23, July 8, 11, 25, and August 17 and 18, 2016, Hearing Officer Kendrah
30 Davis conducted hearings regarding Mr. Murphy's Charge.
31
- 32 12. On August 25, 2017, Hearing Officer Davis issued a decision, in part, to make
33 Mr. Murphy whole for [the] loss [of] compensation he suffered as a direct result of
34 his termination from the Trial Court effective on May 13, 2013.
35
- 36 13. On August 31, 2017, the Respondent requested review of the Hearing Officer's
37 decision by the Commonwealth Employment Relations Board ("CERB").
38
- 39 14. On March 21, 2018, the CERB affirmed the Hearing Officer's decision and
40 OPEIU, Local 6 appealed to the Massachusetts Appeals Court.
41

- 1 15. On October 11, 2019, the Parties argued the case before the Appeals Court.
- 2 16. On December 27, 2019, the Appeals Court affirmed the CERB's Decision and
3 Order.
- 4 17. On March 6, 2020, after unsuccessful mediation attempts to resolve the amount
5 of backpay owed to Mr. Murphy, the Parties submitted a joint request to the DLR
6 to conduct a backpay compliance hearing.
- 7
- 8 18. On May 1, 2020, the DLR assigned the case to Hearing Officer Davis.
- 9
- 10 19. On June 5, 2020, the DLR issued a Notice of Compliance Hearing.
- 11
- 12 20. OPEIU, Local 6 is in compliance with all parts of the CERB's March 21, 2018
13 Order ("Make Whole Order"), except so much of the Make Whole Order as
14 requires OPEIU, Local 6 to make Murphy whole for the loss of compensation he
15 suffered as a direct result of his termination from the Trial Court effective on May
16 14, 2013.⁹

17 FINDINGS OF FACT

18 **Murphy's Education and Employment History (1973 – 2005)**

19 From 1973 to 1979, Murphy attended Yale University and graduated with a B.A.
20 in psychology in May of 1979. From 1979 to 1981, the Department of Mental Health
21 (DMH) employed Murphy as a social worker at Worcester State Hospital. From 1981 to
22 1984, Murphy attended the University of Connecticut (UConn) School of Law and
23 graduated with a J.D. in May of 1984. Murphy became a member of the Massachusetts
24 Bar in 1985.

25 Between 1985 and 1989, Murphy worked at the law firm Seder & Chandler in
26 Worcester, Massachusetts where he engaged in the general practice of transactional
27 law, including "a fair amount of real estate," but did not engage in the practice of

⁹ Although not stipulated affirmatively, the parties do not dispute that the Union has not paid any compensation to Murphy or his estate since the CERB issued its order.

1 criminal law, family law, or litigation. Murphy left Seder & Chandler in 1989 and began
2 working for Carl Aframe (Aframe) who was a “bankruptcy specialist.” Because Murphy
3 believed that he did not make “as much money for Carl as he had hoped,” he left
4 Aframe’s employment in 1992.

5 At some later point in 1992¹⁰ through 1998, Murphy was self-employed as a solo
6 practitioner with an office located at 390 Main Street in Worcester, where he shared
7 office space with two other attorneys, Herbert F. Travers, III (Travers) and Ellen
8 O’Connor (O’Connor), and was engaged in the general practice of transactional law,
9 which included real estate, wills, small business formation, forming corporations,
10 reviewing contracts, and some bankruptcy.¹¹ As a bankruptcy attorney, Murphy
11 represented debtors, charging them between \$600 and \$800 for Chapter 7¹² work.

12 By 1998, some of Murphy’s contacts had, in his words, “kind of drifted away.”
13 Consequently, Murphy left his solo practice and secured employment with the
14 Worcester Public Schools as a long-term substitute teacher at Burncoat Middle School

¹⁰ Although Murphy’s resume did not list any employment (i.e., legal, professional, or otherwise) between 1992 and 1993, he gave un rebutted testimony that he had opened a law office in 1992.

¹¹ Murphy’s resume stated that he was employed at “Travers and Murphy” from 1993 to 1994, and 1996 to 1998. His resume also stated that he was employed at “Travers Murphy & O’Connor” in Worcester from 1994 to 1996. Moreover, Murphy’s cover letter dated February 17, 2005, stated that he was “associated” with Travers and O’Connor. Thus, based on the totality of evidence presented, I find that, at all relevant times, Murphy was associated with Travers and O’Connor, but was neither employed nor partnered with them during that time.

¹² Chapter 7 refers to 11 U.S.C. §§ 701, *et seq.*

1 during the 1998-1999 school year.¹³ Later, between April and October of 1999, Murphy
2 opened, operated, and owned an ice cream store called Mad Murphy's Ice Cream.
3 Between October of 1999 and September of 2000, Murphy found subsequent
4 employment as a campaign manager for then-State senatorial candidate Joseph D.
5 Early, Jr. (Early) which paid about \$500 a week. After Early lost his campaign, Murphy
6 found part-time employment as an English as Second Language (ESL) teacher at
7 Quinsigamond Community College (QCC) in Worcester from 2000 to 2002.¹⁴ Also,
8 between February of 2001 and September of 2001, Murphy worked as the general
9 manager of Gilrein's blues club in Worcester.

10 Beginning in April of 2002, the Red Cross hired Murphy on a full-time basis as
11 Director of Emergency Services in Worcester where he coordinated disaster responses
12 and responded primarily to fires, displaced persons needing housing assistance,
13 clothes, and vouchers for furniture. Murphy earned about \$45,000 annually during his
14 tenure at the Red Cross until his layoff in March of 2003.

15 Between 2003 and April of 2005, Murphy returned to his solo practice by opening
16 a law office at his home address at 40 Howland Terrace in Worcester.¹⁵ He earned

¹³ Murphy's resume stated that he was employed as a long-term substitute teacher between August of 1998 and June of 1999.

¹⁴ Murphy's resume stated that he was employed as an ESL Instructor for the Workplace Education Program at QCC between January and August of 2002.

¹⁵ Murphy lived in his house at 40 Howland Terrace from 1986 until 2017 when the bank foreclosed on his home. Murphy stopped making mortgage payments on his house after his termination in May of 2013 which were \$1,400 monthly. In his 2016 tax returns,

1 approximately \$40,000 annually through general practice, real estate and loan closings,
2 and preparing simple estate plans such as wills. Although Murphy also represented
3 landlords in housing court during this time and appeared in front of those judges, he
4 very rarely in a courtroom; and, at no time did he ever engage in any trial or appeals
5 court litigation.

6 **Murphy's Employment History (2005 – 2013)**

7 **1. The Creation of the Family Law Facilitator Position**

8 At some point around early February of 2005, the Trial Court received
9 emergency funding to hire additional staff and/or create new positions. Pursuant to that
10 funding, then Trial Court Register Steven Abraham (Abraham) decided to create a new
11 Family Law Facilitator position and asked Murphy if he was interested in the position.¹⁶

12 On February 17, 2005, Murphy filed a formal Application for Employment
13 (application)¹⁷ with the Trial Court for the position of Family Law Facilitator. His
14 application¹⁸ included a resume and cover letter which stated, in pertinent part:

Murphy reported receiving \$9,600 in rental income from a unit that he had rented at 40 Howland Terrace.

¹⁶ Murphy gave un rebutted testimony that he, Early, and Abraham attended UConn School of Law around the same time. He also testified that Early had previously spoken with Abraham about considering Murphy for the Family Law Facilitator position. Although Murphy explained to Abraham that he did not practice family law, Abraham responded that it “doesn’t matter” because Murphy could “pick up what [he] need[s] to know pretty quickly.” Murphy testified further that Early called him the following day, asking if he would accept Abraham’s job offer. Neither Abraham nor Early testified.

¹⁷ The Trial Court application asked several questions including: how Murphy was referred to the court, to which he answered “Self;” and the reason for leaving his prior job as a self-employed attorney, to which he answered “N A” [sic].

1

2 I began my career as an attorney in 1984, at the firm of Seder and
3 Chandler. I left the firm in 1989 to work for Carl Aframe, a
4 bankruptcy specialist. In 1992 I opened my own office at 390 Main
5 Street in Worcester, a general practice with a concentration in
6 bankruptcy. I subsequently became associated with Herbert F.
7 Travers, III and Ellen O'Connor.

8 Representation of debtors in bankruptcy has been, since 1989, a
9 major focus of my practice. I emphasize this because I believe my
10 experience in representing hundreds of debtors in bankruptcy
11 proceedings serves me well as preparation for the skills required of
12 a Family Law Facilitator.

13 Most of my bankruptcy clients have found themselves in difficult
14 situations as [a] result of illness, loss of employment or divorce.
15 They are quite often experiencing some of life's greatest stress
16 [sic]. I have embraced the challenge of assisting these clients in
17 obtaining the relief available, explaining the legal system and its
18 procedures, and helping them anticipate and cope with the changes
19 they are going through. I take pride in the skills I've acquired over
20 the years in this regard.

21 In 1998 I decided to leave the full-time practice of law to see if there
22 was a better fit for my goals and abilities. I taught school for a year.
23 I tried my hand at small business, first opening an ice cream store
24 in my neighborhood, and then running a local blues club. I found
25 much enjoyment in both but, unfortunately, not much money. In
26 between I taught English as a second language, ran Joe Early Jr.'s
27 campaign for [S]tate Senate and practiced a little bit of law. In 2002
28 a friend, Lisa Piehler-Jones, the executive director of the local
29 chapter of the American Red Cross, hired me as a full-time
30 consultant to advise her on the operation of the Emergency
31 Services Department of that chapter. Soon thereafter I was hired
32 for the position of Director of Emergency Services. It was in many
33 ways a good fit for me, as it involved the coordination of a large
34 number of volunteers in an effort to deliver much needed resources
35 (financial, counseling and referral) to victims of disasters on a

¹⁸ In his application, Murphy listed three references who included Joseph Lian (Lian) and Francis Russell (Russell). I accepted into evidence a redacted copy of the application which redacted the identity of the third reference.

1 limited budget. This experience, I believe, also prepares me well for
2 the position of Family Law Facilitator. I supervised a large staff of
3 volunteers and paid Red Cross employees in what was essentially
4 social work. The position involved a great deal of direct contact with
5 the clients, which I enjoyed.

6 The common thread that has run through much of my law practice
7 and other professional experience has been a desire to help others,
8 through counsel, referral and education. That is why the challenge
9 of this new position attracts me.

10
11 I resumed a full-time practice of law approximately one year ago.¹⁹
12 And while I've enjoyed the struggle of balancing my inclinations
13 toward community service²⁰ with the business realities of private
14 practice, I have come to realize that something is missing. I believe
15 that something can be found in the position now posted.

16
17

18 After conferring with Murphy and while his application was pending, Abraham
19 submitted a Request for New Position (Request) on or about March 1, 2005, asking the

¹⁹ Murphy's resume stated that he had "[r]ecommenced a full time practice in the spring of 2004." It also stated that his professional experience comprised the "[g]eneral practice of law" and that, from 1998 to 2004 the time devoted to his practice "ranged from full time to part time, reflecting the demands of other employment ventures."

²⁰ Murphy's resume stated that he was involved in the following community activities:

Baseball Coach: Jesse Burkett and Shrewsbury Little Leagues, 1996 to 2001

Politics: Participation in local political campaigns and initiatives.

Volunteer service to a variety of local agencies in the human services area.

1 Trial Court to approve the creation of a new Family Law Facilitator position.²¹ In support
2 of his Request, Abraham stated that:

3 This position has been deemed a critical needs position. The
4 Worcester Probate and Family Court has been and continues to be
5 one of the busiest Probate and Family Courts in the
6 Commonwealth. Worcester County has a large indigent and
7 financially disadvantaged population in need of professional
8 assistance. As was evident by the staffing model, Worcester is
9 severely understaffed and any assistance at this point in time would
10 help to alleviate an already overburdened staff, while providing an
11 absolutely necessary service to those most in need.

12
13 In his request, Abraham also stated that the “critical needs positions” have been
14 approved by the Chief Justice for Administration and Management (CJAM) of the Trial
15 Court Robert A. Mulligan (Mulligan), and by Chief Justice of the Probate and Family
16 Court Department Sean M. Dunphy (Dunphy).²²

17 **2. Murphy’s Employment as Family Law Facilitator**

18
19 By letter dated March 2, 2005, Mulligan notified Abraham²³ that the Trial Court
20 had approved the Request to appoint Murphy as Family Law Facilitator, stating in full:

21 I am pleased to approve your request to appoint Mr. John F.
22 Murphy on a temporary basis to the position of Family Law
23 Facilitator (Position Number: 00183077) at a level 17, step 1 and a

²¹ The record is unclear about why Murphy’s February 17, 2005 application preceded Abraham’s Request on March 1, 2005 to create the Family Law Facilitator position.

²² The record is unclear about when Dunphy approved Abraham’s Request.

²³ Mulligan copied the following individuals on his letter: Honorable Sean M. Dunphy, Honorable Joseph L. Hart, Jr. (Hart), First Justice, Worcester Probate & Family Court, Robert P. Panneton (Panneton), Chief of Staff, Paul T. Edgar (Edgar), Director of Human Resources [unnamed], and Director of Fiscal Affairs William Marchant (Marchant).

1 salary of \$46,559.73. This appointment will cover the period from
2 April 1, 2005 through June 30, 2005.

3
4 Pursuant to G.L. c. 211B, this appointment has been reviewed and
5 determined to be in compliance with the standards promulgated in
6 the *Trial Court's Personnel Policies and Procedures Manual*.
7 [Emphasis in original.] This position is part of the Clerical
8 bargaining unit and is covered by the collective bargaining
9 agreement with the Office and Professional Employees
10 International Union, Local 6. Mr. Murphy should be informed,
11 however, that this temporary appointment is subject to adequate
12 funding.

13 I would like to take this opportunity to welcome Mr. Murphy to the
14 Massachusetts Trial Court. Any questions regarding this
15 appointment may be directed to the Human Resources Department
16 at (617) 742-8575.
17

18 On or about April 1, 2005, the Trial Court processed Murphy's Appointment
19 Documentation, which recognized his continued employment as Family Law Facilitator
20 on a temporary basis based on funding in the fiscal year budget. By letter dated January
21 3, 2006, Mulligan notified Abraham that the Trial Court had approved Abraham's
22 request to appoint Murphy as Family Law Facilitator on a permanent basis, effective
23 January 9, 2006. At all relevant times during his tenure as Family Law Facilitator,
24 Murphy answered only to Register Abraham.²⁴

25 In a telegram.com article published on November 15, 2010, by Worcester
26 Telegram reporter Gary V. Murray (Murray) and staff writer Rick Cinclair (Cinclair),
27 Murphy made the following statements concerning his position as Family Law
28 Facilitator:

²⁴ Abraham was defeated by Stephanie Fattman (Fattman) in the November of 2014 Register election. Fattman was sworn into office in January of 2015.

1 Stephen Abraham, the register of probate, requested funding
2 six years ago for this position, which was originally funded on an
3 emergency basis, because we were overwhelmed by self-
4 represented litigants. Right now, there are only two counties in
5 Massachusetts that have a family law facilitator....

6 Stephen Abraham called me up and asked me if I was
7 interested in this job, not because I had practiced in family court,
8 but because he knew my instincts were more the instincts of a
9 social worker. It was a good call on his part. I love my job.

10

11 I think the [number] 1 attribute that's essential for my job is the
12 ability to communicate with people.... Our challenge is to find a way
13 to determine what exactly their needs are and what procedure they
14 need to follow to get help from the court.²⁵ You need a lawyer to
15 understand some of the complicated issues, such as jurisdiction
16 and notice....

17 When asked by Murray and Cinclair if Murphy "ever [thought] about returning to
18 private practice," Murphy stated that, "They'll have to drag me out of this job. I think it's
19 a perfect fit. I truly enjoy going to work in the morning."

20 **The Family Law Facilitator Job Description**

21 On or about August 1, 2005, the Trial Court posted a job opportunity for an
22 additional Family Law Facilitator position²⁶ which included the following description:²⁷

²⁵ Murphy gave un rebutted testimony that during his tenure as a Family Law Facilitator his job duties were initially ministerial in terms of ensuring correct paperwork and making sure individuals knew where to go. His duties evolved over time because he was eventually "able to...suggest strategies or clear up potential misunderstandings as far as procedure and filings to assist people to get the relief they wanted; so, that when they did get into court, the judge was presented with a succinct recitation of what the problem was and what needed to be done." Murphy also testified that "he got very good at it" and acquired a great deal of knowledge and experience in probate and family court during this time.

1 POSITION SUMMARY:

2 Working within a Division of the Probate and Family Court, the
3 Facilitator will provide assistance to indigent and financially
4 disadvantaged individuals to access the court concerning the
5 process of establishing parentage, establishing, modifying and
6 enforcing child and spousal support and custody and visitation
7 orders, guardianship and child welfare matters, and will perform
8 related legal and administrative duties. The Family Law Facilitator
9 will be hired by the Register of Probate, in consultations with the
10 First Justice.

11
12 MAJOR DUTIES:

13 Meets with indigent and financially disadvantaged parents to inform
14 them of Probate and Family Court procedures and the rules and
15 statutes concerning child support, spousal support, maintenance of
16 health insurance, domestic violence, child custody and visitation
17 and guardianship, and child welfare matters.

18
19 Provides educational material to parents and guardians concerning
20 the procedures for establishing parentage, establishing, modifying
21 and enforcing child support, divorce, paternity, guardianship and
22 adoption including custody, visitation, health insurance orders, and
23 petitions for guardianship and adoption.

24 Assesses service needs of litigants and refers individuals, as
25 appropriate, to the Department of Revenue, the Probation Office,

²⁶ Murphy gave un rebutted testimony that, at some point during his tenure, the Trial Court hired Evelyn Patsos (Patsos) as an additional Family Law Facilitator. Also, at some point during Murphy's tenure, the Trial Court hired Lori Landers (Landers) as another Family Law Facilitator assigned to one of the courts in western Massachusetts.

²⁷ On or about February 28, 2014, the Trial Court posted a job opportunity for the Family Law facilitator position which included mission statements for both the Trial Court and the Worcester Probate and Family Court and added a new category of "job competencies" to the position description. That posting also listed a starting annual salary of \$59,596.30 and included updates to the categories of "position summary," "supervision received," "major duties," and "position requirements." Unlike the August 1, 2005 posting, the February 28, 2014 posting required all applicants to apply online via the Trial Court's website; thus eliminating the ability to apply via paper, facsimile, or email.

1 the Registry of Probate, Domestic Violence Advocates, Legal
2 Services, Bar Association Reduced Fee and Referral Programs,
3 Local Dispute Resolution Coordinator, Lawyer for the Day, District
4 Attorney, Department of Social Service, and community agencies
5 and resources which provide services to parents and children.
6
7 Reviews files, examines documents, assists with the preparation of
8 financial statements and Child Support Guidelines worksheets,
9 provides assistance in completing forms, reviews stipulations and
10 other proposed agreements, determines status of cases, and
11 otherwise assists with the preparation and expediting of matters for
12 hearing.
13 Assists with the coordination of the Lawyer of the Day Program.

14 Collaborates with [local]²⁸ Bar Association in the development of
15 educational programs that will assist indigent and financially
16 disadvantaged litigants to gain meaningful access to the Probate
17 and Family Court.

18 Advises parties, in appropriate cases, of the availability of genetic
19 marker testing and, when appropriate, assists with the execution of
20 a Voluntary Acknowledgement of Parentage after determination of
21 genetic marker testing results.
22
23 Advises parties concerning the service of summons and other
24 notices.

25 Advises parties concerning attendance at parent education classes.

26 Facilitates requests for expedited hearings of Complaint for
27 Modification in cases where the litigant provides written
28 documentation that he or she is unemployed or is temporarily or
29 permanently disabled.

30 Provides an explanation of Child Support Guidelines and their use
31 in child support matters.
32
33 Assists the court to verify income and health insurance costs.
34
35 Performs related duties as required.
36

²⁸ Brackets in original.

1 SUPERVISION RECEIVED:

2 The Family Law Facilitator will be supervised by the Register of
3 Probate in accordance with policies promulgated by the Chief
4 Justice of the Probate and Family Court Department, and will
5 respond to requests for assistance in the processing of cases from
6 the judges sitting in the Division.
7

8 POSITION REQUIREMENTS:

9
10 Admission to the practice of law in Massachusetts.

11 Familiarity with domestic relations practice in the Probate and
12 Family Court Department.
13

14 Knowledge of the statutes, case law and court rules relating to the
15 establishment of paternity and the establishment, modification, and
16 enforcement of child and spousal support, custody and visitation.
17

18 Strong interpersonal skills and the ability to work effectively with
19 judges, court staff, attorneys, and the public.

20 Ability to communicate clearly and effectively.
21

22 Ability to analyze administrative problems and develop feasible
23 solutions.

24 Ability to handle confidential matters with sensitivity.
25

26 Ability to work independently and establish work priorities.
27

28 Knowledge of an ability to use personal computers and related
29 software including Microsoft Windows and Word Perfect.

30 SALARY:

31 \$46,559.73 (Level 17).
32
33

34 **Murphy's Discipline and Termination**

35 On or about January 7, 2013, the Trial Court issued Section 19.200 of its Policy
36 which pertained to Discharge, and stated in full:

- 1 A. An employee of the Trial Court discharged for cause, except
2 those discharged due to the exhaustion of all sick time and
3 leave benefits as a result of a long-term illness, shall not be
4 eligible for hire within the Trial Court.
- 5 B. The discharge of an employee (not including Judges, Clerks,
6 and Registers of Probate) must be made in accordance with
7 the provisions of Section 16.000²⁹ of this Manual.
- 8 C. Employees discharged for cause may or may not be entitled
9 to compensation in lieu of earned and accrued but unused
10 vacation, compensatory, or personal time depending upon
11 the circumstances surrounding the discharge. The
12 department head should contact the Office of Court
13 Management for further information on this issue.
- 14
15 D. Employees who are discharged are subject to the Employee
16 Checkout List³⁰ and exit interview, if appropriate. [Emphasis
17 omitted.]

18 Section 19.500 of the Policy pertained to Retirement and stated in pertinent part:

- 19 B. The payroll clerk or the Office of Court Management will process
20 the employee's final check, including processing vacation pay in
21 lieu of time off and sick leave buy back owed to the employee
22 pursuant to Section 8.500(c) and 8.603(c)³¹ of this Manual and/or
23 the applicable collective bargaining agreement and will be
24 responsible for deducting all monies due to the Trial Court from the
25 employee's final paycheck or for notifying the Office of Court
26 Management if there are problems with processing the employee's
27 final check. [Emphasis omitted.]

28
29 Effective May 14, 2013, the Trial Court terminated Murphy's employment as
30 Family Law Facilitator for violating certain sections of the Policy, *inter alia*.

31 **The Successor Family Law Facilitators**

²⁹ Neither party offered into evidence Section 16.000 of the Policy.

³⁰ Neither party offered into evidence the Employee Checkout List.

³¹ Neither party offered into evidence Sections 8.500(c) or 8.603(c) of the Policy.

1 At some point around June of 2014, the Trial Court hired Paul Mullen (Mullen) as
2 a Family Law Facilitator in the Worcester Probate and Family Court. During his tenure in
3 that position, Mullen would generally begin his day at the front counter and would make
4 himself available to pro se litigants who were trying to file documents and, in most
5 cases, trying to see a judge immediately. Toward the end of Mullen's tenure in the
6 spring of 2016, Register Fattman assigned him to work in the Court Service Center to
7 perform Staff Attorney duties in addition to his Family Law Facilitator duties.³²

8 At a meeting on or about May 6, 2016, Fattman removed the Family Law
9 Facilitator job title and Mullen's name from the probate and family court's organizational
10 flow chart. In or about July of 2016, Mullen applied—and interviewed successfully—for a
11 vacant Staff Attorney position at the Court Service Center in Worcester via LinkedIn.³³
12 Mullen remained in the Staff Attorney position until December of 2019 when the Trial
13 Court promoted him to Manager of the Worcester Superior Court.

14 After Mullen's departure at some point between May and July of 2016, the Trial
15 Court kept unfilled the Family Law Facilitator position. Beginning in or about June of
16 2017, Fattman authorized the transfer of funds, which were originally allocated for the
17 Family Law Facilitator position, for use elsewhere in the Trial Court. Around that time,

³² Mullen gave unrebutted testimony that his Staff Attorney duties included assisting pro se litigants in the superior court, district court, housing court, juvenile court, and probate and family court, but did not include dealing with any attorneys.

³³ Mullen testified that he applied for the staff attorney position “[t]he exact same way I applied for the Family Law Facilitator [position]: I went to LinkedIn; I set up an account; I attached a cover letter [and] my resume; [I] filled out the application and emailed it to Human Resources of the Trial Court.”

- 1 Fattman also authorized the removal of the Family Law Facilitator job title from the Trial
- 2 Court's official organizational chart and monthly reports. Beginning in or about May of
- 3 2016 and continuing to the present, the Trial Court has kept the Family Law Facilitator
- 4 position unfilled; and, since June of 2017, has kept that position unfunded.³⁴

³⁴ While Mullen testified that Fattman explained at the May 6, 2016 meeting that she did not see the role of Family Law Facilitator working into the Trial Court's structure, he conceded that he did not recall her specific words. Union Business Manager George Noel (Noel) testified that he knew Fattman had eliminated the Family Law Facilitator position because she "saw no value in having that job," because he spoke with Mullen about her decision while representing Mullen on another matter, and because she excluded Mullen's name and the position from the Trial Court's monthly report and its flow chart. Additionally, Murphy testified that he became aware that there was no longer an active Family Law Facilitator at the Worcester Probate and Family Court at some point around May of 2016 based on his self-employment, going to court, and speaking with Connie Mortara (Mortara) who was the supervising attorney at the Court Service Center.

Conversely, Fattman testified that she did not recall having conversations with Mullen about the future of the Family Law Facilitator position. She also testified that she did not recall whether she decided to eliminate the Family Law Facilitator position, did not know if, as Register, she had the final authority to keep unfilled that position, and did not know the official process to eliminate the position. Specifically, beginning in June of 2016, she took maternity leave for 12 weeks and decided not to fill the Family Law Facilitator position. However, Fattman later testified that she could have made the decision on or about June 5, 2017, pursuant to an email sent by Chief of Probate and Family Court Angela Ordonez (Ordonez), concerning a new position titled Assistant Judicial Case Manager. While Fattman testified that she intended to fill the Family Law Facilitator position in June of 2017, she admitted to redistributing funds that were allocated for that position and using it elsewhere. She also admitted that as of February 2021, she had kept unfilled the Family Law Facilitator position for about 4 or 5 years.

Similarly, Chief Human Resources officer Paul Dietl (Dietl) testified that the Trial Court had not filled the Family Law Position since 2016 once Mullen left. Specifically, he pointed to the settlement agreement between Murphy and the Trial Court on Oct. 4, 2019, which affirmed that while the Trial Court employs Family Law Facilitators who are assigned in other probate and family courts, that position is no longer located within the Worcester County Probate & Family Court. Moreover, Dietl's affidavit attached to that

1 As discussed in more detail below, Murphy filed a complaint against the Trial
2 Court in federal court on May 5, 2016, alleging discrimination based on mental disability
3 and violation of his due process rights. On or about October 4, 2019, the parties entered

agreement stated that “[u]p until 5/16/16, the Massachusetts Trial Court employed at least one person as a Family Law Facilitator in the Worcester Probate and Family Court. Since 5/16/16, the Massachusetts Trial Court has not employed anyone as a Family Law Facilitator in the Worcester Probate and Family Court.”

Likewise, Trial Court Director of Labor Relations Mark Conlon (Conlon) testified that through his retirement on February 7, 2020, the Family Law Facilitator position remains an active position even though the Trial Court has kept it unfilled and since May of 2016. Conlon also testified that he would have been involved in the discussions on the management side with the Chief Justices or court administrators, and that he would have been the chief negotiator with the Union on any Trial Court decision to eliminate a position. Further, he testified that there is a difference between defunding and eliminating a position where elimination would entail prior notice and bargaining with the Union. Concerning Murphy’s settlement agreement and reinstatement, Conlon conceded that he did not know why the Trial Court did not offer to restore Murphy’s employment as a Family Law Facilitator when he returned to the Trial Court in October of 2019.

Based on the totality of this evidence, I find that the Trial Court did not eliminate the Family Law Facilitator position but kept it unfilled only in the Worcester Probate and Family Court. My finding is based on the unequivocal language contained in the settlement agreement and in Dietl’s affidavit. It is also based on the general recollection of Mullen, and the lack of substantive recollection from Fattman. I also base my finding on a credibility determination involving Noel and Conlon, who both possessed specific recollections about the position. I credit Conlon because he gave unrebutted testimony that he would have been involved in management discussions and would have been the chief negotiator in bargaining collectively with the Union regarding any decision to eliminate the Family Law Facilitator position. I do not credit Noel’s testimony because he did not refute Conlon’s testimony that prerequisite collective bargaining had not occurred prior to the alleged elimination. Nor is there any corroborating evidence that the Union had either filed a grievance and/or an unfair labor practice charge over the elimination. For all these reasons, I find that the Trial Court did not eliminate the Family Law Facilitator position, but has kept it unfilled since about May of 2016, and unfunded since June of 2017.

1 into a settlement agreement which included Murphy's reemployment at the Trial Court
2 as a Staff Attorney at the Worcester Court Service Center effective October 7, 2019.

3 **The Collective Bargaining Agreements**

4 At all relevant times the Union has represented a bargaining unit that includes
5 staff attorneys, research attorneys, interpreters, the Family Law Facilitator, and certain
6 positions assigned to the Trial Court Law Libraries. Unlike other bargaining unit
7 positions which exist in a series (e.g., Case Specialist I, II, III, etc.), the Family Law
8 Facilitator position is a stand-alone position that does not provide any promotional or
9 reclassification opportunities. However, it includes the same contractual benefits as
10 other unit positions such as vacation leave, sick leave, employer health insurance
11 contributions, step increases, and cost of living adjustments (COLA).

12 **1. The 2011-2014 CBA**

13 The Union and the Trial Court negotiated a collective bargaining agreement that
14 was effective from July 1, 2011 through June 30, 2014 (2011-2014 CBA). Article I,
15 Section 1.01 of that CBA recognized the Union as the exclusive collective bargaining
16 representative of all full-time and regular part-time professional employees, which
17 included the Family Law Facilitator. Article VII pertained to Vacation and stated, in
18 pertinent part:

19 Section 7.01 A full-time employee who has successfully completed
20 the probationary period...will be entitled to vacation during the term
21 of this Agreement as follows:

22
23 A. For employees hired prior to July 1, 2012:

24
25

1
2 Effective the first pay period in July 2012, the salary
3 schedule as contained in Appendix B-1, which reflects a
4 1.5% increase, shall become effective.

5
6 Effective the first pay period in January 2013, the salary
7 schedule as contained in Appendix B-2, which reflects a
8 1.5% increase, shall become effective.

9
10 Effective the first pay period in July 2013, the salary
11 schedule as contained in Appendix C-1, which reflects a
12 1.5% increase, shall become effective.

13 Effective the first pay period in January 2014, the salary
14 schedule as contained in Appendix C-2, which reflects a
15 1.5% increase, shall become effective.

16

17 Section 10.02 An employee will advance to the next higher salary
18 step in his or her level after each 12 months of creditable service in
19 a step until the maximum Step 8 salary rate is reached unless said
20 increase is denied by the immediate manager. A step rate increase
21 will become effective on the employee's 12 month anniversary
22 date....

23

24 Article XIII covered Paid Leave including Section 13.07 (A) Sick Leave, which
25 stated in full that, "A full-time employee shall accumulate sick leave with pay credits at
26 the rate of 4.327 hours for each bi-weekly pay period of employment."

27 Article XIV covered Group Insurance and stated in pertinent part:

28 Section 14.01 The Commonwealth shall pay the percentage of the
29 monthly premium rate for the Group Life and Health Insurance
30 Plans for eligible employees as set by statute and the employees
31 shall pay the remaining percentage.

32 Section 14.02 Statutory changes to Group Life and Health
33 Insurance Plans under Mass. Gen. Laws c. 32A will be
34 implemented on the effective date as set forth in such statutes for
35 employees during the term of this Agreement.

36

1 **2. The 2014-2017 CBA**

2 The Union and the Trial Court negotiated a successor CBA that was effective
3 from July 1, 2014 through June 30, 2017 (2014-2017 CBA). Article I Recognition, Article
4 VII Vacation, and Article XIII Sick Leave all remained unchanged. The parties
5 negotiated new terms for Article X, Section 10.01(A) Compensation, which stated in
6 pertinent part:

7 The parties agree to amend the salary schedule as follows:

8
9 1.5 % effective first full pay period in July 2014
10 1.5 % effective first full pay period in January 2015
11 1.5 % effective first full pay period in July 2015
12 1.5 % effective first full pay period in January 2016
13 1.5 % effective first full pay period in July 2016
14 1.5 % effective first full pay period in January 2017
15

16 The parties also negotiated new terms for Appendices A, B-1, B-2, C-1, and C-2
17 which covered 1.5% salary increases for employees at Level 17, Step 8 during the
18 following pay periods:

19 Appendix A \$79,737.17, effective first pay period in July 2014;
20 Appendix B-1 \$80,933.22, effective first pay period in January 2015;
21 Appendix B-2 \$82,147.22, effective first pay period in July 2015;
22 Appendix C-1 \$83,379.43, effective first pay period in January 2016;
23 Appendix C-2 \$84,630.12, effective first pay period in July 2016.

24 **3. The 2017-2020 CBA**

25 The Union and the Trial Court negotiated a successor CBA that was effective
26 from July 1, 2017 through June 30, 2020 (2017-2020 CBA), with Article I Recognition,
27 Article VII Vacation, and Article XIII Sick Leave all remaining unchanged. The parties
28 negotiated new terms for Article X, Section 10.01(A) Compensation and Appendices A,

1 B, C, and H. Specifically, Section 10.01(A) of Article X, Compensation, stated in
2 pertinent part:

3 The parties agree to amend the salary schedule as follows:

- 4
- 5 2% effective first full pay period in July 2017
- 6 2% effective first full pay period in July 2018
- 7 2% effective first full pay period in July 2019

8 The parties['] Memorandum of Agreement [(MOA)] dated April 25,
9 2018 and Addendum dated May 8, 2018 provide details for these
10 increases (see Appendix H).³⁶

11 The parties agree that any salary increases and retroactive
12 payments will be paid only to those employees considered "active"
13 as of the date of the ratification of this successor Agreement.

14 The changes to Appendix A included a salary of \$87,626.16 for employees at
15 Level 17, Step 8, with a 2% COLA, effective during the first full pay period in July of
16 2017. The newly created Appendices B and C listed changed salaries for employees at
17 Level 17, Step 8 with 2% COLA increases during the following pay periods: Appendix B
18 \$89,378.68, effective during the first full pay period of July 2018; Appendix C
19 \$91,166.25, effective during the first full pay period of July 2019.

³⁶ Appendix H pertained to the MOA and Addendum, effective from July 1, 2017 until June 30, 2020, stating in pertinent part:

....

7) Vacation (Section 7.01) - Subsequent to execution of the new collective bargaining agreement, new hires may receive creditable service for vacation accrual only if they are hired without a break in service from cities, towns, counties, and authorities within the Commonwealth of Massachusetts (Massport, MBTA, MWRA, MASSHOUSING, AND LOCAL HOUSING AUTHORITIES). [Emphases in original.]

....

1 **Murphy's Employment Benefits as Family Law Facilitator**

2 **1. The DAR Stipend**

3 By letter dated November 14, 2006, Abraham requested permission from the
4 Trial Court to appoint Murphy as a Deputy Assistant Register (DAR) in the Worcester
5 Probate and Family Court, stating, in pertinent part:

6 I am respectfully requesting permission to fill a vacant Deputy
7 Assistant Register "position" in the Worcester Probate and Family
8 Court. As you know a Deputy Assistant Register is not a position
9 per se but simply a designation which provides the employee with
10 an additional stipend. This "position" is not one of the three new
11 "positions" that was provided for in the recent statute change.³⁷ This
12 designation became vacant upon the resignation of a former
13 employee.

14
15 I would like to appoint John F. Murphy Deputy Assistant Register.
16 Mr. Murphy is currently employed as a Family Law Facilitator and
17 has been performing many of the duties of an Assistant Register.
18 The stipend amount necessary to fill this existing vacancy would
19 amount to a biweekly difference of \$688.88 for an annual amount of
20 \$11,022.08 for the remainder of this Fiscal Year [(FY)].

21 By letter dated November 20, 2006, Chief Justice Mulligan approved Abraham's
22 request to appoint Murphy as DAR, with "a salary in an amount equal to fifteen per cent

³⁷ The parties did not identify the specific statute referenced in Abraham's letter. However, Murphy presented un rebutted evidence that G.L., c. 217, §29F pertains to Worcester probate court; deputy assistant registers, and states in full:

The register of the Worcester probate and family court may, with the approval of the chief justice of the probate and family court, designate 6 employees as deputy assistant registers with the same powers as assistant registers and with the approval of the chief justice remove a deputy assistant register. The deputy assistant register shall receive additional compensation in an amount equal to 15 per cent of the annual salary of the Worcester County register of probate.

1 of the annual salary of the Worcester County Register of Probate.”³⁸ Effective
 2 November 20, 2006, Murphy received a DAR stipend of \$11,022.08 for the remainder of
 3 the FY 2007.³⁹ Beginning in FY 2008 and continuing through May 14, 2013, the Trial
 4 Court approved Abraham’s subsequent requests for the annual appointment of Murphy
 5 as DAR, which included an annual stipend in addition to his regular salary but did not
 6 include additional job duties or responsibilities.

7 During the period between Murphy’s termination and his reinstatement, the
 8 Family Law Facilitator could have received certain DAR stipends, based on the
 9 following statutory salaries of both the Chief Justice of Probate and the Register:

- 10 May 15, 2013 – December 31, 2013
- 11 ○ Probate Chief Justice salary \$135,124.00
 - 12 ○ Register salary \$110,220.65 (81.57% of \$135,124.00)
 - 13 ○ DAR stipend \$10,333.20 (15% of \$110,220.65)
- 14
- 15 January 1, 2014 – June 30, 2014
- 16 ○ Probate Chief Justice salary \$150,124.00
 - 17 ○ Register salary \$122,456.15
 - 18 ○ DAR stipend \$9,184.20
- 19
- 20 July 1, 2014 – December 31, 2014
- 21 ○ Probate Chief Justice salary \$165,124.00
 - 22 ○ Register salary \$134,691.65
 - 23 ○ DAR stipend \$10,101.84
- 24
- 25 January 1, 2015 – June 30, 2015

³⁸ Chapter 169 of the Acts of 2006 and G.L., c. 211B, §4 establishes the annual salaries for both the CJAM and the Chief Justice of the Probate and Family Court department. G.L., c. 217, §35A establishes the annual salary of the Register, and states, in relevant part: “[t]he salaries of the registers of the probate and family court department shall be 81.57 per cent of the salary of the chief justice of the department....”

³⁹ On January 1, 2006, Abraham’s salary as Register was \$110,220.65, of which 15% totaled \$16,533.10 (or \$688.88 per pay period or \$1,377.76 per month).

- 1 ○ Probate Chief Justice salary \$165,124.00
- 2 ○ Register salary \$134,691.65
- 3 ○ DAR stipend \$10,101.84
- 4
- 5 July 1, 2015 – December 31, 2015
- 6 ○ Probate Chief Justice salary \$165,124.00
- 7 ○ Register salary \$134,691.65
- 8 ○ DAR stipend \$10,101.84

- 9 January 1, 2016 – June 30, 2016
- 10 ○ Probate Chief Justice salary \$165,124.00
- 11 ○ Register salary \$134,691.65
- 12 ○ DAR stipend \$10,101.84
- 13
- 14 July 1, 2016 – December 31, 2016
- 15 ○ Probate Chief Justice salary \$165,124.00
- 16 ○ Register salary \$134,691.65
- 17 ○ DAR stipend \$10,101.84
- 18
- 19 January 1, 2017 – June 30, 2017
- 20 ○ Probate Chief Justice salary \$171,374.00
- 21 ○ Register salary \$139,789.77
- 22 ○ DAR stipend \$10,101.84
- 23
- 24 July 1, 2017 – December 31, 2017
- 25 ○ Probate Chief Justice salary \$177,624.00
- 26 ○ Register salary \$144,887.90
- 27 ○ DAR stipend \$10,866.60
- 28
- 29 January 1, 2018 – June 30, 2018
- 30 ○ Probate Chief Justice salary \$183,874.00
- 31 ○ Register salary \$149,986.02
- 32 ○ DAR stipend \$11,248.92
- 33
- 34 July 1, 2018 – December 31, 2018
- 35 ○ Probate Chief Justice salary \$190,124.00
- 36 ○ Register salary \$155,084.15
- 37 ○ DAR stipend \$11,631.36
- 38
- 39 January 1, 2019 – June 30, 2019
- 40 ○ Probate Chief Justice salary \$190,124.00
- 41 ○ Register salary \$155,084.15
- 42 ○ DAR stipend \$11,631.36

- 1
2 July 1, 2019 – October 5, 2019
3 o Probate Chief Justice salary \$190,124.00
4 o Register salary \$155,084.15
5 o DAR stipend \$5,815.68

6 **2. The Step Increases**

7 Murphy's step increases were determined by the contractual Appendices. When
8 the Trial Court first hired Murphy on April 1, 2005, it placed him at Level 17, Step 1,
9 where he earned an annual salary of \$46,559.73. Between April 1, 2006 and April 1,
10 2012, Murphy received the following Step increases:

- 11 \$2,245.26 on April 1, 2006
12 \$2,312.59 on April 1, 2007
13 \$2,312.58 on April 1, 2008
14 \$2,312.62 on April 1, 2009
15 \$2,312.59 on April 1, 2010
16 \$2,527.04 on April 1, 2011
17 \$2,527.05 on April 1, 2012

18
19 By April 1, 2013, Murphy had reached the maximum Level 17, Step 8.

20 **3. The COLAs**

21 Murphy's COLAs were determined by the contractual Appendices. Between
22 October 2, 2005 and January 13, 2013, Murphy received the following COLAs:

- 23 \$2,835.49 on October 2, 2005
24 \$1,549.21 on July 1, 2006
25 \$2,527.04 on March 13, 2011
26 \$1,843.06 on August 26, 2012
27 \$1,126.91 on January 13, 2013

28 29 **4. The Health Insurance Contributions**

1 At all relevant times, the Trial Court pays 75% of employees' health insurance
2 premiums and employees pay the remaining 25% which the Employer deducts from
3 their paychecks 24 times each year. Between FY 2013 and FY 2019, the Group
4 Insurance Commission (GIC) set the following Health Plan Contribution Rates for
5 employees hired on or After July 1, 2003:

6 Fallon Community Health Plan Direct Care (Family)

7
8 FY 2013 - \$272.92
9 FY 2014 - \$283.24
10 FY 2015 - \$290.35
11 FY 2016 - \$296.14
12 FY 2017 - \$312.39
13 FY 2018 - \$333.27
14 FY 2019 - \$356.14
15 FY 2020 - \$378.87

16 Fallon Community Health Plan Select Care (Individual)

17
18
19 FY 2013 - \$144.21
20 FY 2014 - \$149.21
21 FY 2015 - \$154.82
22 FY 2016 - \$164.67
23 FY 2017 - \$173.69
24 FY 2018 - \$185.25
25 FY 2019 - \$192.37
26 FY 2020 - \$203.87

27 On December 1, 2005, Murphy selected the Fallon Individual Health plan. On
28 December 1, 2006, he selected the Fallon Direct Care Family (FDCF) plan, effective
29 until December 31, 2012. Murphy's 25% monthly contribution under the FDCF plan was
30 \$283.24, and the Trial Court's 75% monthly contribution was \$849.72. Murphy
31 terminated his FDCF plan in December of 2012 after modifying his divorce decree and
32 switching to his former wife's health insurance plan which she received through a

1 different employer. Murphy stayed on his former wife's health insurance plan for
2 approximately one year after his termination while he recovered from surgery performed
3 in January of 2013. As a result, between January 1, 2013 and May 13, 2013, Murphy
4 did not make any contributions to the Trial Court's health insurance plan.

5 When the Trial Court terminated Murphy on May 14, 2013, he was not
6 participating in any healthcare plan offered by the Trial Court due to being on his former
7 wife's plan. In or about May of 2014, Murphy left his wife's plan and enrolled in
8 MassHealth.⁴⁰ When the Trial Court reinstated Murphy in October of 2019, he enrolled
9 in the Fallon Select Individual health insurance plan, with a monthly premium of \$208.32
10 effective December 1, 2019.

11 **5. Accrued Vacation Time**

12 During his employment as Family Law Facilitator, Article XIII of the relevant
13 CBAs limited the total amount of Murphy's accrued vacation time at two-years.⁴¹ Prior to
14 May 14, 2013, he was accruing vacation leave at the rate of 4.327 hours for each
15 biweekly pay period. When the Trial Court terminated him on May 14, 2013, Murphy
16 had accrued 187.615184 hours of vacation leave. On or about June 11, 2013, Murphy
17 submitted a Request for Vacation Leave Buy-Back for a Terminating Employee
18 (Request for Buy-Back) in the amount of \$7,335.74 for the vacation time that he had

⁴⁰ The record is void of evidence concerning any contributions made by Murphy while he was enrolled with MassHealth.

⁴¹ The CBAs do not permit vacation accrual beyond two years.

1 earned and accrued but did not use. The Trial Court approved his Request for Buy-Back
2 on June 25, 2013, and subsequently paid the requested amount.⁴²

3 **6. Accrued Sick Leave**

4 Murphy's accrued sick leave was determined by Article VII of the relevant CBAs,
5 which did not limit the amount of sick time that he could accrue. Also, the CBAs
6 provided a 20% buy back option of accrued sick time that bargaining unit members (or
7 the personal representatives of their estates) could purchase at the time of their
8 retirement or at death. However, the Trial Court Policy prohibited this buy back option if
9 employees were separated from their Trial Court employment for reasons other than
10 retirement or death.⁴³

11 Prior to May 14, 2013, Murphy had accrued sick leave benefits at the rate of
12 4.327 hours for each biweekly pay period per Article VII, Section 7.01. When the Trial
13 Court terminated him on May 14, 2013, Murphy had accrued 38.65 hours of sick leave.
14 Upon termination, Murphy did not receive any sick leave compensation from the Trial
15 Court.

⁴² The record is unclear about whether the Trial Court paid this amount to Murphy, or when it made the payment. The record is also unclear about whether Murphy received any vacation credit from the Trial Court when it reemployed him as a Staff Attorney in October of 2019, or whether it paid Murphy's estate vacation pay in lieu of time off accrued by Murphy prior to his death on September 1, 2021.

⁴³ As stated in Section 19.200 (A) of the Policy, employees discharged for cause shall not be eligible for hire within the Trial Court except for employees "discharged due to the exhaustion of all sick time and leave benefits as a result of a long-term illness." Similarly, Section 19.200 (C) of the Policy stated that employees discharged for cause "may or may not be entitled to compensation in lieu of earned and accrued but unused vacation, compensatory, or personal time depending upon the circumstances surrounding the discharge...."

1 **7. The Retirement Plans**

2 **a. The Massachusetts State Retirement Board**

3 The Massachusetts State Retirement Board (MSRB) treats certain Group 1⁴⁴
4 employees who have at least ten years of full-time service with the Commonwealth as
5 vested in the MSRB retirement system, making them eligible to receive a retirement
6 allowance in the form of an annuity or a pension. The MSRB determines retirement
7 eligibility based on one of the following conditions:

- 8 • You entered state service prior to April 2, 2012 and you have
9 20 years of full-time creditable service at any age, or
10 • You entered state service prior to April 2, 2012 and you attain
11 the age of 55 with ten years of creditable service, or
12 • You entered state service on or after April 2, 2012 and you
13 attain the age of 60 if retiring from Group 1, with ten years of
14 creditable service.

15 The MSRB considers factors that affect the amount of an eligible employee's
16 retirement allowance (i.e., age, length of credible service, amount of average annual
17 rate of regular compensation, and group classification). It also defines the terms annuity
18 and pension as follows:

19 The contributions that are deducted during the course of your
20 creditable service⁴⁵ are deposited for you in an annuity savings
21 fund by your retirement board. The interest that accrues on these
22 contributions is credited to your individual account. The part of your

⁴⁴ The MSRB assigns employees to one of four specific groups based on the classifications established in G.L. c. 32, §3. The MSRB assigned Murphy to Group 1, which comprises certain "official and general employees including clerical, administrative and technical workers, laborers, mechanics, and all others not otherwise classified.

⁴⁵ The MSRB measures creditable service in full years and completed months.

1 retirement allowance that is based on the total amount in your
2 annuity savings account on the date of your retirement is the
3 annuity.
4 A pension is the difference between the total retirement allowance
5 specified by law and the annuity as described above.
6

7 **b. Murphy's Retirement Contributions**

8 On or about April 1, 2005, Murphy filed a New Member Enrollment Form with the
9 MSRB and listed his position as Family Law Facilitator with a start date of April 1, 2005.
10 The MSRB made its first deduction from Murphy's earned wages through the Trial Court
11 on April 2, 2005. The MSRB continued to make regular deductions from Murphy's
12 earned wages until his termination on May 14, 2013.

13 On or about October 7, 2019, the Trial Court reemployed Murphy as a Staff
14 Attorney in the Court Service Center. Around that time, Murphy reenrolled in the MSRB
15 retirement system and filed an application with the MSRB to buy back certain retirement
16 and pension service. By letter dated September 28, 2020, MSRB Associate Board
17 Counsel James H. Salvie (Salvie) responded to Murphy's buyback application, stating in
18 pertinent part:

19Your client, John F. Murphy, is not seeking to purchase service
20 pursuant to one of the many service purchase provisions in G.L. c.
21 32.⁴⁶ Rather, he is seeking to obtain creditable service (and pay
22 missed deductions) due to wrongful termination from his
23 employment with the Trial Court, from his termination as a facilitator
24 in the Worcester Probate and Family Court on May 14, 2003 [sic] to
25 his re-employment as a staff attorney on or about October 4, 2019.
26

27 My understanding of the facts comes from *Office and Professional*
28 *Employees International Union, Local 6 v. Commonwealth*

⁴⁶ Chapter 32 of the Law pertains to Retirement Systems and Pensions.

1 *Employment Relations Board (“CERB”), 96 Mass. App. Ct. 764*
2 (2019) and the materials you submitted.... [Italics in original.]

3

4 The CERB decision was apparently the final administrative decision
5 and it provided, among other things, that the Union “make Murphy
6 whole for the loss of compensation he suffered as a direct result of
7 his termination from the Trial Court effective May 14, 2013....”

8

9
10 In May of 2016, Mr. Murphy brought an action in federal district
11 court, apparently for wrongful termination due to discrimination of
12 some sort. That action never reached judicial resolution but rather
13 was settled in 2019. Pursuant to the settlement agreement, which
14 you have supplied, Mr. Murphy was “re-employed” by the Trial
15 Court in a different position (staff attorney) from the one he held
16 previously, effective from that date going forward. Mr. Murphy re-
17 enrolled in the retirement system at that time. Nothing in the
18 settlement agreement reinstates him as of 2013 and there is no
19 payment of back pay.

20

21 You are correct that there are instances in which a judicial award of
22 “back pay” in a wrongful termination suit, or a settlement in such a
23 suit, can result in a recognition of the creditable service that should
24 have been earned had the wrongful termination not occurred. This
25 is the case, however, only in cases where employer pays the back
26 pay, not where a third party tortfeasor pays the back pay as
27 damages. [Emphasis in original.] See, e.g., *Ballote v. City of*
28 *Worcester*, 51 Mass. App. Ct. 728 (2000) and *Ballote v. City of*
29 *Worcester*, 2003 WL 22699805 (Worcester Superior Ct.,
30 7/22/2003). [Italics in original.] An award (or agreement) for back
31 pay “in a wrongful termination case” is intended to make the plaintiff
32 whole by “plac[ing] [the plaintiff] in the same position she would
33 have been in had she not been terminated,” and creditable service
34 is part of that. *Tarlow v. Mass. Teachers’ Retirement System*, CR-
35 10-793 (CRAB, 2013). [Italics in original.]

36
37 In your case, despite your and your client’s remarkable tenacity,
38 from the perspective of the employer Mr. Murphy is not “in the
39 same position [he] would have been in had [he] not been
40 terminated.” Rather, from the employer’s perspective and thus the
41 retirement system’s perspective, Mr. Murphy was terminated on
42 May 14, 2003 [sic], grieved that action, but abandoned it after an
43 adverse decision. His termination became final. Over sixteen [sic]

1 years later, he was re-employed in a different position. He had no
2 employment relations with the Trial Court from 2003 [sic] to 2019
3 and during that period provided no service and received no
4 compensation....

5
6 ...[I]t is unclear to me why the loss of retirement credit is not part of
7 the "loss of compensation he suffered as a direct result" of the 2003
8 [sic] termination. Though you would need an actuary to calculate
9 the present value of those lost benefits, I believe that calculation
10 could be done and the retirement system could provide you with the
11 specific information an actuary would need to make that
12 calculation....

13

14 By email on or about December 9, 2020, Murphy contacted Salvie requesting
15 certain information. By reply letter dated December 10, 2020, Salvie informed Murphy of
16 the following:

17 This letter is in response to your email of yesterday requesting
18 certain information.

19
20 1. Mr. Murphy has been a member of this retirement system since
21 2005. He was in active service from 2005 to 2013 and again
22 from 2019 to the present. The precise amount of creditable
23 service that a member has is determined and verified at the time
24 of retirement; I can tell you, however, that our electronic
25 member benefit system credits Mr. Murphy with nine years and
26 three months of creditable service as of this date.

27
28 2. Our records indicate that Mr. Murphy began contributing to our
29 system in 2005 and did not take a refund of his contributions
30 during the period that he was inactive. Assuming this is correct,
31 he will be regarded as a "pre-April 2, 2012" member under G.L.
32 c. 32, §5.⁴⁷ This will change, of course, should he take a refund
33 of his contributions (and later re-enroll) at some point in the
34 future.

35

⁴⁷ Chapter 32, Section 5 of the Law pertains to Superannuation Retirement.

1 At some point on or around December 10, 2020, the MSRB rejected Murphy's
2 buy back application. Later, Murphy filed an appeal which was pending by the end of
3 this compliance hearing. When Murphy passed away on September 1, 2021, he had
4 earned nine years and eleven months of creditable service.

5 **c. Actuarial Expert - Paul Boulay**

6 Paul Boulay (Boulay)⁴⁸ is a pension consulting actuary at Hub
7 International/Summit Financial Corporation who certifies Internal Revenue Service (IRS)
8 results for defined benefit pension plans.⁴⁹ Boulay's actuarial duties include creating the
9 plans, consulting with plan sponsors on the plan design, and ensuring compliance to
10 fund the plan. Boulay is also responsible for the day-to-day administration of plans,
11 determining eligibility and benefit amounts for individual participants,⁵⁰ providing non-

⁴⁸ After the Charging Party established a proper foundation, I qualified Boulay as an expert witness in the area of actuarial science based on his education, training, experience, and familiarity with the subject.

⁴⁹ Boulay testified that a defined benefit pension plan is a promise by an employer to pay a benefit when an employee retires, which can be funded fully by the employer or funded in part by both the employer and the employee (e.g., 401(k) plans or profit-sharing plans).

⁵⁰ To determine the minimum and maximum amounts of an employer's contribution to a defined benefit pension plan, Boulay calculates an employee's future retirement benefits to establish the present value of their plan, which may include a lump sum value. To reach the present value, he compares "assets under management supporting it," aggregates all probabilities and discount rates, and then determines the interest rate environment. Specifically, "the lower that discount rate, the higher the obligations," which means that "in a low interest rate environment...annuities are very expensive, [and] in a higher interest rate environment...annuities are less expensive." "All other things being equal," Boulay testified that "a higher discount rate would result in a lower rate that [an employee] would have to pay upfront."

1 discrimination testing as applicable, providing traditional benefit values for plan
2 sponsors that want to terminate their plans in lieu of providing lump-sum payments to
3 retirees, and other related functions. Boulay also provides the value of an annuity⁵¹ for
4 plan sponsors that want to absolve their obligation to pay earned benefits via a qualified
5 third party (e.g., insurance companies).

6 On or about December 15, 2020, Boulay created a report which calculated the
7 present value of pension plan benefits that Murphy had lost as a result of his termination
8 from the Trial Court.⁵² Boulay based his report on certain information, including plan
9 details available on the MSRB website,⁵³ MSRB Associate Counsel Salvie's letter to

Boulay later conceded that the industry standard on which he relies to estimate the present value of an employee's future entitlement to financial payments applies generally to private sector employees. Although Boulay has provided actuarial services for a "handful" of public sector employers, including the Pennsylvania State Association of Township Supervisors, he admitted that his clients are primarily in the private sector. He also admitted that he did not rely on data for public sector employees in Massachusetts when he calculated Murphy's specific future retirement benefits.

⁵¹ Boulay testified that an annuity is typically a monthly benefit payment that comes from an insurance company for your lifetime. He also testified that the pricing of an annuity is calculated by how much it would cost up front to buy that promise from an insurance company to provide a certain number of payments to the retiree every year that they live. In terms of variables that affect the price of an annuity, those would include a person's age and gender, the probabilities of each birthday that a person may reach, the benefit start date, the underlying discount rate environment, interest rate environment that we're currently in, and certain mortality assumptions about the employee.

⁵² Boulay conceded that he was unaware that Murphy had filed a wrongful termination action in federal court against the Trial Court. He also conceded that he did not review Murphy's 2019 settlement agreement with the Trial Court prior to creating his actuarial report.

1 Murphy dated December 10, 2020, certain IRS data, and other mortality data such as
2 Murphy's "demographic" information, which included:

| | | |
|---|--------------------------|------------------------|
| 3 | Date of birth: | July 29, 1955 |
| 4 | Date of hire: | April 1, 2005 |
| 5 | Date of termination: | May 14, 2013 |
| 6 | Date of reinstatement: | October 6, 2019 |
| 7 | Assumed termination: | July 29, 2025 (age 70) |
| 8 | Assumed retirement date: | August 1, 2025 |

9 In his report, Boulay estimated that once Murphy reached age 70,⁵⁴ he would
10 have received a projected benefit assuming no separation from service for the period
11 between October 7, 2019 and July 29, 2025. Boulay compared that projected benefit to

⁵³ Boulay admitted that he did not contact anyone from the MSRB, the Trial Court, or the Union prior to determining Murphy's expected future increases. He also admitted to not knowing whether Murphy was vested in the MSRB retirement system prior to creating the report. Instead, Boulay assumed that if Murphy's pension did not vest until October of 2021, and Murphy left his employment with the Trial Court prior to that time (e.g., due to resigning or dying), then neither Murphy nor his estate would be entitled to any pension benefits because he would not be vested. Instead, Murphy's estate would be entitled to a refund of his employee contributions. Conversely, Boulay also assumed that if Murphy died after his pension vested, the retirement benefit that his estate would receive under the MSRB system "would depend on a combination of two things," i.e., whether Murphy elected either a continuing benefit to a designated beneficiary or a guaranteed certain minimum number of total payments, along with the amount of his employee contributions with interest.

⁵⁴ Relying on certain mortality data, Boulay assumed that Murphy would have lived to at least age 70. He also assumed that Murphy's date of retirement would have been at the end of the month during which he reached age 70, and that Murphy would have maintained uninterrupted, continuing employment through July of 2025. Despite these assumptions, Boulay admitted that he did not speak directly with Murphy in calculating his estimated retirement benefits. In fact, Boulay conceded that he assumed that Murphy would live until July 29, 2025, but did not know if Murphy intended on retiring at age 70. Boulay also admitted that prior to completing his report he did not know the status of Murphy's medical condition or general health and did not review any of Murphy's medical documentation.

1 the projected benefit that Murphy would have received based on his actual employment
2 history at the Trial Court (i.e., from April 1, 2005 to May 14, 2013, and from October 7,
3 2019 through his projected service end date on July 29, 2025). Based on those
4 projections, Boulay developed two separate plan benefit estimates: one based on
5 Murphy's actual employment history and another based on uninterrupted employment
6 had the Trial Court never terminated him (i.e., from May 14, 2013 through July 29,
7 2025). Boulay also determined the projected values of these plans on both a lump-sum
8 basis and as an annuity.

9 Specifically, Boulay found that Murphy would have been entitled to an estimated
10 annual benefit of \$33,797.09 based on his actual employment history. Boulay also
11 found that Murphy would have been entitled to an estimated annual benefit of
12 \$49,677.65 based on uninterrupted employment had the Trial Court never terminated
13 Murphy, and assuming his continued employment through July 29, 2025.⁵⁵ Based on
14 these findings, if Murphy retired on August 1, 2025 at age 70, he would have lost
15 \$15,880.50 in annual retirement benefits, which is the difference between \$33,797.09
16 and \$49,677.65.⁵⁶

⁵⁵ Boulay determined that Murphy's total projected employment period was 20 years and four months, which represented the period between April 1, 2005 and July 29, 2025, had the Trial Court never terminated his employment.

⁵⁶ In calculating the present value of Murphy's possible retirement plans, Boulay relied on Murphy's actual compensation history, the highest average compensation that Murphy had earned, and the rates of compensation contained in the CBAs, including the salary charts from the relevant CBAs which forecast salary increases at a rate of 2% per year for the years 2017, 2018, and 2019. Based on these forecasts, Boulay assumed that, with respect to Murphy's expected earnings through July 29, 2025, he

1 Additionally, Boulay opined that purchasing an annuity from a third party with an
2 estimated annual benefit of \$49,677.65 was the only way for Murphy to fully replace his
3 lost pension benefits. This is because the payment of a single lump sum in lieu of an
4 annuity would have exposed Murphy to several risks, including investment and
5 longevity. Finally, Boulay opined that Murphy had lost employee contributions that he
6 did not make between May 14, 2013 and October 7, 2019, for a total of \$55,619.66.⁵⁷ In
7 the alternative, Boulay also found that the estimated cost to purchase an annuity to
8 replace Murphy's missing retirement benefit payments was \$199,529.71.⁵⁸ Boulay then

would have received annual salary increases of 2% for the next 4.5 years. Boulay also considered Murphy's initial employment history from April 1, 2005 to May 14, 2013 (eight years and one month), his separation from service between May 15, 2013 and October 6, 2019 (six years and six months), and his projected reemployment period from October 7, 2019 to July 29, 2025 (five years and nine months).

⁵⁷ To determine the amount that Murphy would have had to contribute to be entitled to a full retirement benefit, Boulay calculated the lost employee contributions that Murphy did not make between May 14, 2013 and October 7, 2019, which totaled of \$55,619.66. Next, Boulay looked at Murphy's employee contributions to the MSRB between April 2, 2005 and May 14, 2013, which were 9% of all compensation plus an additional 2% of compensation in excess of \$30,000 at roughly 11% per year. Boulay then estimated that Murphy's calendar contributions in 2014 would have been \$79,147.90, and then in each subsequent year where there was a partial year of service. Thus, assuming that Murphy had remained employed with the Trial Court between May 14, 2013 and October 19, 2019, Boulay's best estimate of Murphy's missing retirement contributions was \$55,619.66.

⁵⁸ To determine the value of Murphy's estimated benefit as it related to the discount rate, Boulay performed two calculations. His first calculation was based on his analysis of what a third-party insurer might charge. Next, Boulay used the most recent 1.9% discount rate to calculate the estimated annuity replacement cost, which was between \$49,677.65 and \$33,797.09. He then combined that figure with the MSRB's 2.5% annuity cost multiplier (which is a figure that represents the cost to provide one dollar of annuity starting on August 1, 2021 to Murphy), along with the mortality table and "the probability of payment each month on August 1, 2025 through Murphy's expected future

1 subtracted \$55,619.66 from \$199,529.71 to find the “correct” cost of contributions that
2 Murphy would have had to make to reach the full retirement benefit that he was
3 projected to receive, which was \$143,910.05.⁵⁹

4 **Murphy’s Termination Period (May 14, 2013 – October 6, 2019)**

5 Between May 14, 2013 and around mid-November of 2013, Murphy was
6 unemployed and collected 26 weeks of unemployment benefits from the Department of
7 Unemployment Assistance (DUA). Although the DUA required Murphy to keep a job
8 log⁶⁰ of his efforts to seek employment while he collected unemployment income,
9 Murphy did not maintain any logs of his job searches.⁶¹ Between mid-November of 2013
10 and October 6, 2019, Murphy did not collect any unemployment benefits from the DUA.
11 At no time during Murphy’s unemployment period (May of 2013 until November of 2013)

lifetime. Based on this calculation Boulay concluded that every dollar of an annuity benefit would cost \$12.56, roughly, to pay for today. In determining the lump sum value of that benefit, Boulay found it would cost \$11.52 per dollar of the benefit based on the assumptions prescribed by the IRS. Thus, Boulay concluded that the amount it would cost Murphy to purchase an annuity to replace the lost retirement benefits that he suffered as a result of his termination from the Trial Court would be a “figure no less than \$199,529.71 as of January 1, 2021.”

⁵⁹ Boulay testified that the formula he used to reach the annuity purchase amount of \$143,910.05 came from the MSRB’s website which was the annuity purchase minus the employee cost of the value of the benefit with the delta, amounting to the difference between those two numbers, or \$199,529.71 minus \$55,619.66 for a sum of \$143,910.05.

⁶⁰ Vocational Expert Nancy Segreve gave un rebutted testimony that the DUA requires a job seeker to certify that they are making “three active work searches a week across three different days,” and to keep a log of those searches.

⁶¹ Murphy testified that while he did not maintain a job search log, he remembered that someone from the DUA “talked about keeping a log,” which was his only recollection about anyone ever discussing a log for employment search.

1 or his termination period (May 14, 2013 until October 6, 2019) was he unable to work
 2 due to a disability, nor did he ever receive any disability income during this time.

3 During Murphy's termination period, he reported earning \$112,008.00 in
 4 employment income (\$62,608 in wages, salaries, tips, etc. and \$49,400 in business
 5 income) during tax years 2013 – 2019:

| Tax Year | Wages, Salaries , Tips, Etc. | Busines s Income | Total Income | Adjusted Gross Income |
|--|---------------------------------------|------------------------|------------------------|-----------------------------|
| 2013 | \$45,725 | \$0 | \$65,433 ⁶² | \$64,804 |
| 2014 | \$0 | \$1,400 | \$2,246 | \$2,147 |
| 2015 | \$0 | \$4,027 | \$4,027 | \$3,742 |
| 2016 | \$0 | \$6,582 | \$16,182 ⁶³ | \$15,717 |
| 2017 | \$0 | \$14,918 | \$14,918 | \$13,864 |
| 2018 | \$0 | \$15,131 | \$15,131 | \$14,062 |
| 2019 | \$16,883 | \$7,342 | \$24,225 | \$22,297 |
| Total Reporte d Amounts (2013 - 2019) | \$62,608 | \$49,400 | \$142,162 | \$136,63 3 |

6 1. Murphy's Job Search Methodology

7 Between May 14, 2013 and October 7, 2019, Murphy conducted job searches in
 8 Lawyers Weekly and on Indeed.com, but only when he was at the Law Library which

⁶² Murphy reported receiving \$19,399.00 in unemployment compensation in 2013.

⁶³ Murphy reported receiving \$9,600.00 in rental income in 2016.

1 was “maybe once a month.”⁶⁴ While Murphy utilized his personal/business email
2 address of johnmurphylaw@hotmail.com, he did not have a business website and did
3 not utilize any social media⁶⁵ to promote his law practice.

4 During his job search, Murphy did not access the job placement center at UConn
5 Law School because he was “not familiar with it” although he assumed that such a
6 placement center existed. Nor did he attend any workshops or training courses during
7 his termination period. While Murphy did utilize Idealist.org and Indeed.com to apply for
8 positions, he did not create any job search profiles on LinkedIn, Craigslist, Law
9 Crossing, Monster.com, or any other website where employers might look to hire
10 attorneys. Further, Murphy did not contact the Worcester Bar Association⁶⁶ or any other
11 bar association in Massachusetts about possible employment opportunities. Instead,
12 most of his job inquiries were made directly to friends and colleagues, some of whom
13 were lawyers.

⁶⁴ Murphy testified that he did not recall ever finding “any good leads” in Lawyers Weekly. He also testified to looking at a couple of positions that were posted on Indeed.com but did not remember exactly what they were or when he looked at those postings.

⁶⁵ Murphy admitted that he had “never been a Facebook guy,” and did not market himself on social media for his personal job search or his private practice because he “didn’t feel that was necessary.”

⁶⁶ In addition to the 40 or more lawyers with whom Murphy interacted “fairly regularly” while he was employed at the Trial Court, he testified that he “was always friendly with most members of the Bar” and did not “have too many enemies in Worcester.” He also testified that the Worcester Bar Association is “a very tight-knit group” and “the kind of place where [he] felt [he] had a pretty good reputation in the community as a good guy and a competent lawyer.” Despite these interactions and his reputation, Murphy admitted to not directly contacting any bar association to inquire about possible jobs.

1 **2. Murphy's Professional and Personal Relationships**

2 Between April 1, 2005 and May 13, 2013, Murphy came to know several of the
3 Trial Court judges, including some who Murphy considered to be "pretty good friends,"
4 including Judge Roach, Judge Lian, Judge Meagher, Judge Hart, and Judge King.
5 Despite these relationships, Murphy only contacted three judges during his search for
6 employment.⁶⁷ Specifically, by email on February 2, 2018, Murphy informed Judge
7 Roach that his "confidence level was greater than it was in 2016," in terms of his hope
8 of receiving a large back-pay settlement from the Union.

9 During his termination period, Murphy also contacted 19 attorneys and non-
10 attorney politicians and/or other professionals about possible employment
11 opportunities.⁶⁸ For example, Murphy maintained a good relationship with Early who he

⁶⁷ Murphy testified to not having much contact with the judges after May 14, 2013, because once he was terminated he did not associate with them and did not call them. However, Murphy gave un rebutted testimony that he may have spoken with Judge King about trying to get on a list of attorneys from juvenile court for possible assignment to certain cases. In or around December of 2015, he also listed Judge Meagher as a professional reference, and in 2018 he exchanged emails with Judge Roach in 2018.

⁶⁸ During his termination period, Murphy testified initially that he reached out to "dozens and dozens, at least 50" lawyers and businesspersons in Worcester about finding employment. Specifically, he sent emails in 2015 and 2016 to prospective employers at the Department of Children and Families (DCF) via Annie Singh (Singh) and Matthew Braman (Braman), and at the Committee for Public Counsel Services (CPCS) via Maria Sanchez (Sanchez). Murphy also sent emails in 2015 and 2016 about possible employment opportunities to Worcester County District Attorney Early and attorney Denis Leary (Leary), and to non-attorneys Jeffrey Bar (Bar) and Jeffrey Crowley (Crowley). Additionally, Murphy sent emails in 2017 to Community Legal Aid (CLA) Development Director Lauren Aquino (Aquino) concerning two separate networking events one hosted by Murphy & Rudolf, LLP and another hosted by CLA. Last, Murphy sent other emails in 2019 to Ann Cascanett (Cascanett) concerning paystubs and health insurance involving Carolyn McCarthy (McCarthy) and John Piccolo (Piccolo).

Murphy gave un rebutted testimony that he also wrote “a few letters,” made “oral inquiries,” and “spoke with a few lawyers,” asking if they “might have extra work.” Specifically, he spoke with an unnamed attorney who worked with Early in the Worcester County District Attorney’s Office and who appeared before the Worcester probate and family court. Murphy testified that he could not recall this attorney’s name and could only refer to him as “this guy” in his testimony. He also spoke with criminal defense attorney Brian Murphy and Brian Murphy’s wife who worked at the Commonwealth’s Executive Office of Health and Human Services (EOHHS) in Framingham. Although Murphy testified on direct examination that he met with Brian Murphy’s wife in 2016 or 2017, he clarified on cross-examination that he met with her “once at a coffee shop in Westborough, Mass....as a favor through her husband,” which took place in 2014 or 2015 in the two-year period immediately following his termination. Additionally, Murphy provided un rebutted evidence that by email to Crowley on April 4, 2016, he spoke directly with then State Senator Ryan Fattman (spouse to Register Stephanie Fattman), attorney Steve Rodolakis (Rodolakis), and Lieutenant Governor Karyn Polito (Polito), seeking assistance with his job search.

Murphy also spoke with Sheriff Lew Evangelidis (Evangelidis), an unnamed social worker at an unspecified jail in 2014 or 2015, with UMass Medical School Psychologist Gerry Wolfson (Wolfson), and with “headhunter” Stuart Saddock (Saddock) at some point between 2015 and 2019. Murphy testified that Saddock was an employment consultant with whom he had attended eighth grade. While Saddock “was friendly” toward him “once or twice,” Murphy admitted that reaching out to him for possible employment “wasn’t very helpful.” Concerning Evangelidis, Murphy testified that he reached out “to get a crack at the prison population because a lot of the fathers [with whom Murphy had dealt as Family Law Facilitator] would get sent to jail on restraining order issues, [and/or] violations of restraining orders.” Murphy did not indicate where or when in 2014 he met with Evangelidis.

Based on the totality of this evidence, I find that Murphy engaged in email correspondence with Singh, Braman, Sanchez, Early, Leary, Bar, Crowley, and Cascanett between 2015 and 2019. Although the record is void of documentary evidence showing that Murphy sent non-electronic “letters” related to his job search, I credit his un rebutted testimony that he sent “a few letters” and made “oral inquiries” to Ryan Fattman, Rodolakis, and Polito in or around April of 2016. However, I do not find that Murphy reached out to “50” lawyers and businesspersons during his termination period. This is because the record shows that he contacted only 19 persons including 12 lawyers (i.e., Singh, Braman, Sanchez, Early, an unnamed attorney in Early’s office, Leary, Bar, Crowley, Cascanett, Rodolakis, Brian Murphy, and Brian Murphy’s wife), and 7 non-lawyers (i.e., Evangelidis, an unnamed social worker at an unspecified jail, Aquino, Wolfson, Saddock, Ryan Fattman, and Polito).

1 contacted at least three or four times about possible job prospects during his
2 unemployment period.⁶⁹

3 **3. Murphy's Job Applications and Employment**

4 **a. May 14, 2013 – December 30, 2013**

5 Between May 14, 2013 and December 30, 2013, Murphy volunteered with
6 Stephanie Fattman's (Fattman) campaign for Register against Abraham. Murphy did not
7 receive any compensation or references from Fattman for his volunteer work. During
8 this time, Murphy also assisted attorney Michael Angelini (Angelini) who was
9 representing Murphy *for gratis* by pursuing his termination grievance against the Trial
10 Court. Specifically, Murphy researched labor laws, remedies for wrongfully terminated
11 employees, and engaged with people in the community to discuss the dynamics of his
12 case. Angelini did not compensate Murphy for this work. Other than volunteering for
13 Fattman and assisting Angelini, Murphy neither searched for nor secured any
14 employment, including self-employment, between May 14, 2013 and December 30,
15 2013.

⁶⁹ Murphy maintained a good relationship with Early throughout his tenure at the Trial Court; and, continued to maintain that relationship after his termination, continuing through his reemployment in October of 2019. At all relevant times during his termination period, Murphy maintained hope that Early would offer him employment in the District Attorney's office "in some capacity" because as an attorney, Murphy "was familiar with many of the issues that arise and custody battles and just stressed-out family situations." Specifically, Early informed Murphy "several times" that because Murphy "was just a little hot right now," Early wanted to wait until Murphy had settled his case against the Trial Court before possibly offering Murphy employment "in some capacity...as an employee" in the District Attorney's office.

1 **b. January 2014 – December 2015**

2 Between January of 2014 and August of 2015, Murphy was engaged in limited,
3 private practice work as a solo practitioner⁷⁰ but was primarily focused on pursuing his
4 case against the Union at the DLR.⁷¹

5 Beginning in or about September of 2015, Murphy contacted psychologist Gerry
6 Wolfson (Wolfson) who was a childhood friend of Murphy and who worked at the Court
7 Clinic which was affiliated with the University of Massachusetts (UMass) Medical School
8 in Worcester. Around this time, Murphy also contacted another individual who was
9 either from UMass or was affiliated with Early in the District Attorney's office because
10 that individual specialized in "psychologically damaged families."⁷²

⁷⁰ Murphy admitted that it was only in 2014 that he bought a 3-in-1 printer and file cabinets—and really tried to “make a go of it” on his own. He also testified that his tax returns in 2014 and 2015 were accurate, reporting business income of \$1,400 and \$4,027, respectively.

⁷¹ Murphy assisted his attorneys Luke Rosseel (Rosseel) and John Martin (Martin) in litigating his Charge against the Union at the DLR on April 9, 2014. However, Murphy conceded that he was not looking for a job “early on” because he always thought [he] was going to win the arbitration which was scheduled for hearing on May 6, 2015; and he was always confident that he would get some relief. Additionally, between January of 2014 and August of 2015, Murphy focused on his DLR case against the Union, even though the time he spent assisting Rosseel and Martin “didn’t help” his ability to earn a living as a private lawyer, but only impacted it “slightly.” Murphy also conceded that once the arbitration decision had issued, he began to focus seriously on finding comparable employment. Specifically, when the Union had finally disclosed that it had not filed for arbitration in a timely fashion, Murphy began to ask around about other employment.

⁷² Although Murphy gave un rebutted testimony about his contact with the individual who was either from UMass or was affiliated with Early in the District Attorney's office, the record is void of further evidence concerning Murphy's contact with this individual.

1 By email on September 22, 2015, Murphy contacted the Department of Children
2 and Families (DCF) Health Law Institute Director Annie M. Singh (Singh), requesting
3 information about the Staff Attorney posting that he found on Idealist.org, which Singh
4 provided by email later that day. By email on October 16, 2015, Murphy filed an
5 application and resume with DCF for a different position of Deputy Regional Counsel.

6 By email on December 22, 2015, Murphy applied for a position as a Legal
7 Training Attorney at Committee for Public Counsel Services (CPCS). By reply email
8 later that day, CPCS confirmed receipt of Murphy's application. By follow-up email on
9 December 22, 2015, Murphy contacted CPCS employee Maria Sanchez (Sanchez)
10 concerning his application and submitted additional information which included a letter
11 of interest and references.

12 By email on December 22, 2015, Murphy also corresponded with Early, stating in
13 pertinent part:

14

15 I just supplemented my application for the Legal Training Attorney
16 position at CPCS to include your name as a professional reference
17 (along with Judge Meagher).

18 It sounds like a great job for me. It's in the family law area, and it's
19 heavy on the training stuff, which I love (and got great reviews
20 when I did it through the Judicial Institute).

21 I am attaching my letter of interest, resume and writing sample.
22 Any feedback would be most welcome....

23
24
25
26

1 By reply email on December 23, 2015, Early stated in pertinent part, “Murph, I
2 think the letter is great and that you present as extremely qualified for the position. I will
3 talk to you soon....”

4 **c. January 2016 – September 2016**

5 By email on January 25, 2016, Veterans, Inc.⁷³ Executive Director/Chief
6 Operating Officer Dennis Leary (Leary) notified Murphy about a Community Resources
7 for Justice (CRJ) Residential Counselor position located in Leominster. By reply email
8 on January 27, 2016, Murphy informed Leary that:

9
10

11 Well, the thing that jumps out at me is that “High School diploma or
12 GED” is the first qualification. But, beggars can’t be choosers. I’m
13 thinking if I have to take a job like this I’d rather not have to drive
14 back and forth to Fitchburg to do it.

15
16 But I don’t have anything better at the moment. As I said to you, I
17 have recently come to the decision that I must stop looking for the
18 “perfect” (or near perfect) job and just get **A** job. [Emphasis in
19 original.] It just feels like this is dropping too far, too fast (?) [sic]
20 Analogous to trying to sell my house at \$250,000, having no offers,
21 and re-listing it at \$100,000.

22
23 I don’t want to jerk you around. I’m sure you are very busy and I
24 have imposed upon you for your help. And after all, it’s not like I’m
25 your little brother or something. While I don’t want to lose the
26 chance of getting your help and guidance, my gut reaction is I have
27 to reject this particular position as a possibility. I appreciate your
28 effort though. I really do.

29 Boy, this process is equal parts frustrating, embarrassing, and just
30 crazy. I regret putting you into it. If you choose to withdraw, I
31 certainly won’t hold it against you.

32

⁷³ Veterans, Inc. is located in Worcester.

1 By surreply on January 27, 2016, Leary asked Murphy if he was interested in four
2 additional positions posted online at detma.org. By separate email that same day, Leary
3 sent Murphy a weblink for a position at UMass Medical School and asked if that position
4 was “a no-go right now?” Murphy responded to Leary by email later that day, stating in
5 pertinent part:

6 Thanks Denis. I'll be looking closely at all of these.

7
8 To answer your question, there is legally no obstacle for me in
9 applying for a state position (such as anything at UMass [M]edical
10 [S]chool). It is only the Massachusetts Trial Court that I can no
11 longer work for. [Emphasis in original.] I am just discouraged about
12 my previous efforts at applying for state jobs (DMH,⁷⁴ DCF) and I
13 attribute my lack of success to my being a “terminated state
14 employee”. But I'm still willing to try. I called you because I had just
15 decided to expand my search to include non-profits. I thought you
16 guys or one of your affiliates might have something. But these
17 suggestions appear fruitful.

18
19 I am currently investigating two positions at UMass Memorial, in
20 Emergency Mental Health. Those are not state jobs, as opposed to
21 anything at the medical school. [Emphasis in original.] A state job
22 would be a bonus for me because I need to eventually put two
23 more years into the pension plan.

24
25 My hope is I can find something, somewhere, for now, that involves
26 helping people.

27
28 Thank[s] so much for your efforts. I'll keep you posted.⁷⁵

29

⁷⁴ There is no corroborating evidence in the record that Murphy applied for any DMH positions between May 14, 2013 and October 6, 2019.

⁷⁵ Murphy testified that he knew Veterans, Inc. was “very well funded” and was “awash with money,” and he hoped that Leary would hire him and create a position for him. Although Murphy considered Leary to be a casual friend, he believed ultimately that Leary didn't want him to come work for Veterans, Inc. which caused Murphy to feel surprised and disappointed, admitting that he “never got anywhere with [Leary].”

1 By email on January 26, 2016, UMass Medical School Ombudsman of Patient
2 Services Jeffrey Bar (Bar) shared with Murphy available "opportunities" at the Medical
3 School, but nothing ever materialized.

4 By email on January 28, 2016, DCF Executive Assistant Matthew Braman
5 (Braman) responded to Murphy's earlier correspondence with Singh in September and
6 October of 2015. In that email, Braman coordinated a time for Murphy to interview with
7 DCF for the position of Deputy Regional Counsel. By follow-up email on February 11,
8 2016, Braman contacted Murphy about his rescheduled interview at DCF's Worcester
9 office on February 19, 2016. At some point on or around February 19, 2016, Murphy
10 interviewed with DCF. Although Murphy thought it went very well, DCF did not offer him
11 the Deputy Regional Counsel position.

12 By email on April 4, 2016 Murphy informed Jeff Crowley (Crowley) that:

13

14
15 It was great to see you the other night....

16
17 I hope you guys had a good meal. I love it at Pic's. John Piccolo is
18 a good friend and it is my home away from home.

19
20 You offered to drop a note on my behalf in connection with the
21 position I applied for with DCF: Deputy Regional Counsel,
22 Worcester. I first applied for it back in October. I was given an
23 interview on 2/19/16 which I thought went rather well.

24 My problem (in this case) is: A) the job is probably pledged to a
25 qualified insider candidate; and B) I am a terminated trial court
26 employee, which casts a pall over me.

27
28 I applied for the DCF position because I thought it most closely
29 approximated the kind of work I was doing at Probate and Family
30 Court, which I loved.

31

1 I bounced around for a lot of years. The private practice of law was
2 never a good fit for me. Some of the other stuff I did (blues club, ice
3 cream store, etc.) was fun, but didn't make much money. I got
4 cosmically lucky at age 50, to find a position I enjoyed so much. I
5 actually liked going into work in the morning. And I was able to help
6 a lot of people. It's like I found the thing I was meant to do.

7 And then some narcissistic jerk took it away.

8
9 But, hey! I'm reasonably healthy, I have a wonderful son who I am
10 very close to (he called me this morning to ask if I wanted to go with
11 him to Cuba in May)⁷⁶ and a bunch of good friends. And I should
12 recover a large back wage settlement from my union for screwing
13 up my arbitration.

14 So it ain't all that bad. I just have to find something to do with my
15 days.

16
17 Anything you can do to help would be most appreciated. I asked
18 Ryan Fattman (I was very helpful in assisting his wife Stephanie run
19 my former boss out of office) to make a call and I spoke with Steve
20 Rodolakis about having Karyn Polito do the same. The thing about
21 politics is, there's so much bullshit involved, you never know who's
22 shooting straight. Probably very few are.

23 By reply email on September 1, 2016, Crowley responded to Murphy, stating in
24 full: "Hi John[,] I finally found this as I was looking for something else...I must have been
25 in a month long stupor this entire spring...I sent the resume into Karyn [Polito's]
26 office...we need you in DCF. Have a Great wkend [sic]. Jeff[.]"

27 **d. September 2017 – October 2017**

28 By email on September 13, 2017, Murphy informed Murphy & Rudolf, LLP
29 Paralegal Danielle Frommer (Frommer) that he would be attending the Mike Hussey

⁷⁶ In May of 2016, Murphy took a personal trip to Cuba for about six days.

1 (Hussey)⁷⁷ reception on October 19, 2017. Subsequently, on October 10, 2017, Murphy
2 notified Community Legal Aid (CLA) Development Director Lauren Aquino (Aquino) that
3 he would not be attending the Hussey reception due to him travelling to Florida. By
4 surreply to Aquino on October 17, 2017, Murphy recommended that she introduce
5 herself to Hussey's wife Susan Hussey, who was a former court stenographer. By that
6 same email, Murphy also informed Aquino that Mike and Susan Hussey "host the best
7 parties, always a great time."⁷⁸

8 By separate emails later that day, Aquino thanked Murphy, reminded him about
9 participating in CLA's private bar fundraising campaign in Worcester County, and
10 informed him about a meeting hosted by Campaign Committee Chairman John Shea
11 (Shea) who worked at the law firm of Mirick O'Connell DeMaille & Lougee, LLP (Mirick)
12 in Worcester. By two follow-up emails on October 25, 2017, Aquino also reminded
13 Murphy that the CLA fundraiser would be held on or about October 30, 2017 and/or
14 November 2, 2017.

15 **e. January of 2018 – October 5, 2019**

16 Murphy continued his job search by sending some emails⁷⁹ between January of
17 2018 through September of 2019. During this time, he also maintained his private

⁷⁷ Based on an un rebutted email sent from Murphy on October 17, 2017, Hussey was a recent retiree from the Public Defender's office.

⁷⁸ Despite Murphy's assertions to Aquino about his familiarity with Mike and Susan Hussey, the record does not show that Murphy ever directly contacted them for assistance in finding employment.

1 practice as a solo practitioner where he engaged in mostly family law related cases that
2 involved “quite a few” clients involved in custody disputes.⁸⁰

3 **Murphy’s Personal Trips**

4 Between May 14, 2013 and October 6, 2019, Murphy took personal, weekend
5 trips to Connecticut where he stayed with Richard Shea (Shea).⁸¹ Shea also
6 “sponsored” Murphy’s weekend trips to Florida, which occurred on three or four
7 occasions. Murphy also took vacations to Cape Cod for a couple of weekends and to

⁷⁹ By email on June 13, 2019, Murphy contacted Ann Cascanett (Cascanett) regarding Carolyn McCarthy [(McCarthy)] /John Piccolo [(Piccolo)] Health Insurance, and attached a letter related to an Annual Registration Statement that Murphy had submitted to the Massachusetts Board of Bar Overseers. By reply email on June 14, 2019, Cascanett informed Murphy that she would “send over documentation shortly” and that “Carolyn pays \$251.09 bi-weekly for health insurance” and that “John can reduce his payments to \$125.54.” By follow-up email on July 12, 2019, Murphy asked Cascanett to send him the year-end paystubs for 2017 and 2018 so he can “calculate what the health insurance costs were for those two years and...extinguish the overpayment.” Despite this correspondence, the record is unclear about whether Cascanett had specifically retained Murphy’s legal services on behalf of McCarthy and Piccolo. The record is also unclear about whether Cascanett, McCarthy, and/or Piccolo ever discussed employment opportunities with Murphy. Neither Cascanett, McCarthy, nor Piccolo testified.

⁸⁰ Murphy testified that while he charged clients \$100 hourly, he ended up doing lots more work than he ever got paid for. He also testified that when it came to appearing before some of the judges with whom he had a “fairly decent” rapport, Murphy “tried to get by on his charm.”

⁸¹ Shea was Murphy’s college roommate who has a place on the beach, lives in West Hartford, and practices law in Hartford. Shea also works at a law firm of about 15 lawyers, where he performs transactional work and franchise development. Despite Shea’s relationship with Murphy, Murphy admitted that he never reached out to Shea for help in securing employment during his termination period. The record is unclear about whether Richard Shea is related to attorney John Shea at Mirick O’Connell.

1 New York. Once in May of 2016 and, once again at some point in 2017, Murphy
2 travelled to Cuba where he stayed for about six days each trip.

3 **The Federal Court Complaint and Murphy's Reemployment**

4 As noted above, Murphy filed a federal court complaint against the Trial Court on
5 May 5, 2016, for alleged discrimination. In that complaint, he sought reinstatement but
6 did not seek back pay relief from the Trial Court. At some point between May 6 and 20,
7 2019, Murphy and the Trial Court participated in federal court mediation; and, on or
8 about May 20, 2019, the parties entered into a confidentiality agreement.

9 On October 4, 2019, Murphy and the Trial Court entered into a settlement
10 agreement which included his reemployment as a Staff Attorney at the Worcester Court
11 Service Center, effective on October 7, 2019, with an annual salary of \$91,166.25.
12 While that agreement did not contain any back pay provision,⁸² it stated that the Trial
13 Court, would agree, in part, to take the following action:

14

15 2. Re-employ Murphy as a Staff Attorney with a principal
16 assignment in the Court Service Center located in the Worcester
17 County Court Complex located at 225 Main Street, Worcester,
18 Massachusetts. Murphy's rate of pay shall be \$91,166.25 per
19 annum at the time he recommences employment, and he shall be

⁸² While the Union tried to get involved in Murphy's settlement agreement with the Trial Court, the Union did not participate in either the federal mediation or settlement negotiations. Specifically, Union Business Manager Noel testified that he made several attempts to contact Director of Labor Relations Conlon and to put Union counsel Michael Feinberg (Feinberg) in contact with the Assistant Attorney General representing the Trial Court. Conlon corroborated Noel's testimony, testifying that he recalled a number of conversations with [Feinberg], and communicated Noel's requests to the Attorney General's office concerning the Union's desire to participate in those settlement discussions.

1 at Step 8, Grade 17 members of the Office and Professional
2 Employees International Union (OPEIU); [footnote "2" omitted]
3
4
5 4. Provide Murphy with an Affidavit (in the form attached hereto as
6 Exhibit A)⁸³ regarding the status of Family Law Facilitator position

⁸³ Exhibit A to the Agreement included an affidavit signed by Chief Human Resources Officer Dietl on December 12, 2019, which affirmed the following:

1. I am employed by the Massachusetts Trial Court in the position of Chief Human Resources Officer.
2. I gained personal knowledge of the facts asserted herein through my work at the Massachusetts Trial Court. I am competent to testify to these facts and I agree to appear before the Massachusetts Department of Labor Relations at a convenient time to provide testimony consistent with the facts set forth in this Affidavit.
3. Certain Massachusetts Trial Court employees who are employed in the Massachusetts Probate and Family Court are eligible to be designated Deputy Assistant Registers pursuant to chapter 217, sections 29C through 29L of the Massachusetts General Laws. Employees who are designated Deputy Assistant Registers pursuant to chapter 217, sections 29C through 29L of the Massachusetts General Laws consequently receive additional compensation above and beyond their normal salaries.
4. The Massachusetts Trial Court employs people as Staff Attorneys in Court Service Centers located at a number of Massachusetts Court Houses.
5. People that the Massachusetts Trial Court employs as Staff Attorneys in Court Service Centers are not eligible to be Deputy Assistant Registers.
6. The Massachusetts Trial Court also employs Family Law Facilitators, who work in the Commonwealth's Probate and Family Courts.
7. The Family Law Facilitator is eligible to be designated a Deputy Assistant Register.
8. As of the date of the termination of his employment at the Massachusetts Trial Court, John Murphy was designated a Deputy Assistant Register pursuant to chapter 217, sections 29F of the

1 that is no longer located within the Worcester County Probate &
2 Family Court;

3
4

5 7. Provide all reasonable assistance and cooperation to Murphy in
6 any effort by Murphy to receive creditable service pursuant to
7 M.G.L. c. 32 or other applicable law for the period of time from May
8 14, 2013 until Murphy comes to be reemployed by the [Trial Court].

....

9 9. The Executive Office of the Trial Court shall place Murphy into
10 his position as Staff Attorney on or about October 7, 2019.

11
12

13 11. This Agreement and all attachments to it are public documents
14 and may be subject to disclosure. This Agreement may be offered
15 in evidence in any judicial or other proceeding to enforce any of its
16 provisions, or for any other lawful purpose.

17

18 From October 7, 2019 until September 1, 2021, the Trial Court employed Murphy
19 as a Staff Attorney in the Worcester Court Service Center.

20 **Trial Court Back Pay Calculations**

21 The Trial Court has employed Linda Rowe (Rowe) in its Human Resources
22 department for about 40 years. At all relevant times, Rowe was responsible for
23 calculating back pay for employees who were reinstated or reemployed with the Trial
24 Court. Specifically, she calculates back pay wages from the date of the employee's

Massachusetts General Laws, and was being paid additional compensation above and beyond his base salary because of that designation.

9. Up until 5/16/16, the Massachusetts Trial Court employed at least one person as a Family Law Facilitator in the Worcester Probate and Family Court. Since 5/16/16, the Massachusetts Trial Court has not employed anyone as a Family Law Facilitator in the Worcester Probate and Family Court.

1 termination to the date of their reinstatement or reemployment and limits her
2 calculations to the gross pay that the employee would have earned during their
3 separation period, and to the sick time and vacation leave that employee would have
4 accrued had they been on the payroll during that period. Rowe does not calculate health
5 insurance contributions toward employee back pay.⁸⁴

6 Concerning Murphy's reemployment and sick leave, Rowe calculated that he was
7 entitled to buyback 20% of sick time for the period between May 14, 2013 and October
8 5, 2019 because he did not use any sick time during this period. Concerning Murphy's
9 vacation leave, she calculated that while he was entitled to 181.615184 hours of
10 vacation time, he was not entitled to any monetary value associated with that time.⁸⁵
11 This is because when employees use earned vacation time, the Trial Court pays them
12 for each vacation day used but does not pay for both their regular workday and their
13 vacation day.

14 **Vocational Expert – Nancy Segreve**

15 **1. Background**

⁸⁴ Rowe gave un rebutted testimony that in determining an employee's back pay entitlement, she has never calculated the difference between what the Trial Court contributes to that employee's health insurance premium and the amount contributed by the employee.

⁸⁵ Rowe testified that when Murphy was terminated, the Trial Court owed him his last paycheck for regular wages, as well as a vacation buyback of whatever vacation balance he had on the books at that time, which was 187.615184 hours divided by 7.5 hours which would give the number of days of vacation that he had not yet used but earned. She also testified that while the Trial Court pays employees for each vacation day that they use, it does not pay employees for both their regular workday and their vacation day. Rather, they get the same amount of pay on the days that they are taking vacation, and she simply gives back their earned hours back.

1 For over 30 years, Nancy L. Segreve (Segreve)⁸⁶ has been a vocational
2 consultant who helps prospective employees find employment or return to the workforce
3 and stay employed. Segreve is also a certified rehabilitation counselor, a certified case
4 manager, and a vocational rehabilitation provider. Her duties include assisting clients
5 with resume writing, identifying career goals, strategizing job searches, and conducting
6 interviews. She also performs job analyses, makes employability assessments,
7 produces labor market surveys, and testifies as an expert witness in various court and
8 administrative hearings.⁸⁷ Segreve's offices are located in Lawrence, Mass. and
9 Westerly, Rhode Island.

10 On or about September 21, 2020, Segreve created an Employability Assessment
11 report where she evaluated Murphy's employability by assessing his earning capacity,
12 his job search efforts, and the availability of jobs that he could have performed in an

⁸⁶ After the Respondent established a proper foundation, I qualified Segreve as an expert witness in the areas of vocational consulting and counseling based on her education, training, experience, and familiarity with the subjects.

⁸⁷ Segreve has testified as an expert witness at the United States district court in Boston and Worcester, the Middlesex superior court, the Essex superior court, the Massachusetts probate and family court, the Belknap County court in New Hampshire, and the Connecticut superior court. She is also a qualified expert in Social Security Administration hearings and has about 10 years of experience providing expert testimony and labor market surveys in civil cases, including divorce and child custody cases, and employment law. Despite participating in "hundreds" of cases with the Department of Industrial Accidents (DIA), where she assisted persons with injury or illness return to the workforce in a job comparable to what they had in earned past wages, she admitted that she had never provided expert testimony in a DLR proceeding.

1 appropriate labor market based primarily on data from the United States Department of
2 Labor (DOL).⁸⁸

3 **2. Methodology**

4 To determine Murphy's employability⁸⁹ and the transferability⁹⁰ of his skills,
5 Segreve's relied on certain methodology to review available jobs⁹¹ in similar
6 occupational groups, and whether those jobs used similar materials, products, subject
7 matters or services. She also relied on Murphy's resume and cover letter, his affidavit,
8 his 2013 – 2019 tax returns, his gross pay records from 2007-2012, his personnel file,
9 and the Family Law Facilitator job description. Based on this information, Segreve found
10 that Murphy would have been well-qualified to pursue work as a practicing attorney in
11 family law and in private practice because his work as a Family Law Facilitator was

⁸⁸ Segreve looked at data from the DOL Bureau of Labor Statistics (BLS) Occupational Outlook Handbook, BLS Occupational Employment Statistics (OES) Survey May 2013 – May 2019, and reviewed August 2020 data from the Economic Research Institute. She testified that "technically," the statistical information cited in her report is the NECTA (or New England City Town Area) which comes from the OES survey and breaks down numbers of employees and wage data based upon metropolitan statistical areas, and national survey data for a particular area within a state.

⁸⁹ Specifically, Segreve found that Murphy had degrees from "great" colleges and had experience as a practicing attorney working for firms as well as on his own. She also found that he possessed specialized knowledge of the "inner workings" of the probate and family court, as well as knowledge of certain issues involving custody, parentage, spousal support, and interactions with judges and attorneys.

⁹⁰ Segreve defined transferability of skills as the knowledge, skills, and abilities that an employee has garnered from one job or occupation that they can use in another occupation with as little adjustment as possible.

⁹¹ Specifically, Segreve looked at practicing attorney jobs in family law that were limited to 45 towns that surround Worcester.

1 “almost identical” and “very similar/very comparable” to the work of a family law
2 attorney.⁹²

3 To justify her findings, Segreve identified certain DOL employment projections
4 and determined whether certain occupations existed in the Worcester area between
5 January of 2013⁹³ and October of 2019. She also looked at the OES survey, NECTA,
6 certain salary surveys, and certain career projections. Next, she determined what
7 lawyers in the relevant geographic areas had earned on a percentile basis and median

⁹² Segreve determined that when Murphy was Family Law Facilitator he had prior experience as a practicing attorney through assisting and advising on regulations, procedures, access, and navigating the probate and family court system. She also determined that by virtue of working in the probate and family court, Murphy interacted with the attorney for a day/lawyer program, along with social service agencies, other attorneys, judges, and other court personnel, which should have been his “first layer” of networking opportunities. Additionally, while the job posting for the Family Law Facilitator had qualifications that Murphy did not have, she testified that his prospective cover letters could have explained why his experience may have related to those qualifications. Thus, Segreve opined that the Family Law Facilitator position was within the same occupational category and the same occupational group as a family law attorney. She also opined that the job postings listed in her report included employers in the Worcester area that were hiring family law attorneys, and that Murphy should have applied for those jobs even if he didn’t meet all of the listed qualifications.

Segreve conceded that the Family Law Facilitator position is not virtually identical to being a family law attorney, and that Murphy did not provide legal advice as a Family Law Facilitator and did not represent clients in a court of law the way that a family law attorney would. She also admitted that she was not actually certain if Murphy had tried a case based on his practice and his resume. She admitted further that she had never placed a family law attorney into a family law firm in Worcester after they’ve been fired from the family law court in Worcester.

⁹³ In her report, Segreve listed two staff attorney positions at H3 Counsel LLC and CPCS which were posted on January 31, 2013 and February 6, 2013, respectively, prior to Murphy’s May 14, 2013 termination date. She admitted that she erroneously included these postings because Murphy was still employed at the Trial Court as a Family Law Facilitator and was not seeking other employment during that time.

1 basis, and how many were employed as attorneys between 2013 and 2019. Segreve
2 also contacted a “handful” of employers⁹⁴ in the Worcester area, inquired about their
3 hiring practices between January of 2013 and October of 2019, and confirmed whether
4 they had hired persons for positions in family services and legal services. Additionally,
5 she looked at historical data to find archived job postings from various legal websites
6 such as Indeed, Monster, Law Crossing,⁹⁵ and Law Dawgs, and from the American Bar
7 Association (ABA), the Massachusetts Bar Association (MBA), Lawyers Weekly,⁹⁶ and
8 the law school libraries at Boston University, Harvard University, and Suffolk University.

9 Finally, Segreve applied the standard for a prospective employee’s reasonable,
10 diligent, or active job search which includes the following factors:

⁹⁴ Segreve testified that she contacted the following five Worcester County law firms to inquire about their hiring practices: Mirick, CLA, Hebert Family Law Group, Bowditch & Dewey, LLP (Bowditch), and Fletcher Tilton, P.C. (Fletcher). However, she admitted to not contacting every employer identified in her report because it was not necessary and would take an undue amount of time. Rather, Segreve looked only at a “sampling” of job postings by employers that were hiring family law attorneys where Murphy would have been a qualified candidate between January of 2013 and October of 2019. She also admitted that some of the job postings were not actual job offers, but rather represented a profile of available jobs that, through vocational research and clinical judgment, have been determined to be suitable alternatives taking into consideration Murphy’s educations, training, skills, and work experience.

⁹⁵ Segreve testified that because LawCrossing.com keeps public their archived data, she entered search terms for “family attorney or family law,” entered a date range, and reviewed those search results to see which jobs were posted during the relevant time period.

⁹⁶ Segreve testified that the digital edition of Lawyers Weekly is archived and includes job postings/job advertisements, through which she searched for journals and job advertisements to determine if there was a likelihood that those jobs were posted during the relevant timeframe. However, she admitted that she did not look at every single week of Lawyers Weekly; but looked quarter-to-quarter/year-to-year as a sampling of some of the postings for attorneys in family law.

- 1) spending 20-25 hours per week on a job search;
- 2) identifying 10-15 employer contacts per week, at least;
- 3) having a systemized process for applying for jobs;
- 4) recording your job applications [such as] keeping...some type of job log;
- 5) strategizing your system of following up with employers and following through with applications;
- 6) creating a resume that can be customized to match the requirements of individual jobs [for which] you're applying;
- 7) having a cover letter that also allows you to customize that cover letter;
- 8) networking and using all job search resources available [including] having a LinkedIn page that reflects your skills and qualifications;
- 9) making sure that you have done everything possible to get your name in front of the person who's responsible for hiring [which means:]
 - a. you've applied in a manner consistent with what the employer has requested,
 - b. you've applied in a manner consistent with what that employer has requested,
 - c. you've followed up on that and done essentially everything you can do to provide the hiring decision-maker with whatever they need to make their final decision.

Based on these factors, Segreve concluded that Murphy's job search was neither diligent nor reasonable⁹⁷ because there were at least 35 available job opportunities that

⁹⁷ Segreve testified that she found no evidence that Murphy had conducted either a reasonable or a diligent job search, and that such a failure to conduct a diligent job search would raise certain questions by prospective employers. Specifically, when an employer sees a large gap in employment, it would usually want to know where that person has been and what they've been doing, and why someone with that level of skill and expertise would be out of the workforce for so long. It can also be a red flag for employers and an added barrier that a job seeker would have to overcome when they are trying to market themselves after an extended period away from the labor market. Further, Murphy's email inquiries between September of 2015 and June 2019 would not come close to a reasonable or a diligent job search, which coupled with his total business income between May of 2013 and October of 2019, demonstrated a job search that appeared to be "negligible" and lacked effort in a meaningful way to find

1 existed between January of 2013 and October of 2019, for which Murphy failed to
 2 apply.⁹⁸ She also concluded that Murphy's efforts to be reinstated as Family Law
 3 Facilitator by pursuing his grievance to arbitration, filing a charge at the DLR, and filing
 4 suit against the Trial Court in federal court did not meet the standard for a reasonable
 5 and diligent job search.

6 **3. Available Job Postings 2013 – 2019⁹⁹**

7 **a. 2013 – One Posting**

| | | |
|----|------------------|--|
| 8 | Employer: | Committee for Public Counsel Services |
| 9 | | (CPCS) |
| 10 | Address: | Worcester, MA |
| 11 | Position: | Attorney, Family Law Litigation |
| 12 | | |
| 13 | Duties: | Client interviews, legal research and writing |
| 14 | | pre-72 hour hearing investigation including |
| 15 | | reviewing pleadings and exhibits, locating and |
| 16 | | interviewing witnesses, preparing witnesses, |
| 17 | | gathering facts from the social worker and |

employment. Moreover, had Murphy conducted a reasonable job search, Segreve testified that it would have taken him three to six months to find employment given his education, legal experience, his prior employment as a Family Law Facilitator.

⁹⁸ Specifically, Segreve's report concluded, in pertinent part:

Based upon my knowledge of the facts and circumstances of this case; a vocational analysis applying methodology accepted in the field of vocational rehabilitation; and my expertise in the field of vocational rehabilitation, it is my opinion within a reasonable degree of vocational certainty that there were jobs available in Worcester [C]ounty] that were consistent with Mr. Murphy's job as a family law Facilitator and which he would have been a qualified candidate had he in good faith applied to such jobs. If Mr. Murphy were to be employed in these types of jobs, he would have earned at least at the median wage as described by the OES survey, comparable to what he was earning at the time of termination.

⁹⁹ All posting descriptions restated with original text.

1 other collateral providers, obtaining DCF file,
2 reviewing service plans, client to meet with
3 court investigators, preparing motions,
4 identifying matters requiring further hearing.
5 Providing formal and informal assistance to
6 private attorneys on cases assigned through
7 the private counsel division.

8 **Qualifications:** Eligible to practice law in Massachusetts.
9 Termination of parental rights trial experience
10 as counsel for a parent and as counsel for a
11 child or children. A demonstrated commitment
12 to the principle of zealous advocacy in the
13 representation of indigent persons in child
14 welfare cases; strong interpersonal and
15 analytical skills. Ability to work in a community
16 and defense-oriented capacity, both
17 independent and collaboratively, reliable
18 transportation. Foreign language skills
19 desirable.

20
21 **Posted:** 10/24/2013
22

23 **b. 2014 – Four Postings**

24
25 **Employer:** Patriot Law Group
26 **Address:** Southborough, MA
27 **Position:** Family Law Attorney

28
29 **Qualifications:** 5 years of solid work history, excellent
30 analytical, communication, writing and editing
31 skills; effective at multitasking and critical
32 thinking; JD degree from an accredited law
33 school; member in good standing with bar.

34
35 **Posted:** 4/25/2014

36 **Employer:** Internal Revenue Service (IRS)
37 **Address:** Worcester, MA
38 **Position:** Counsel III, Litigation Attorney

1 case-related research on clinical and medical
 2 issues. Coordinating advocacy with CAFL
 3 social work staff. Supervising staff attorneys in
 4 court including second seating of trials and
 5 significant evidentiary hearings. Formally and
 6 informally evaluating the performance of staff
 7 attorneys. Planning and conducting in-office
 8 training.

9
 10 **Qualifications:** 4+ years of experience representing parents
 11 and children in child welfare matters including
 12 experience as counsel for a parent and for a
 13 child in termination of parental right trials.
 14 Eligible to practice law in Massachusetts and in
 15 good standing as a member of the bar. A
 16 demonstrated commitment to the principle of
 17 zealous advocacy in the representation of
 18 indigent persons in child welfare cases; strong
 19 interpersonal skills, analytical ability, and legal
 20 skills. Foreign language skills are desirable.

21
 22 **Posted:** 12/21/2014

23
 24
 25 **Employer:** Lexacount Search
 26 **Address:** Westborough, MA
 27 **Position:** Partner

28
 29 **Duties:** Family Law Partner/ Counsel. Lead a domestic
 30 relations family law practice. Responsibilities
 31 will include leading group in all aspects of
 32 family law including divorce, paternity, and
 33 custody litigation.

34
 35 **Qualifications:** Minimum of 5 years of experience. JD from an
 36 ABA approved law school and an active
 37 member in good standing of the bar.

38
 39 **Posted:** 9/24/2014

40 **c. 2015 – Eight Postings**

41
 42 **Employer:** Pollack Law Group

1 Address: Southborough, MA
2 Position: Associate Attorney
3 Qualifications: JD with 3 years of sales or business
4 experience.
5 Posted: 9/28/2015
6
7
8 **Employer:** Department of Children and Families (DCF)
9 Address: Worcester, MA
10 Position: Deputy Regional Counsel
11 Duties: Supervises the legal activities of the regional
12 attorneys (12+ assistant regional counsels,
13 support staff, and externs) and performs
14 related work under the general supervision of
15 the regional counsel.

16 Qualifications: 5 years of full time or equivalent part time
17 supervisory or managerial experience in the
18 particular specialty. Knowledge of the laws of
19 the Commonwealth and of Federal Laws.
20 Ability to direct legal research and the
21 preparation of reports and to confer with
22 judicial officials. Ability to file answers, prepare
23 briefs, effect settlement, prepare instrumental
24 documents, and plan department legal
25 activities.
26
27 Posted: 10/3/2015

28 **Employer:** Pollack Law Group
29 Address: Southborough, MA
30 Position: Entry Level Associate Attorney
31 Duties: Handle divorce, custody, and support cases
32 Qualifications: 3 years sales and/or family law experience
33 Posted: 10/12/2015, 12/1/2015, and 12/28/2015

34 **Employer:** Community Legal Aid Services
35 Address: Worcester, MA
36 Position: Entry Level Associate Attorney
37 Duties: Handle divorce, custody, and support cases
38 Qualifications: 3 years sales and/or family law experience
39 Posted: 10/12/2015, 12/1/2015, and 12/28/2015

1 Trainings, assist the training unit in presenting
 2 programs, prepare and provide information
 3 about administrative changes and policies to
 4 private attorneys. Assist in developing and
 5 update resource materials for website.
 6

7 **Qualifications:** Eligible to practice law in MA. 7+ years of legal
 8 experience including 4+ in child welfare
 9 matters (7 preferred). Should have significant
 10 litigation experience. Willing to travel. Have
 11 excellent writing, litigation, and oral
 12 presentation skills.
 13

14 **Posted:** 5/13/2016

15 **Employer:** Pollack Law Group
 16 **Address:** Southborough, MA
 17 **Position:** Mid-level Associate
 18

19 **Duties:** Handle initial client inquiries related to divorce,
 20 custody, parenting, modification and other
 21 contempt matters. Should be able to draft
 22 Probate & Family Court pleadings, be
 23 comfortable appearing in court and work well
 24 with clients.
 25

26 **Qualifications:** 2-5 years of litigation experience
 27 **Posted:** 5/17/2016 and 9/6/2016

28

29 **Employer:** DCF
 30 **Address:** Worcester, MA
 31 **Position:** Counsel I
 32

33 **Duties:** Represents the agency in juvenile and Probate
 34 Court in custody, termination of parental rights,
 35 guardianship, and adoption cases. Interprets
 36 laws, court decisions and opinions, rules and
 37 regulations applicable to the agency. Prepares
 38 and litigates custody, termination of parental
 39 rights, and guardianship court cases. Prepares
 40 petitions, affidavits, memoranda of law,
 41 discovery motions, findings of fact, and other

1 legal documents for agency court involved
2 cases.

3 Qualifications: JD Degree, admission to the Mass. Bar and
4 some experience in legal research, legal
5 writing, and legal procedures and processes.
6

7 Posted: 9/29/2016 and 10/18/2016
8

9
10 **Employer:** MetroWest Legal Services
11 Address: Framingham, MA
12 Position: Staff Attorney, part time (21 hours per week)
13

14 Duties: Represent domestic abuse victims in family law
15 cases. Direct client representation as well as
16 community education and outreach.

17 Qualifications: Experience working in public interest or legal
18 aid environments, be passionate about
19 achieving justice and overcoming barriers
20 facing low income clients. Prior experience
21 working with victims of domestic violence
22 preferred. Ability to speak Portuguese or
23 Spanish helpful.

24 Posted: 11/29/2016
25

26 **Employer:** CPCS – Children & Family Law Division
27 Address: Worcester, MA
28 Position: Supervising Staff Attorney
29

30 Duties: Under the direction of the Attorney in Charge
31 assist in the supervision of staff attorneys.
32 Interview, consult with and advise adult clients.
33 Conduct investigation and obtain discovery.
34 Conduct legal research and writing.
35 Coordinating advocacy with CAFL social work
36 staff. Supervising staff attorneys in court
37 including second seating of trials and
38 significant evidentiary hearings. Formally and
39 informally evaluating the performance of staff
40 attorneys. Planning and conducting in office
41 training.

1 Qualifications: 5+ years of experience (7+ preferred)
 2 representing parents and children in child
 3 welfare matters. Eligible to practice law and a
 4 member of the MA Bar in good standing. A
 5 commitment to working with culturally diverse
 6 low income population.
 7
 8 Posted: 11/30/2016

9 **e. 2017 – Three Postings**

10
 11 **Employer:** Community Legal Aid Services
 12 Address: Worcester, MA
 13 Position: Family Law Staff Attorney
 14 Duties: Assist individuals with cases involving family
 15 law matters including divorce, child support,
 16 visitation, and custody. Majority of clients will
 17 be survivors of domestic violence, will have
 18 significant client contact, and will assume an
 19 active case load while continuing to accept
 20 new cases. Engage in community outreach
 21 and education and will work closely with
 22 community partners including domestic
 23 violence service providers. Some grant writing
 24 and grant reporting activities are required.

25 Qualifications: JD Degree and admission to MA bar. Fluency
 26 in Spanish preferred, prior family law
 27 experience particularly with survivors of
 28 domestic violence preferred
 29
 30 Posted: 1/10/2017

31
 32 **Employer:** Mann Family Law
 33 Address: Framingham, MA
 34 Position: Litigation Attorney
 35
 36 Duties: Manage full caseload, variety of cases
 37 including personal injury, employment law, civil
 38 litigation family law, commercial litigation,
 39 general practice.

1 **Employer:** Community Legal Aid
2 Address: Worcester, MA
3 Position: Family Law Staff Attorney
4 Duties: Assist clients with cases involving law matters
5 including divorce, child support, visitation, and
6 custody.
7 Qualifications: Admission to the MA bar, eligibility to sit for the
8 next MA bar exam. Fluency in Spanish is
9 highly desirable. Prior experience in applicable
10 substantive practice areas is also highly
11 desirable.
12
13 Posted: 7/16/2018
14
15
16 **Employer:** Apply with Lawyersweekly.com¹⁰⁰
17 Address: Massachusetts
18 Position: Family Law Attorney
19 Duties: Assisting clients in a family law practice.
20 Qualifications: 3-5 years' experience in family law. Exception
21 [sic] communication and writing skills along
22 with trial experience. Must be admitted to MA
23 Bar.
24
25 Posted: 4/16/2018
26
27
28 **Employer:** Apply with Lawyersweekly.com¹⁰¹
29 Address: Massachusetts
30 Position: Senior Family Law Associate
31 Duties: Assisting clients in a family law practice.
32 Qualifications: Experience in family law. Exception [sic]
33 communication and writing skills along with trial
 experience. Must be admitted to MA Bar.
 Posted: 3/26/2018

¹⁰⁰ Segreve's Report neither identified this employer nor its location.

¹⁰¹ Segreve's Report neither identified this employer nor its location.

1 **Employer:** Apply with Lawyersweekly.com¹⁰²
2 Address: Massachusetts
3 Position: Family Law Attorney
4 Duties: Handling all aspects of family law matters in
5 Massachusetts.
6 Qualifications: At least 2 or more years' experience win [sic]
7 domestic relations/family law. Litigation
8 experience, including courtroom.
9 Understanding the requisite forms and process
10 for divorce cases.
11
12 Posted: 11/26/2018
13
14
15 **Employer:** Community Legal Aid
16 Address: Worcester, MA
17 Position: Staff Attorney
18
19 Duties: Spearhead a medical/legal partnership with
20 UMass Memorial Medical Center. Oversee the
21 administration of the project and hold regular
22 intake hours to help train, recruit, and mentor
23 private volunteer attorneys who will accept pro
24 bono referrals, serve as a liaison between the
25 legal aid and clinical project partners and
26 handle a varied caseload.
27 Qualifications: Admission to the MA Bar. At least two years of
28 civil legal practice, preferably in legal aid or
29 similar setting, required. Experience in
30 developing, administering and/or working as an
31 attorney in a medical-legal partnership or other
32 collaborative setting strongly preferred.
33
34 Posted: 2/5/2018

35 **g. 2019 – One Posting**
36

37 **Employer:** MetroWest Legal Services
38 Address: Framingham, MA

¹⁰² Segreve's Report neither identified this employer nor its location.

1 Position: Staff Attorney
 2
 3 Duties: Provide representation at administrative
 4 hearings and in court to person with disabilities
 5 seeking SSI and/or SSDI benefits; and in other
 6 government benefit cases including
 7 unemployment, case assistance, MassHealth,
 8 and Food stamps. Responsibilities include
 9 direct client representation as well as
 10 community education and outreach.
 11
 12 Qualifications: 1-3 years of experience preferred. Applicants
 13 should have a demonstrated experience
 14 working in public interest or legal aid
 15 environment, be passionate about achieving
 16 justice and overcoming barriers facing low
 17 income clients and low income communities.
 18
 19 Posted: 9/23/201

20 **4. Law Firms and Legal Organizations**

21 Segreve conducted general research into the following law firms¹⁰³ in Worcester
 22 County and inquired about their hiring practices: Bowditch, Mirick, Fletcher, and CLA for
 23 Central and Western Massachusetts. In addition, the following attorneys testified about
 24 the hiring practices at their respective law firms: Bowditch Chair Angelini, Mirick Partner
 25 Paul Carey (Carey),¹⁰⁴ Fletcher Director Paul Jalkut (Jalkut),¹⁰⁵ and CLA Executive
 26 Director Paul Mannina (Mannina).

¹⁰³ Segreve admitted that her search results did not lead her to conclude that these firms would have hired Murphy had he applied for available positions between May 14, 2013 and October 6, 2019. Rather, she found only that these employers had hired family law attorneys in the past. She also admitted that while these law firms practiced family law or hired family law attorneys, she did not know when they filled those positions.

1 **a. Bowditch and Dewey**

2 Bowditch is a general practice law firm that employs approximately 70 lawyers
3 with a primary office in Worcester and other offices in Framingham and Boston. It has
4 large departments in the following practice areas: litigation, business, real estate,
5 employment, and probate. The probate department comprises three family law lawyers,
6 all of whom are partners, and represents clients in matters concerning divorce, domestic
7 relations, dispute resolution, separation, prenuptial agreements, postnuptial
8 agreements, guardianships, conservatorships, and custody.

9 Currently, Bowditch employs Angelini as its chairman where he serves as a
10 “relationship manager” who consults on matters involving firm progress, hiring and other
11 employment considerations, community relationships, and various professional and
12 non-professional matters. According to Angelini, Bowditch hires employees on an at-will
13 basis, hires based on need and talent, and typically hires younger lawyers who have
14 “promise,” who reflect a commitment to the community, and who have an ability to
15 establish client relationships over the length of their association with the firm. Bowditch
16 also looks for prospective employees who are smart and have demonstrated their talent
17 either in law school or in other employment. Often, Bowditch considers experienced
18 applicants who have practiced for a significant period after law school and who possess

¹⁰⁴ Although Segreve testified to contacting Mirick about available job postings between May of 2013 and October of 2019, Carey gave un rebutted testimony that Segreve never contacted him, and that he was unaware if she had contacted anyone else at Mirick concerning Murphy.

¹⁰⁵ Jalkut gave un rebutted testimony that Segreve never contacted him, and was unaware if Segreve had contacted anyone else at Fletcher concerning Murphy.

1 a “book of business.” Between 2013 and 2019, Bowditch hired about one to three new
2 lawyers annually who included recent law school graduates and other candidates with
3 certain experience.

4 At all relevant times, Angelini knew that Murphy was a lawyer in Worcester
5 County; however, he also knew about Murphy’s termination from the Trial Court
6 because it was a matter of active discussion among members of the bar. Although
7 Angelini never socialized with Murphy, they had a lawyer-client relationship because
8 Angelini represented Murphy *for gratis* in challenging his termination via the grievance-
9 arbitration process. In terms of employability” at Bowditch, Angelini believed that
10 Murphy “was not a very successful lawyer” in terms of his book of business. He also
11 believed that the likelihood of Bowditch hiring Murphy between 2013 and 2019 was
12 “zero” because Murphy was in his late 50’s, with almost no litigation experience, no
13 clients, and no law firm expertise. Further, Angelini knew that Murphy was actively
14 seeking reinstatement with the Trial Court and presented “no advantage whatsoever”
15 over a younger lawyer coming to the firm. Unless there was “a very, very satisfactory
16 explanation,” Angelini believed that Bowditch would not hire someone who had been
17 terminated and/or was actively seeking reinstatement with their prior employer. Thus,
18 Angelini concluded that Bowditch would not have hired Murphy.¹⁰⁶

¹⁰⁶ Angelini gave unrebutted testimony that between May 14, 2013 and October 6, 2019, Murphy never asked him for assistance in finding employment. In fact, had Murphy asked for a letter of reference, Angelini would have written one. However, Angelini did not think that a letter of recommendation from him would have resulted in any change in Murphy’s unemployment status. Similarly, had Murphy asked Angelini to speak with Register Fattman or any of her representatives on his behalf, Angelini would

1 **b. Mirick**

2 Mirick is a traditional, full-service law firm with offices in Worcester,
3 Westborough, and Boston. Mirick comprises over 60 attorneys and has practice areas
4 in litigation, family law, bankruptcy, corporate law, mergers and acquisitions, real estate,
5 and probate. At all relevant times, Carey was a partner at Mirick in the bankruptcy
6 group. According to him, Mirick places job advertisements in Lawyers Weekly, reviews
7 resumes of certain prospective candidates, and invites them for interviews. Ultimately,
8 Mirick usually recruits second-year law students for summer associate positions and
9 often hires them as first year associates. Between 2013 and 2020, Mirick hired one
10 person, for a total of five attorneys in its family law practice. By 2020, Mirick had
11 employed four attorneys in its family law practice, with a partner in its Worcester office
12 and three attorneys practicing from Boston.

13 In March of 2018, Carey served on Mirick's recruiting committee as the hiring
14 partner where the firm considered applicants for a family law position who did not meet
15 every qualification but presented attractive value. Specifically, he explained that Mirick
16 valued more senior applicants who possessed a book of business and were able to
17 bring previous clients to the firm.¹⁰⁷ Concerning Murphy, Carey met him when they both

have done so. Moreover, had Angelini known in 2013 that it would be several years before Murphy got his job back, he would have encouraged Murphy to try to get "a job," and to look for employment someplace else but not in the legal profession.

¹⁰⁷ Carey conceded that a book of business might not work all that well in the family law practice because "it's tough to have a lot of repeat business" in that area.

1 practiced as bankruptcy lawyers. However, after reviewing Murphy's resume,¹⁰⁸ Carey
2 concluded that Murphy would not be a serious candidate at Mirick as a family law
3 lawyer.

4 **c. Fletcher**

5 Fletcher is a general services law firm with a primary office in Worcester, other
6 offices in Framingham and Centerville, Mass., and one office in Providence, Rhode
7 Island. Fletcher comprises about 50 lawyers who practice in a variety of areas. In
8 addition to serving as Director,¹⁰⁹ Jalkut currently serves as Fletcher's litigation
9 department chair. Between 2012 and 2017, Jalkut served on Fletcher's management
10 committee where he participated in the hiring process and considered the candidate's
11 employment history including how their relationship ended with their prior employer.¹¹⁰
12 At no time did Jalkut ever participate in recruiting, interviewing, or hiring a family law
13 attorney.

14 Jalkut's knowledge of Murphy was limited to seeing him on the street or at the
15 courthouse and saying hello. After reviewing Murphy's resume, Jalkut concluded that if

¹⁰⁸ The record is unclear about whether Murphy filed a job application with Mirick. The record is also unclear about how Carey received a copy of Murphy's resume and/or when Carey reviewed it.

¹⁰⁹ Jalkut testified that Fletcher's governing structure doesn't include "partners" but comprises "directors who are also shareholders," non-director officers who are not shareholders, and "third tier associate[s]."

¹¹⁰ Jalkut gave un rebutted testimony that Fletcher would not want to hire someone who "had a track record of creating problems in the workplace" or someone whose former employer terminated them because that "would be a screaming red flag for us."

1 Fletcher ever offered to interview Murphy, it would have been a “courtesy interview”
2 because Murphy would never have made it through the interview process.

3 **d. CLA**

4 In January of 2021, CLA employed around 80 attorneys who were unionized¹¹¹
5 and who had clientele that were mostly indigent.¹¹² At all relevant times, CLA has had a
6 hiring committee that conducts interviews and considers candidates “who have a
7 demonstrated commitment to legal services to the poor,”¹¹³ who have experience
8 practicing “poverty law,” who possess language skills, writing skills, and a certain job
9 history. As Executive Director between 2013 and 2019, Mannina reviewed resumes,
10 met with finalists, and made final hiring decisions for all attorneys and non-attorney
11 staff.

12 Mannina knew Murphy many years ago from different social circles. For instance,
13 he would occasionally bump into Murphy at court or in the street and would say hello.
14 Mannina also knew that Murphy had worked in the probate and family court as a Family

¹¹¹ Angelini gave un rebutted testimony that he once served on the board of directors at CLA and recalled that those lawyers were members of a union. Other than CLA, Angelini testified that he was not aware of any lawyers practicing in Worcester County who are also members of a unionized bargaining unit.

¹¹² Mannina testified that CLA has hired attorneys between 2013 and 2019. He later admitted to not knowing the exact number of hires but testified that it was “not over 100.” Mannina also admitted to not knowing how many attorneys left the CLA between 2013 and 2019.

¹¹³ Mannina testified that when the CLA hires candidates “we’d like them to stay for a long time.” However, he admitted that the initial hire is usually for a temporary period of time, and that “very frequently” over the last several years CLA has turned almost every temporary position into a permanent one.

1 Law Facilitator and, from time-to-time, referred cases from the CLA. Additionally,
2 Mannina knew that the Trial Court had terminated Murphy in May of 2013, and had later
3 reemployed him at the Court Service Center.

4 After reviewing Murphy's resume and considering his prior separation from the
5 Trial Court,¹¹⁴ Mannina concluded that Murphy would not have been a "viable
6 candidate"¹¹⁵ for employment at the CLA because he lacked experience providing legal
7 advice and representing low income clients in court. While Mannina conceded that, as
8 Family Law Facilitator, Murphy worked with persons who were either indigent or
9 financially disadvantaged, that position comprised mostly of giving people information
10 and directing them to different resources which is not the same as legal advocacy and
11 representing low-income people.

12 OPINION

13
14 Section 11 of the Law authorizes the CERB to issue orders and fashion remedies
15 that are designed to effectuate the purposes of the Law and vitiate the effects of a
16 prohibited practice violation. Boston Police Patrolmen's Association, Inc., 8 MLC 1993,

¹¹⁴ Without specifying the basis for his knowledge, Mannina testified that the CLA would not have hired Murphy because "there was still bad blood" between Murphy and the Trial Court." Mannina also testified that he would not have been excited to hire Murphy based on his general awareness that Murphy had been "moving around from job-to-job."

¹¹⁵ Mannina gave un rebutted testimony that if a prospective candidate was fired for cause by the Trial Court, that would be a "big red flag" for the CLA because of its requirement that attorneys appear before the Trial Court. It would also be "problematic" and "challenging" because of the CLA's lawyer-for-the-day programs where attorneys communicate regularly with judges and court staff. Moreover, Mannina would consider it "a strike" against an applicant who lacked experience representing clients and/or litigating cases for low-income people.

1 2002, MUPL-2049 and MUPL-2050 (Feb. 23, 1982 and March 23, 1982). When the
2 CERB finds that a party has violated the Law, it orders that party to take certain actions
3 designed to restore the charging party to a position as nearly as possible to that which
4 would have existed but for the unfair labor practice. Newton School Committee, 8 MLC
5 1538, 1541-42, MUP-2501 (Nov. 16, 1981), aff'd sub nom School Committee of Newton
6 v. Labor Relations Commission, 388 Mass. 557, 576 (1983); Massachusetts
7 Department of Transportation, 44 MLC 1, 4, SUP-14-3576 and SUP-14-3640 (July 31,
8 2017).

9 In compliance proceedings, the party required to comply shall have the burden of
10 proving such compliance by a preponderance of the evidence. See, 456 CMR 16.08(5).
11 Preponderance of the evidence means that the respondent has the burden of proving
12 that it was more probable than not that it has complied with the CERB's order. See,
13 generally, Sargent v. Massachusetts Accident Co., 307 Mass. 246, 250 (1940):

14 [T]he weight or ponderance of evidence is its power to convince the
15 tribunal, which has the determination of the fact, of the actual truth
16 of the proposition to be proved. After the evidence has been
17 weighed, that proposition is proved by a preponderance of the
18 evidence if it is made to appear more likely or probable in the sense
19 that actual belief in its truth, derived from the evidence, exists in the
20 mind or minds of the tribunal notwithstanding any doubts that may
21 still linger there.

22 Id. at 250; compare; Corsetti v. Stone Co., 396 Mass. 1, 23-24 (1985) (plaintiff
23 failed to show "greater likelihood or probability" that the harm complained of was due to
24 causes for which the defendant was responsible than from any other cause). If, on all
25 the evidence, it is just as reasonable to suppose that the respondent's non-compliance
26 is as probably false as it is true, then the respondent has not met its burden of proving

1 by preponderance of the evidence that it complied with the CERB's order. Sargent, 307
2 Mass. at 251; Corsetti, 396 Mass. at 24.

3 **The Survival Statute**

4 As a threshold matter, the Union contends that Murphy is not entitled to any back
5 pay because his claim does not survive his death under the Massachusetts survival
6 statute, G. L. c. 228, s 1.¹¹⁶ Construing that statute with Gasior v. Massachusetts
7 General Hospital, 446 Mass. 645, 649 (2006),¹¹⁷ Rendek v. Sheriff of Bristol County,
8 440 Mass. 1017 (2003) (rescript opinion), and Pine v. Rust, 404 Mass. 411, 417 (1988),

¹¹⁶ G.L., c. 228, §1 states in full:

Section 1. In addition to the actions which survive by the common law, the following shall survive:—

(1) Actions under chapter two hundred and forty-seven;

(2) Actions of tort (a) for assault, battery, imprisonment or other damage to the person; (b) for consequential damages arising out of injury to the person and consisting of expenses incurred by a husband, wife, parent or guardian for medical, nursing, hospital or surgical services in connection with or on account of such injury; (c) for goods taken or carried away or converted; or (d) for damage to real or personal property; and

(3) Actions against sheriffs for the misconduct or negligence of themselves or their deputies.

¹¹⁷ In Gasior, the plaintiff's employment discrimination claim was not among those enumerated specifically in the survival statute. Nonetheless, the Court held that it was an action that survived "by the common law" because the plaintiff was an at-will employee whose at-will employment relationship contained implied terms, the breach of which was actionable. Id., 446 Mass. at 650-51. Although the Gasior Court acknowledged that what constitutes a contract claim has not been rigidly defined, it reasoned that there is a "close relationship" between some employment discrimination claims and actions for "breaches of contract" to warrant survival by the common law. Id. at 649 (citing Rendek, 440 Mass. at 1017-1018 (other citations omitted)).

1 the Union asserts that a duty of fair representation claim is neither enumerated in the
2 survival statute nor deemed an action that survives by the common law. Additionally, it
3 maintains that the duty of fair representation is a judicially created doctrine which
4 evolved in the context of racial discrimination against employees, and that the system of
5 collective bargaining is based on the subordination of the interests of the individual
6 employee to the collective interests of all members of the bargaining unit.

7 While the Union concedes that the survival statute is silent regarding whether a
8 duty of fair representation claim falls under a matter of tort or contract, it relies on
9 Graham v. Quincy Food Serv. Employees Association & Hospital, Library and Public
10 Employees Union, 407 Mass. 601, 613 (1990), to argue that a breach of duty of fair
11 representation is “more similar to a tort claim than one of contract.” Thus, because
12 Murphy’s claim does not seek “the vindication of personal rights,” and does not create
13 any contractual or quasi contractual rights based on his membership in the bargaining
14 unit, his claim is excluded from the survival statute and cannot survive his death.

15 Conversely, the Charging Party makes three arguments. First, the survival
16 statute does not apply here because this case has been fully heard, and the Union’s
17 liability to make Murphy whole has been fixed pursuant to the doctrine of *nunc pro*
18 *tunc*.¹¹⁸ Second, Murphy had a property right in continued employment based on

¹¹⁸ Nunc pro tunc is a Latin term meaning “now for then” and refers, generally, to an action taken retroactively to correct an earlier ruling. See, generally, City of Boston, 32 MLC 4, MUP-2749 and MUP-01-2892 (June 24, 2005) (prior to the close of the hearing, hearing officer allowed union’s motion to strike certain testimony from the record *nunc pro tunc* on grounds it constituted inadmissible evidence. The CERB reversed finding, *inter alia*, the disputed evidence was not material to the outcome of the case); compare

1 damage to his personal property pursuant to G.L. c., 228, §1(2)(d), Cleveland Board of
2 Education v. Loudermill, 470 U.S. 532, 538 (1985),¹¹⁹ and Gasior, 446 Mass. at 649.¹²⁰
3 Third, this case survives as a quasi-contractual action because Murphy was a third-
4 party beneficiary to the relevant CBAs.

5 Relying on Noyes v. Bankers Indem. Ins. Co., 307 Mass. 567, 569 (1941),¹²¹ the
6 Charging Party first contends that the Union remains liable to Murphy's estate because

Commonwealth v. Courage K. Asase, 93 Mass. App. Ct. 356, 358 n. 3 (2018) (citing Perkins v. Perkins, 225 Mass. 392, 396 (1917) (nunc pro tunc entries are made "to prevent a failure of justice resulting from delay in court proceedings subsequent to a time when a judgment, order, or decree ought to and would have been entered, save that the cause was pending under advisement").

¹¹⁹ In Loudermill, the employer terminated employee for dishonesty even though Ohio law classified employee as a civil servant and permitted termination only for cause. Both the civil service commission and the federal district court upheld the dismissal, but the appeals court reversed in part, finding that the employer had deprived the employee of due process and that he had a compelling private interest in retaining his employment. The United States Supreme Court affirmed, finding that while "the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Id. at 537-38, 541 n. 3 (citing Arnett v. Kennedy, 416 U.S. 134, 167 (1974)).

¹²⁰ The Charging Party cites to Gasior to argue that Murphy's claim survives as a quasi-contractual action because he was a third-party beneficiary to the relevant CBAs based on the close relationship between Murphy's claim that the Union breached its duty of fair representation and what the SJC has characterized as breaches of contract. While the Charging Party concedes that this is an untested issue in Massachusetts, it also points to Ryan v. Ryan, 419 Mass. 86 (1994) and Bassette v. Steele, 72 Mass. App. Ct. 1117 (2008) (unpublished), where the Appeals Court held, respectively, that third-party beneficiary claims to a contract survive a party's death.

¹²¹ In Noyes, the plaintiff filed a successful petition to vacate judgment after the defendant died. The Appeals Court voided that judgment due to plaintiff's failure to serve the petition on either the defendant or his personal representative, holding, in pertinent part, that "it has become the practice at common law to enter the judgment

1 after a verdict or a finding has been made decisive of the rights of the parties, and one
2 of them dies pending a decision on some question of law, it is correct to enter the
3 judgment *nunc pro tunc* as of a date before the death of the party. The Charging Party
4 also cites to Baker v. Hobson, 80 Mass. App. Ct. 1107 (2011) (unpublished
5 disposition),¹²² where the Appeals Court affirmed that a pre-mortem verdict “was binding
6 and conclusive” and subject to an entry of judgment on that date despite the
7 defendant’s subsequent death. Based on Noyes and Baker, the Charging Party
8 contends that Murphy’s pre-mortem request for compliance survives his death because
9 the Hearing Officer, the CERB, and the Appeals Court entered their respective
10 decisions before Murphy died.

11 Next, the Charging Party relies on Loudermill to argue that the Union’s breach of
12 its duty of fair representation deprived Murphy of his property right in his continued
13 employment at the Trial Court. Specifically, it contends that Murphy had an objective
14 expectation that he would remain employed by the Trial Court absent just cause to
15 terminate him, and that the Union’s breach of its duty of fair representation deprived
16 Murphy of the security afforded by continued employment, including the benefits that

nunc pro tunc as of a date before the death of the party” where, after a verdict or a finding has been made decisive of the rights of the parties, one of them dies pending a decision on some question of law. Id., 307 Mass. at 569 (citing Kelley v. Riley, 106 Mass. 339; Perkins v. Perkins, 225 Mass. 392; Barnes v. Barnes, 291 Mass. 383)).

¹²² In Baker, the plaintiffs moved unsuccessfully to dismiss the defendant’s counterclaim, asserting that it was extinguished by her death while the trial was ongoing. The trial judge ruled that the jury’s verdict on the counterclaim was binding and conclusive despite a delayed entry of judgment; and the Appeals Court affirmed.

1 came therewith. Further, it asserts that Section 1(2)(d) of the survival statute covers
2 both specific personal estates of which one may be the owner, and specific property
3 rights that were damaged.

4 For the following reasons, I am unpersuaded by the Union's argument that
5 Murphy's claim does not survive his death. First, the survival statute states
6 unequivocally that actions of tort for damage to personal property shall survive. G.L., c.
7 228, §1(2)(d). Despite the Union's contention that Murphy's claim does not seek a
8 "vindication of personal rights," I find that Murphy possessed a protected property right
9 in his continued employment at the Trial Court based on his bargaining unit position as
10 a Family Law Facilitator. See, e.g., Harris v. Board of Trustees of State Colleges, 405
11 Mass. 515, 520 (1989) (citing Loudermill, 470 at. 538-539) (college's grant of tenure to
12 the plaintiff, which included in its terms that he could be dismissed only for "just cause,"
13 created a constitutionally protected property right in his continued employment));
14 compare, Moore v. Executive Office of the Trial Court, 487 Mass. 839, 845 (2021)
15 (assistant clerk-magistrate's suspension without pay constituted a permissible exercise
16 of the employer's statutory authority and did not violate her due process rights even
17 though she had a "significant interest in continued employment").

18 Next, I find that the Union's reliance on Rendek and Pine is inapposite. First,
19 Rendek is distinguished because that case pertained to a quasi-contractual matter
20 which is not at issue here.¹²³ There, the Court held that "actions seeking the vindication

1 of personal rights, in the absence of a statute, do not survive while those seeking
2 redress for damage to property rights do survive." Id. 440 Mass. at 1017. However, it
3 also held that there were some exceptions to this rule because what constitutes a
4 contract claim has not been rigidly defined. Id. (citing McStowe v. Bornstein, 377 Mass.
5 804, 808 (1979)). Specifically, it found that the plaintiff's claim survived as "quasi-
6 contractual" because G. L. c. 35, §51 controlled a critical term of the employee's
7 employment, i.e., permissible grounds for termination, thus, permitting the employee's
8 estate to seek damages from his former employer for breach of that term. Id. at 1018.

9 Pine is also distinguished because that case analyzed whether an action filed
10 pursuant to G. L. c. 272, §99, the statute regulating wiretapping and eavesdropping,
11 could survive under G.L., c. 228, § 1(2)(a) of the survival statute which pertained to
12 actions of tort for "other damage to the person." Specifically, the Pine Court held that
13 while Section 1(2)(a) "could" be applied appropriately to the tort of intentional infliction of
14 emotional distress, Pine, 404 Mass. at 417 (citing Harrison v. Loyal Protective Life Ins.
15 Co., 379 Mass. 212, 214-216 (1979)), such an application does not apply "where no
16 actual damage has been sustained." Id. (citing Sheldone v. Marino, 398 Mass. 817, 819
17 (1986)). Unlike, Pine, I analyze Murphy's claim pursuant to Section 1(2)(d) of the
18 survival statute as it relates to actions of tort for damage to his personal property
19 interest in continued employment at the Trial Court. Also, unlike Pine, I find that Murphy

¹²³ Similarly, both parties rely on Gasior to argue whether Murphy's claim is contractual or quasi-contractual in nature. However, I decline to analyze the merits of those arguments because they pertain to actions for breach of contract which are not at issue here.

1 suffered actual damage to that property interest when the Trial Court terminated his
2 employment without just cause and when the Union failed to file a timely grievance
3 challenging that termination.

4 Finally, I distinguish Graham where the relevant issue was whether the Court
5 should apply a six-month or three-year statute of limitations on a claim for breach of the
6 duty of fair representation. Ultimately, the Court decided that the proper limitations
7 period was three years because a duty of representation claim in this context was
8 similar to both a tort claim and an attorney malpractice claim; thus, concluding that the
9 plaintiff's claim was not time-barred. Id., 407 Mass. at 613. However, the Court did not
10 analyze this procedural similarity as it related to the survival statute because the plaintiff
11 was alive at all relevant times to that case. Thus, the Union's reliance on Graham is
12 misplaced.

13 For all these reasons, I find that Murphy's claim against the Union survives his
14 death, and the Union remains obligated to his personal representative in compliance
15 with the CERB's order *nunc pro tunc* for breaching its duty of fair representation. Noyes,
16 307 Mass. at 569.

17 **Back Pay**

18 Where the CERB finds that a union has violated its duty of fair representation, it
19 has the discretion to order a back pay award. Quincy City Employees Union, H.L.P.E.,
20 15 MLC 1350, 1367 n. 67, 1374 (1989), aff'd sub nom. Nina Pattison v. Labor Relations
21 Commission (Pattison), 30 Mass. App. Ct. 9 (1991), further rev. den'd, 409 Mass. 1104
22 (1991); Bellingham Teachers Association, 9 MLC 1536, 1550, MUPL-2336 (Dec. 30,

1 1982); Newton School Committee, 5 MLC at 1027, aff'd sub nom School Committee of
2 Newton v. Labor Relations Commission, 388 Mass. at 576.

3 In calculating the amount of back pay owed, the CERB applies the following
4 formula: net back pay equals gross back pay minus (interim earnings minus expenses).
5 Boston School Committee, 29 MLC 143, 150, MUP-9067 (Feb. 27, 2003) (citing Greater
6 New Bedford Infant Toddler Center, 15 MLC 1653, 1657, UP-2493 (Nov. 23, 1988);
7 Plymouth County House of Correction and Jail, 6 MLC 1523, 1524, MUP-2234 and
8 MUP-2429 (Oct. 24, 1979)). Gross back pay is the total amount of wages and other
9 economic benefits the employee would have received but for the respondent's unlawful
10 conduct. Boston School Committee, 29 MLC at 150. Interim earnings are the amounts
11 earned during the back pay period that offset the loss of compensation resulting from
12 the termination. Id. Expenses are the costs incurred in earning the interim income. Id.

13 Here, there is no dispute that the Union failed to comply with the CERB's make
14 whole order because it never paid Murphy any portion of his back pay award or any
15 interest on that award. Nor is there a dispute that the relevant period to calculate
16 Murphy's back pay began on May 14, 2013. However, the parties dispute when
17 Murphy's back pay period ended and the total amount of back pay owed.

18 **1. The Back Pay Period**

19 The CERB has long held that the period of back pay runs from the date of the
20 unlawful discharge to either the date when the employee is unconditionally offered
21 reinstatement to the former position, Boston School Committee, 29 MLC at 150, or the
22 date when the employee is offered reemployment to a substantially equivalent position.

1 Greater New Bedford Infant Toddler Center, 15 MLC at 1658; Plymouth County House
2 of Correction and Jail, 6 MLC at 1524.

3 The Charging Party argues that the back pay period ended on October 7, 2019,
4 when the Trial Court reemployed Murphy as a staff attorney in the Court Service Center.
5 Conversely, the Union argues that the back pay period ended on May 16, 2016 when
6 the Trial Court eliminated the Family Law Facilitator position. Specifically, the Union
7 points to Fattman's decisions to defund the Family Law Facilitator position and exclude
8 it from the Trial Court's organizational chart in 2016, and her decision to create new
9 staff attorney positions within the Court Service Center that now perform some of the
10 duties performed previously by the Family Law Facilitator. It also asserts that even if
11 Murphy had remained employed as Family Law Facilitator, the Trial Court would have
12 effectuated his lay off and not rehired him in that position after May 16, 2016, based on
13 the intense application process and because Murphy had only secured the position
14 "through a patronage system."¹²⁴ While the Union concedes that the Family Law
15 Facilitator position has only remained unfilled, it maintains that Murphy's claim for
16 damages cannot extend beyond May 16, 2016 because that is when the position
17 ceased to exist in the Worcester Probate and Family Court, and because had Murphy
18 been employed in May of 2016, he would have lost his job with no recourse under the
19 CBA. To support its arguments, the Union relies first on Archambault v. United
20 Computing Systems, Inc., 786 F.2d 1507, 1515 (11th Cir. 1986). In that case, the court

¹²⁴ Despite this argument, there is insufficient evidence in the record to show that the creation of the Family Law Facilitator position supports a finding of patronage.

1 found that although the employer had unlawfully terminated the employee based on
2 age, the employee's lack of "technical expertise...would have prevented him from
3 remaining with the company after elimination of [his] position." Thus, the court found
4 that the appropriate back pay period ended on the date of the position elimination based
5 on the employer's proffer of a legitimate, non-discriminatory reason for the elimination.
6 The Union also relies on Commonwealth of Massachusetts, 14 MLC 1322, 1327, SUP-
7 2864 (Nov. 19, 1987) (CERB ordered rescission of wage increases but provided union
8 with unilateral option to insist or waive "its right to insist on restoration of the status quo
9 ante") and City of Gardner, 10 MLC 1218, 1222-23, MUP-4917 (Sept. 14, 1983) (CERB
10 unable to determine extent and identity of employees who suffered economic harm due
11 to unlawful transfer, but informed parties that such evidence could be determined at a
12 compliance proceeding), arguing that awarding lost wages to Murphy after May 16,
13 2016 would be unlawful because the CERB requires economic losses to be "actual," not
14 speculative.

15 I am unpersuaded by the Union's arguments. The record shows that Mullen
16 succeeded Murphy as Family Law Facilitator at the Worcester Probate and Family
17 Court at some point around June of 2014. In or about May of 2016, Fattman
18 communicated to staff, including Mullen, that she intended to remove the Family Law
19 Facilitator position from the Trial Court's organizational flow chart. Later, in July of 2016,
20 the Trial Court promoted Mullen to staff attorney and decided to keep unfilled the Family
21 Law Facilitator position to present. While Fattman authorized a subsequent transfer of
22 Family Law Facilitator funds in June of 2017, which effectively defunded the position,

1 there is no evidence that Fattman or anyone else at the Trial Court ever officially
2 eliminated the Family Law Facilitator position or bargained to resolution or impasse with
3 the Union over that elimination. Rather, the record shows that the Trial Court has kept
4 the position in a vacant and unfunded status since July of 2016 to present. Further,
5 there is no evidence in the record to support the assumption that had the Trial Court
6 never terminated Murphy, it would have defunded his position.

7 For all these reasons, I find that the appropriate back pay period began on May
8 14, 2013, when the Trial Court terminated Murphy's employment as Family Law
9 Facilitator, and ended on October 7, 2019, when the Trial Court reemployed Murphy as
10 a staff attorney in the Court Service Center in Worcester. Greater New Bedford Infant
11 Toddler Center, 15 MLC at 1658.

12 **2. The Back Pay Award**

13 Next, the Charging Party argues that the total amount of back pay owed to
14 Murphy is \$1,069,995.32, which comprises \$538,749.29 in lost regular compensation,
15 \$131,704.80 in lost DAR stipends, \$50,460.48 in lost health insurance contributions,
16 \$42,343.43 in lost vacation time, \$6,675.48 in lost sick time, \$143,910.05 in lost
17 retirement benefits, and \$156,151.79 in statutory interest through January 1, 2021.¹²⁵
18 Conversely, the Union contends that Murphy is not entitled to any back pay because he
19 failed to mitigate his damages by not seeking comparable, available employment during
20 his termination period. In the alternative, the Union argues that the Trial Court is liable

¹²⁵ The disputed amount of statutory interest owed by the Union to Murphy is addressed in the Order section, below.

1 for damages owed to Murphy due to its unlawful termination and, thus, should share
2 liability in paying an apportioned amount of the total damages owed to Murphy.

3 **a. Regular Compensation, Including Step Increases and COLAs**

4 During his tenure as Family Law Facilitator at the Trial Court between April 1,
5 2005 to May 14, 2013, Murphy earned regular compensation, including step increases
6 and COLAs. Between May 15, 2013 and October 6, 2019, Murphy lost regular
7 compensation, including step increases and COLAs, that he would have earned as a
8 Family Law Facilitator during that time in the amount of \$538,748.29, based on step
9 increases and COLAs contained in the CBAs. Specifically, he lost certain regular
10 compensation at the Trial Court during the following pay periods and workdays:

- 11 May 15, 2013 – July 13, 2013
12 ○ four pay periods (\$2,932.85 per period) and three workdays
13 (\$293.29 per day), totaling \$12,611.27.
- 14 July 14, 2013 – January 11, 2014
15 ○ 13 pay periods (\$2,976.84 per period) totaling \$38,698.92.
16
- 17 January 12, 2014 – July 12, 2014
18 ○ 13 pay periods (\$3,021.49 per period) totaling \$39,279.37.
- 19 July 13, 2014 – January 10, 2015
20 ○ 13 pay periods (\$3,066.81 per period) totaling \$39,868.53.
21
- 22 January 11, 2015 – July 11, 2015
23 ○ 13 pay periods (\$3,112.82 per period) totaling \$40,466.66.
24
- 25 July 12, 2015 – January 9, 2016
26 ○ 13 pay periods (\$3,159.51 per period) totaling \$41,073.63.
27
- 28 January 10, 2016 – July 9, 2016
29 ○ 13 pay periods (\$3,206.90 per period) totaling \$41,689.70.
- 30 July 10, 2016 – January 7, 2017
31 ○ 13 pay periods (\$3,255.00 per period) totaling \$42,315.00.

- 1
2 January 8, 2017 – July 8, 2017
3 ○ 13 pay periods (\$3,303.83 per period) totaling \$42,949.79.
4
5 July 9, 2017 – July 7, 2018
6 ○ 26 pay periods (\$3,370.24 per period) totaling \$87,626.24.
7
8 July 8, 2018 – July 6, 2019
9 ○ 26 pay periods (\$3,437.64 per period) totaling \$89,378.64.
10
11 July 7, 2019 – October 5, 2019
12 ○ 6 pay periods (\$3,506.39 per period) and five workdays
13 (\$350.64 per workday) totaling \$22,791.54.

14 Although the Union contends that Murphy is not entitled to any back pay
15 compensation due to his failure to mitigate damages, it does not dispute that Murphy
16 would have earned \$538,748.29 in regular compensation between May 15, 2013 and
17 October 6, 2019, based on the step increases and COLAs contained in the CBAs. Thus,
18 I find that Murphy's back pay award shall include \$538,748.29 in lost regular
19 compensation.

20 **b. DAR Stipends**

21 Between April 1, 2005 and May 14, 2013, Murphy received monthly DAR
22 stipends which comprised statutory percentages of the annual salaries of the Probate
23 Chief Justice (81.57%) and the Register of Probate (15%). Between May 15, 2013 and
24 October 6, 2019, Murphy lost the opportunity to receive DAR stipends as Family Law
25 Facilitator, which would have totaled \$131,704.80 during the following bi-monthly
26 distribution periods:

- 27 May 15, 2013 – December 31, 2013
28 ○ 15 distributions at \$688.88 per distribution, totaling
29 \$10,333.20

1 January 1, 2014 – June 30, 2014
2 ○ 12 distributions at \$765.35 per distribution, totaling \$9,184.20
3

4 July 1, 2014 – December 31, 2014
5 ○ 12 distributions at \$841.82 per distribution, totaling
6 \$10,101.84
7

8 January 1, 2015 – June 30, 2015
9 ○ 12 distributions at \$841.82 per distribution, totaling
10 \$10,101.84

11 July 1, 2015 – December 31, 2015
12 ○ 12 distributions at \$841.82 per distribution, totaling
13 \$10,101.84
14

15 January 1, 2016 – June 30, 2016
16 ○ 12 distributions at \$841.82 per distribution, totaling
17 \$10,101.84
18

19 July 1, 2016 – December 31, 2016
20 ○ 12 distributions at \$841.82 per distribution, totaling
21 \$10,101.84

22 January 1, 2017 – June 30, 2017
23 ○ 12 distributions at \$873.69 per distribution, totaling
24 \$10,484.28

25 July 1, 2017 – December 31, 2017
26 ○ 12 distributions at \$905.55 per distribution, totaling
27 \$10,866.60
28

29 January 1, 2018 – June 30, 2018
30 ○ 12 distributions at \$937.41 per distribution, totaling
31 \$11,248.92
32

33 July 1, 2018 – December 31, 2018
34 ○ 12 distributions at \$969.28 per distribution, totaling
35 \$11,631.36

36 January 1, 2019 – June 30, 2019
37 ○ 12 distributions at \$969.28 per distribution, totaling
38 \$11,631.36

1 July 1, 2019 – October 5, 2019

- 2 ○ 6 distributions at \$969.28 per distribution, totaling \$5,815.68

3 The Union argues that Murphy is not entitled to any DAR stipends because these
4 payments are speculative, non-permanent, not guaranteed, “potential” wages. It also
5 argues that those stipends are solely based on the discretion of the Register and the
6 approval of the Chief Justice of the Probate and Family Court, which may be revoked at
7 any time. Despite these arguments, Rowe gave un rebutted testimony that she was
8 unaware of any reason why Murphy would not have continued to receive an annual
9 DAR stipend had he remained employed as Family Law Facilitator between May 14,
10 2013 and October 6, 2019. Moreover, the record shows that a request for removal of a
11 DAR stipend requires “the approval of the Chief Justice of the Probate and Family
12 Court,” and the record is void of evidence that the Probate Chief Justice would have
13 approved such a request for removal as it pertained to Murphy. For all these reasons, I
14 find that Murphy’s back pay award shall include \$131,704.80 in lost DAR stipends.

15 **c. Health Insurance Contributions**

16 The Charging Party contends that Murphy’s back pay award should include
17 \$50,460.48 in lost Employer health insurance contributions beginning July 1, 2013
18 through October 6, 2019. Specifically, it argues that July 1, 2013 represented the spring
19 open-enrollment period in 2013 where Murphy would have been eligible to re-enroll in
20 the Fallon Direct Care Family Plan. It also argues that Murphy was entitled to receive
21 the 25% - 75% employee-employer contributions that he lost during this period.
22 Conversely, the Union argues that Murphy is not entitled to any health insurance
23 contributions because he was not enrolled in the Trial Court’s health insurance program

1 at the time of his termination in May of 2013, and was not enrolled in any health
2 insurance program since December 31, 2012.

3 The evidence shows that the Trial Court made monthly contributions to Murphy's
4 health insurance plans between December of 2005 and December of 2012. Specifically,
5 between December 1, 2005 and December 31, 2012, the Trial Court contributed
6 \$849.72 per month towards Murphy's Fallon Direct Care Family Plan. Murphy
7 unenrolled from the Fallon Direct Care Family Plan on December 31, 2012, and enrolled
8 in his former wife's health insurance plan which she received through a different
9 employer, for him to undergo surgery (on or about January 1, 2013) and stayed on his
10 former wife's health insurance plan for about a year to recover. Sometime in 2014,
11 Murphy left his wife's plan and enrolled in MassHealth, until his reinstatement with the
12 Trial Court on October 7, 2019, when he enrolled in the Fallon Select Individual plan.
13 Additionally, Murphy gave unrebutted testimony that after his recovery period on or
14 about January 1, 2014, he would have re-enrolled in the Trial Court's health insurance
15 program but for his termination.

16 The Charging Party points to Allison v. Whittier Regional Vocational High School
17 District, 15 Mass. App. Ct. 944 (1983), to assert that health insurance contributions are
18 compensation for purposes of back pay, and that Murphy would have been entitled to
19 continue receiving the Trial Court's 75% contribution during this termination period even
20 though he dropped his Trial Court health insurance in 2012 before his termination. In
21 that case, the issue was whether a tenured teacher, whose employment with a school
22 committee was superseded by a regional school district, was entitled to continue

1 receiving the employer's 75% health insurance contribution. Interpreting the language of
2 G.L. c. 71, sec. 42B which pertains exclusively to Rights of School Employees in
3 Regional Districts, and which prohibits the reduction of teachers' compensation due to a
4 change of employers, the court held that health insurance contributions are among the
5 types of compensation that a school employee may carry over to a superseding district.
6 Id., 15 Mass. App. Ct. at 945. Thus, Allison is distinguished because it concerned a
7 teacher's superseding employment in the context of transferring his statutorily-protected
8 compensation, whereas this case concerns Murphy's terminated employment in the
9 context of calculating his compensatory back pay.

10 Moreover, Murphy was not enrolled in the Trial Court's health insurance at the
11 time of his termination; nor does the evidence show that he had incurred additional
12 health insurance costs because of his termination. Contrast Commonwealth of
13 Massachusetts, 16 MLC 1455, 1462, SUP-3007 (Dec. 20, 1989) (citing Newton School
14 Committee, 8 MLC at 1538; Plymouth County House of Correction, 6 MLC at 1530)
15 (employee who incurred additional health insurance costs because of an unlawful
16 termination entitled to recover the increased cost expended in obtaining comparable
17 coverage)). Consequently, I find that Murphy's back pay award shall not include any
18 compensation related to lost health insurance contributions.

19 **d. Vacation Benefits**

20 The Charging Party argues that Murphy's back pay award should include
21 \$42,343.43 in lost vacation pay between May 15, 2013 through October 5, 2019.
22 Relying primarily on the Wage Act, G. L. c. 149, § 148, it contends that vacation benefits

1 are included in the statutory definition of wages, and that, at termination, employers
2 must pay employees for any accrued, unused vacation time in addition to any earned
3 regular compensation. Specifically, it asserts that “the economic value the employee
4 receives is the amount of regular compensation they are paid without having to ‘go to
5 work and perform their job duties.’”

6 Conversely, the Union argues that Murphy is not entitled to vacation pay as part
7 of his back pay award based on the language in the Wage Act and certain case law
8 (e.g., Mui v. Massachusetts Port Authority, 32 Mass. L. Rep. 567 (2015), and Dennis v.
9 Jager, Smith & Stetler, P.C., 11 Mass. L. rep. 567 (2000)). The Union also argues that
10 exceptional circumstances where employees were entitled to vacation pay in addition to
11 their regular wages, such as those found in certain NLRB cases (e.g., Richard W.
12 Kaase Co., 162 NLRB 1320 (1967), Truck Drivers Union Local 164, 274 NLRB 909
13 (1985), and Mike-Sell’s Potato Chip Co., 2018 NLRB LEXIS 177 (March 7, 2018)), are
14 not present here. Further, the Union asserts that the CBA disallows employees from
15 accruing vacation time separate and apart from wages and does not contain any
16 provision that permits employees to receive vacation pay in addition to their regular
17 wages. For the following reasons, I agree with the Union.

18 Article 7, Sections 7.06 and 7.07 of the relevant CBAs, provided that, “[v]acation
19 may accrue only to the maximum earned in a 2-year period of employment,” and that
20 “[e]mployees eligible for vacation who are separated from employment shall receive
21 vacation pay in lieu of time off for accrued, credited vacation as determined by this
22 Article.” Further, Section 7.01(3) provides that employees hired prior to July 1, 2012

1 who have reached “9 years and 6 months but less than 17 years and 6 months of
2 employment,” are entitled to earn vacation “at the rate of 5.769 hours for each bi-weekly
3 pay period of service, but not exceeding 150 hours (20 days) per year.”

4 When the Trial Court terminated Murphy on May 14, 2013, he had over eight
5 years of service and had accrued 187.615184 hours of vacation leave. On or about
6 June 11, 2013, Murphy submitted a “Request for Vacation Leave Buy-Back for a
7 Terminating Employee” in the amount of \$7,335.74, which the Trial Court approved on
8 June 25, 2013, and subsequently paid. Between May 15, 2013 and October 6, 2019,
9 Murphy lost the opportunities to reach 14.5 years of employment, which entitled him to
10 earn vacation leave at the higher rate of 5.769 hours for each bi-weekly pay period of
11 service, but not exceeding 150 hours (20 days) per year.

12 Despite these lost opportunities, Murphy is not entitled to receive the monetary
13 value of his lost vacation benefits. While the CERB treats accrued vacation time as a
14 benefit, it does not apply a monetary value on that benefit in the context of awarding
15 back pay. Plymouth County House of Correction, 6 MLC at 1529-1530. Moreover, Rowe
16 also gave unrebutted testimony that in calculating back pay, she does not include the
17 employees’ accrued vacation time as a monetary value in her calculation. Instead, she
18 simply “give[s] them the hours back” because when employees use earned vacation
19 time, the Trial Court pays them for each vacation day that they use but does not pay
20 them for both their regular workday and their vacation day. Instead, I find that an
21 appropriate award should include restoration of the maximum amount of vacation credit
22 that Murphy would have accrued had he worked continuously during the back pay

1 period, which was 150 hours (or 20 days) per year between May 14, 2013 and October
2 6, 2019. Id. at 1530.

3 Thus, I find that Murphy's back pay award shall not include any monetary
4 compensation related to lost vacation benefits but shall include the restoration of 150
5 hours (20 days) of vacation credits that he would have accrued between May 15, 2013
6 and October 6, 2019.

7 **e. Sick Leave Benefits**

8 The Charging Party argues that Murphy's back pay award should include
9 \$6,675.48 for the period between May 15, 2013 through October 6, 2019, which
10 represents the "20% payout" from Murphy's lost, unused sick time. Specifically, Murphy
11 lost the opportunity to accrue sick leave time at the rate of 4.327 hours at \$46.75 per
12 hour (or \$3,506.39 per bi-weekly pay period) for 165 periods, totaling 713.955 hours
13 (i.e., 20% of 713.955 hours of sick leave time equals 142.791 hours multiplied by
14 \$46.75 per hour, for a total of \$6,675.48). Conversely, the Union argues that Murphy is
15 not entitled to sick leave in the amount of \$6,675.48. Rather, it contends that his back
16 pay award should include 7.138 hours of sick leave time or \$333.70, which represents
17 20% of his unused, earned, and accrued sick leave (or 35.69 hours) at the time of his
18 termination on May 14, 2013.

19 Article 7, of the relevant CBAs, provided most bargaining unit members with
20 three weeks of accrued sick time per year at a rate of 4.327 hours per full pay period.
21 Unlike vacation time, the CBAs did not limit the amount of sick time that employees
22 could accrue, and unit members who retired were allowed to "buy back" 20% of their

1 accrued, unused sick time at retirement. However, the CBAs did not allow employees to
2 recoup these benefits if they were separated from employment for reasons other than
3 retirement or death.

4 On May 13, 2013, Murphy had accrued 38.65 hours of earned sick leave at a
5 rate of 4.327 hours per full, bi-weekly pay period. Upon termination on May 14, 2013,
6 Murphy did not receive any sick leave compensation from the Trial Court. Between May
7 15, 2013 and October 6, 2019, Murphy lost the opportunity to accrue earned sick leave
8 benefits. Moreover, Rowe gave unrebutted testimony that Murphy was entitled to
9 buyback 20% of his sick leave time for the period between May 15, 2013 and October 6,
10 2019, because he did not use any sick leave time during this period. Based on the
11 totality of this evidence, I find that Murphy's back pay award shall include \$6,675.48,
12 which represents the monetary amount of sick leave time that Murphy was entitled to
13 buyback between May 14, 2013 and October 6, 2019.

14 **f. Retirement Benefits**

15 During his tenure as Family Law Facilitator, Murphy made certain percentage-
16 based contributions toward his future retirement benefits between April 1, 2005 through
17 May 13, 2013. Murphy stopped making certain percentage-based contributions toward
18 these benefits between May 14, 2013 and October 6, 2019, due to his termination from
19 the Trial Court, which resulted in him losing 6.5 years of credible service toward his
20 retirement. Based on this loss, the Charging Party argues that Murphy's back pay award
21 should include \$143,910.05 in lost retirement benefits for the period between May 14,
22 2013 through October 6, 2019, which represents the cost to purchase an annuity to

1 replace Murphy's missing pension benefit (i.e., \$199,529.71) subtracted from his
2 missing retirement contributions (i.e., \$55,619.66). Additionally, the Charging Party
3 contends that Boulay's assumptions about Murphy's retirement date and his mortality
4 were "an essential feature of actuarial science," and that the Union has "no basis to
5 doubt the reasonableness" of those assumptions because at the time of Boulay's report
6 "there was a risk that [Murphy] would work and live for a longer duration of time than
7 was actuarially indicated." Thus, the Charging Party maintains that Murphy is entitled to
8 lost retirement benefits as part of the Union's obligation to comply with the make whole
9 order *nunc pro tunc*.

10 Conversely, the Union argues that Murphy is not entitled to any lost retirement
11 because he never achieved vested status. Even if Murphy had lived long enough to vest
12 and retire at age 70, it contends that Boulay's report was unreliable because he: based
13 it on speculative assumptions from the private sector; did not consider Murphy's failure
14 to mitigate damages; relied erroneously on "future collective bargaining success" in
15 assuming annual 2% increases; "assumed...continuous employment through July 31st"
16 of 2025; failed to speak with either the Trial Court or the Union to determine their
17 "expectations...for future [wage] increases;" failed to speak with Murphy to determine
18 his general health, to verify whether he intended to remain employed with the Trial
19 Court until the age of 70 and would retire at that age, or to establish which retirement
20 option (i.e., pension or annuity) he would have selected at retirement.

21 The evidence shows that between April 1, 2005 and May 13, 2013, Murphy had
22 earned over 8 years of credible service toward his future retirement, which would have

1 vested after 10 years on April 1, 2015, had Murphy continued his employment with the
2 Trial Court on an uninterrupted basis. The evidence also shows that Murphy would have
3 earned an additional 3.833 years of credible service between April 1, 2015 and October
4 6, 2019, for a cumulative total of 13.833 years (i.e., between April 1, 2005 and October
5 6, 2019). There is no dispute that Murphy's future retirement benefits were scheduled to
6 vest in October of 2021 based on the time that he was actually employed at the Trial
7 Court. Nor is there any dispute that Murphy passed away on September 1, 2021.
8 Moreover, Boulay admitted that if Murphy left his employment prior to achieving vested
9 status, then neither he nor his estate would be entitled to any pension benefits because
10 "he would not be vested." Nonetheless, Murphy is entitled to receive \$143,910.05,
11 which comprises the cost to replace his missing pension benefit (\$199,529.71)
12 subtracted from the missing retirement contributions (\$55,619.66) that he would have
13 made between May 14, 2014 and October 6, 2019. See, e.g., Massachusetts Teachers
14 Association and Anthony Swiercz, 39 MLC 233, MUPL-08-4631 (Feb. 28, 2013) (CERB
15 ordered union to make employee whole for loss of retirement income that he suffered as
16 a direct result of the union's unlawful conduct); see, generally, NLRB v. United
17 Brotherhood of Carpenters and Joiners of America, Local 1913, AFL-CIO, 531 F.2d
18 424, 425 (9th Cir. 1976) (union liable for pension contributions employee would have
19 accrued had his employment continued without unlawful interruption); compare Heavy
20 and Highway Construction Workers Local Union No. 158, 301 NLRB 35, 38-39 (1991)
21 (other citations omitted) (court ordered respondent to pay pension fund contributions,

1 finding such contributions were properly compensable in backpay proceedings where
2 employee would also have earned those benefits absent the respondent's unlawful act).

3 For all these reasons, I find that Murphy's back pay award shall include
4 \$143,910.05, which represents the monetary amount of his lost retirement contributions.

5 **3. Net Back Pay**

6 Based on the totality of this evidence, I find first that Murphy is entitled to
7 \$821,039.62 in gross back pay which comprises \$538,749.29 in regular compensation
8 plus \$131,704.80 in DAR stipends plus \$6,675.48 in sick leave buyback plus
9 \$143,910.05 in retirement benefits. Boston School Committee, 29 MLC at 150. Next, I
10 find that Murphy's gross back pay is offset by \$117,234.00¹²⁶ interim earnings which he

¹²⁶ The CERB is free to either deduct or not deduct unemployment compensation from gross back pay as part of its authority to fashion remedies that best effectuate the purposes of the Law. Boston School Committee, 29 MLC at 150 (citing Greater New Bedford Infant Toddler Center, 15 MLC at 1659-1660; Newton School Committee, 8 MLC 1538, 1560 (1981), aff'd sub nom. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983)). When determining whether to deduct unemployment compensation from gross back pay, the CERB examines whether that compensation is recoverable by the Department of Unemployment Assistance (DUA). Id. at 150. If DUA can recoup the unemployment compensation, the CERB does not deduct that compensation and notifies DUA of its decision—leaving to that agency the repayment determination concerning the affected employee's liability, if any. Id. (citing Greater New Bedford Infant Toddler Center, 15 MLC at 1659-1660; Plymouth County House of Correction, 6 MLC at 1533 n. 8). If, on the contrary, DUA cannot recover the unemployment, the CERB deducts that compensation from gross back pay as part of the interim earnings to avoid making the terminated employee more than whole. Id. (citing Newton School Committee, 8 MLC at 1559-1560). Based on the CERB's reasoning in these cases, I decline to deduct Murphy's unemployment compensation (i.e., \$19,399.00) from his gross back pay as part of his interim earnings. See, G.L., c. 151A, s. 71, stating in relevant part:

1 reported on his tax returns between 2013 and 2019. Finally, I find no evidence in the
2 record that Murphy incurred any expenses while earning this interim income. Id.
3 Therefore, Murphy's total net back pay equals \$703,805.62 (i.e., \$821,039.62 in gross
4 back pay minus \$117,234.00 in interim earnings minus \$0.00 in expenses) Id.

5 **Duty to Mitigate**

6 It is well established that a public employee who is wrongfully discharged has a
7 duty to mitigate damages by "dispos[ing] of his time in a reasonable way, so as to obtain
8 as large compensation as possible, and to use honest, earnest and intelligent efforts to
9 this end." Boston Police Department, 98 Mass. App. Ct. 762, 771 (2020) (citing Sheriff
10 of Suffolk County, 465 Mass. 584, 589 (2013); Maynard v. Royal Worcester Corset
11 Co., 200 Mass. 1, 6 (1908)). An employee's failure to satisfy this obligation may result in
12 full or partial forfeiture of their back pay award. Dickson v. Riverside Iron Works, Inc., 6
13 Mass. App. Ct. 53, 57 (1978).

The [DUA] commissioner may reconsider a determination whenever he finds that (1) an error has occurred... in connection therewith; or (2) wages of the claimant pertinent to such determination but not considered in connection therewith have been newly discovered; or (3) benefits have been allowed or denied or the amount of benefits fixed on the basis of misrepresentation of fact; provided, however, that with respect to (1) and (2) no such redetermination shall be made *after* one year from the date of the original determination; and provided, further, that with respect to (3) no such redetermination shall be made after four years from the date of the original determination; and provided, further, that *the time limitations specified above shall not apply with respect to an award of back pay received by an individual for any week in which unemployment benefits were paid to such individual....* [Emphasis added.]

1 Despite this duty, the respondent bears the burden of proving that the employee
2 has failed to mitigate his damages. Id. at 771 (citing Sheriff of Suffolk County, 465
3 Mass. at 592). To meet its burden, the respondent must establish that: (a) one or more
4 discoverable opportunities for comparable employment were available in a location as
5 convenient as, or more convenient than, the employee's place of former employment;
6 (b) the employee made no attempt to apply for any such job; and (c) it was reasonably
7 likely that the employee would have obtained one of those comparable jobs. Id. The
8 duty to find comparable employment does not require the employee to "go into another
9 line of work [or] accept a demotion." Boston Police Department, 98 Mass. App. Ct at
10 771 (citing Sheriff of Suffolk County, 465 Mass. at 593; Ford Motor Co. v. Equal
11 Employment Opportunity Comm'n, 458 U.S. 219, 231 (1982)). Rather, the respondent
12 must show the availability of substantially similar employment that "offer[ed] similar
13 long-term benefits and opportunities for promotion as compared to the original position."
14 Id. at 772 (other citations omitted).

15 The Charging Party argues that the Union failed to satisfy its burden of proving
16 that Murphy had failed to mitigate his damages because it presented only one witness,
17 Segreve, who was unable to demonstrate that Murphy had available to him
18 discoverable opportunities for comparable employment between May 14, 2013 and
19 October 6, 2019. Specifically, it contends that while Segreve had testified before the
20 DIA, and while she contacted five law firms and produced over two dozen job listings,
21 she never testified previously in a DLR hearing and was unable to show whether the
22 firms or listings included jobs that were virtually identical to the Family Law Facilitator

1 position. In fact, Segreve never asked those employers about the experience required
2 for prospective family law attorneys, and failed to show that the prospective employers
3 would have been willing to hire or would have even consider hiring a family law attorney
4 who had been recently fired for cause from the Trial Court and/or who was actively
5 seeking reinstatement to another job. Additionally, Segreve did not know whether those
6 employers were interested in hiring a family law attorney who did not have a book of
7 business. Further, she failed to rebut testimony from attorneys at four of the five law
8 firms contacted by her that their firms would not have hired Murphy because he was
9 “fired for cause,” was “actively pursuing reemployment,” and had “no book of business
10 or experience practicing law...[in] nearly a decade.”

11 The Charging Party also contends that Segreve never established that it was
12 reasonably likely that Murphy would have obtained a comparable job based on available
13 positions. Rather, she demonstrated only that Murphy would have obtained “a job” had
14 he conducted a meaningful search, but not necessarily a job from her list of available
15 positions. Moreover, Segreve conceded that Murphy’s efforts to pursue reinstatement at
16 the Trial Court, in addition to his solo practice work, constituted a type of job search that
17 was not necessarily unreasonable.

18 Conversely, the Union argues that Murphy failed to mitigate¹²⁷ his damages
19 between May 14, 2013 and September of 2015, because he did not actively seek
20 discoverable, comparable employment opportunities during this time. It also argues that

¹²⁷ Without citation, the Union also argues that Murphy violated his “moral” duty to mitigate his damages. However, the Law does not address morality; therefore, I decline to address this issue.

1 Murphy continued to fail to mitigate his damages between September of 2015 and
2 October 6, 2019, because while he inquired about possible employment in six
3 instances, he filed only three job applications during this time. Further, Murphy earned
4 only a total of \$46,410 during his entire termination period between May 14, 2013 and
5 October 6, 2019, and failed to take the following actions: apply to law firms; contact an
6 employment placement center; contact a bar association; contact career centers of local
7 law schools; create an electronic job profile; and network with judges and attorneys with
8 whom he had become familiar during his tenure as Family Law Facilitator.

9 Concerning Segreve, the Union contends that I should credit her conclusions that
10 while comparable employment opportunities existed, Murphy failed to conduct a
11 reasonably diligent job search into those opportunities, which would have likely resulted
12 in him obtaining employment. Specifically, it asserts that Segreve is a qualified expert in
13 the field of vocational counseling, has credibly testified on the issues of comparable
14 employment in the Commonwealth, and used widely accepted methodology and reliable
15 data to reach her conclusions.

16 To support its position, the Union points to Sheriff of Suffolk County, where the
17 Supreme Judicial Court (SJC) did not articulate “a clear definition of ‘comparable
18 employment’ in the context of mitigation of damages,” but looked to the United States
19 Supreme Court and other jurisdictions which define that term as “employment that offers
20 similar long-term benefits and opportunities for promotion as compared to the original
21 position.” 465 Mass. at 593. The Union also distinguishes Boston Police Department,
22 above, where the Appeals Court placed the burden of proof on the employer because,

1 by virtue of its unlawful firing, it caused the circumstances of the employee's
2 unemployment. Instead, it relies on Black v. School Committee of Malden, 369 Mass.
3 657, 662 (1976), where the SJC found that a discharged employee must take the
4 consequences of his or her indolence.¹²⁸

5 **1. 2013**

6 The record shows that between May 14, 2013 and December 30, 2013, Murphy
7 neither searched for nor secured any employment. Instead, he volunteered for
8 Fattman's campaign and assisted Angelini, in addition to collecting 26 weeks of
9 unemployment until mid-November of 2013. Despite this evidence, the record also
10 shows that between May 14, 2013 and October 23, 2013, there were no discoverable
11 opportunities for comparable employment in Worcester or the surrounding areas.

12 There was at least one discoverable opportunity for employment posted on
13 October 24, 2013 at the CPCS in Worcester, which sought a Family Law Attorney who
14 had trial experience and who could perform client and witness interviews, legal research
15 and writing, fact-gathering, reviewing documents, preparing motions, and assisting

¹²⁸ In Black, the SJC found that the employer's termination of plaintiffs' employment because of their pregnancies violated their constitutional rights. However, in deciding back pay liability, the SJC reversed the lower court's exclusion of certain evidence offered by the employer to meet its burden of proving the plaintiffs' failure to mitigate their damages by not reasonably reducing their losses through obtaining comparable employment. Id., 369 Mass. at 658. Specifically, the Court found that neither plaintiff had "sought employment as a school teacher elsewhere" even though "there were teaching openings for persons of their training in the adjoining cities," and other "teachers of their discipline were hired in adjoining school districts." Id. at 660-661. It also found that "the plaintiffs could have avoided all or any part of their damages resulting from their improper discharge," had the lower court not excluded evidence of available, comparable employment in neighboring cities including salary scales paid in three of the adjoining cities during all or part of the termination period. Id.

1 private attorneys. Although Murphy did not apply for this job, I find that it was not
2 comparable to the Family Law Facilitator position because it required trial experience as
3 a litigator. I also find that it was not reasonably likely that Murphy would have obtained
4 this job because the Trial Court fired him for cause, he was actively pursuing
5 reemployment with the Trial Court, and he had no litigation experience practicing as a
6 Family Law attorney.

7 **2. 2014**

8 Between January of 2014 and December of 2014, Murphy neither searched for
9 nor secured any employment other than limited solo practice and assisting attorneys
10 Rosseel and Martin in litigating his case against the Union at the DLR. Despite this
11 evidence, the record shows that between January 1, 2014 and April 24, 2014, there
12 were no discoverable opportunities for comparable employment in Worcester or the
13 surrounding areas. However, between April 25, 2014 and December 21, 2014, there
14 were four discoverable opportunities for employment. Despite these opportunities, I find
15 that they were not comparable to the Family Law Facilitator position, and it was not
16 reasonably likely that Murphy would have obtained those jobs because the Trial Court
17 fired him for cause, he was actively pursuing reemployment with the Trial Court, he had
18 no trial experience as a Family Law litigator, and he possessed no book of business.

19 Specifically, the April 25, 2014 posting by Patriot Law Group in Southborough,
20 and the September 24, 2014 posting by Lexaccount Search, sought a family law attorney
21 and partner, respectively, and were both private sector positions that required 5 years of
22 experience. While the August 20, 2014 posting by the IRS in Worcester, seeking a

1 litigation attorney was a public sector job, it required over 6 years of family law
2 experience and over 3 years of supervisory experience. Similarly, the December 21,
3 2014, CPCS position in Worcester, seeking a supervising attorney was public sector but
4 required over 4 years of parental and child welfare trial experience along with
5 supervisory experience over staff attorneys, which Murphy did not have.

6 **3. 2015**

7 Between January of 2015 and August of 2015, Murphy neither searched for nor
8 applied for any jobs other than maintaining his limited solo practice and providing
9 continued assistance to attorneys Rosseel and Martin in litigating his case against the
10 Union at the DLR. Again, despite this evidence, the record shows that between January
11 1, 2015 and September 27, 2015, there were no discoverable opportunities for
12 comparable employment in Worcester or the surrounding areas.

13 Beginning in September of 2015 and continuing through December of 2015,
14 Murphy searched for employment by searching Lawyers Weekly, Indeed.com, the Law
15 Library, and by reaching out to contacts at three government agencies (i.e., Wolfson at
16 UMass Medical School Court Clinic, Early at the Worcester District Attorney's Office,
17 and Singh at DCF). He also applied for a position as a Legal Training Attorney" via
18 Sanchez at CPCS. Moreover, between September 28, 2015 and December 28, 2015,
19 there were eight discoverable opportunities for employment. However, I find that these
20 opportunities were not comparable to the Family Law Facilitator position, and it was not
21 reasonably likely that Murphy would have obtained those jobs because the Trial Court

1 fired him for cause, he was actively pursuing reemployment with the Trial Court, he had
2 no trial experience as a Family Law litigator, and he possessed no book of business.

3 Specifically, the September 28, 2015 posting by Pollack Law Group in
4 Southborough, simply sought a private sector associate attorney with a “JD” and “3
5 years of sales or business experience, without providing any duties or elaborating on
6 any further qualifications. Moreover, the October 12, December 1 and 28, 2015 postings
7 by the same employer Pollack Law Group sought a private sector, entry-level associate
8 attorney to handle divorce, custody, and support cases who had three years of sales
9 and/or family law experience, without providing more information. While the CLA
10 postings on October 12, December 1 and 28, 2015 sought a private sector, bargaining
11 unit, entry-level associate attorney, and described the same duties and qualifications as
12 the entry-level attorney sought by the Pollack Law Group, Mannina gave un rebutted
13 testimony that the CLA would not have hired Murphy given his “problematic” and
14 “challenging” relationship with the Trial Court, and because he was not a “viable
15 candidate” due to having neither a poverty law background nor experience representing
16 low-income people.

17 **4. 2016**

18 Between January 25, 2016 and September 1, 2016, Murphy continued his job
19 search by searching Lawyers Weekly, Indeed.com, the Law Library, and by reaching
20 out to Leary at Veterans Inc., Bar at UMass Medical School, Crowley at DCF, to State
21 Senator Ryan Fattman, and to former Lt. Governor Polito’s office. Murphy also applied

1 and interviewed (unsuccessfully) for the Deputy Regional Counsel position at DCF via
2 Braman and Singh.

3 Between January 8, 2016 and November 30, 2016, there were eight discoverable
4 opportunities for employment, none of which were comparable to the Family Law
5 Facilitator position. Nor was it reasonably likely that Murphy would have obtained those
6 jobs for the following reasons—in addition to the Trial Court terminating Murphy for
7 cause, his active pursuit of reemployment with the Trial Court, his lack of trial
8 experience as a family law litigator, and his lack of a book of business.

9 First, as stated above, Mannina gave un rebutted testimony that CLA would not
10 have hired Murphy based on its January 8, 2016, posting that sought a 6-month staff
11 attorney in Worcester. Next, the staff counsel and supervising staff attorney positions at
12 CPCS that were posted on September 29, and October 18, 2016, and on November 30,
13 2016, respectively, required significant family law litigation and supervisory experience.
14 Next, the April 29, 2106, Callahan Barraco posting for a family law attorney, the May 17
15 and September 6, 2016, postings for a mid-level associate at Pollack Law Group, and
16 the November 29, 2016, MetroWest Legal Services posting for a part time staff attorney,
17 were all private sector positions that required significant litigation experience. Finally,
18 the September 29 and October 18, 2016 postings by DCF for a Counsel I position also
19 required family law litigation experience.

20 **5. 2017**

21 Murphy continued his job search between September 13, 2017 and November 2,
22 2017, by searching Lawyers Weekly, Indeed.com, the Law Library, and by reaching out

1 to Hussey via Frommer at Murphy & Rudolf, LLP, Aquino at CLA, and Shea at Mirick
2 O'Connell. Despite this search, Murphy did not apply to any jobs during this time.
3 However, although there were three discoverable opportunities for employment
4 between January 10, 2017 and February 25, 2017, there were no discoverable
5 opportunities between February 26, 2017 and December 30, 2017. Moreover, of the
6 three available opportunities, none were comparable to the Family Law Facilitator
7 position; and it was not reasonably likely that Murphy would have obtained those jobs
8 because the Trial Court had terminated him for cause, he was actively pursuing
9 reemployment with the Trial Court, he lacked trial experience as a family law litigator,
10 and he lacked a book of business.

11 Specifically, Mannina gave un rebutted testimony that CLA would not have hired
12 Murphy for its January 10, 2017, posting that sought a litigation attorney located in
13 Framingham. Next, the January 20, 2017 posting for a litigation attorney at Mann Family
14 Law, and the February 25, 2017 posting for a family law litigation attorney at Roncone
15 Law Offices, and were both private sector positions that required significant litigation
16 experience.

17 **6. 2018 and 2019**

18 Murphy continued his job search between January 1, 2018 through October 4,
19 2019, by searching Lawyers Weekly, Indeed.com, the Law Library, and by sending
20 emails to friends and colleagues, while also maintaining his private practice. However,
21 Murphy did not apply for any jobs during this time. During this period, there were six
22 discoverable opportunities for employment between February 5, 2018 and November

1 26, 2018, and one discoverable opportunity on September 23, 2019; yet, none were
2 comparable to the Family Law Facilitator position, one position was located in
3 Springfield, and it was not reasonably likely that Murphy would have obtained any of
4 those jobs because the Trial Court had terminated him for cause, he was actively
5 pursuing reemployment with the Trial Court, he lacked trial experience as a family law
6 litigator, and he lack of a book of business.

7 First, the October 1, 2018, posting by the Central West Justice Center in
8 Springfield was not in a convenient location, and sought a staff attorney who was fluent
9 in Spanish of which Murphy was not, and who had administrative agency experience
10 including a law school clinic—of which Murphy had none. Next, the three postings on
11 March 26, April 16, and November 2018 neither listed the name of the employer(s) nor
12 the location(s) of the positions, which all sought a family law attorney who could assist
13 clients in a family law practice. Next, the February 5 and July 16, 2018, postings by CLA
14 seeking a family law staff attorney and a staff attorney, respectively, both in Worcester,
15 required litigation experience, desired fluency in Spanish, and were not favorable for
16 Murphy due to Mannina's unrebutted testimony that the CLA perceived him as not a
17 "viable" candidate. Last, the September 23, 2019 posting by MetroWest Legal Services
18 in Framingham for a staff attorney required litigation experience at administrative and
19 court hearings for persons with disabilities seeking certain benefits, which Murphy did
20 not possess.

21 Based on the totality of this evidence, I find that the Union has not satisfied its
22 burden of proving that Murphy beached his duty to mitigate his damages. This is

1 because the Union failed to demonstrate the existence of one or more discoverable
2 opportunities for comparable employment that were available in a location as
3 convenient as, or more convenient than Worcester, between May 14, 2013 and October
4 4, 2019; and failed to show that it was reasonably likely that Murphy would have
5 obtained one of these jobs. See, e.g., Boston Police Department, 98 Mass. App. Ct at
6 771 (citing Sheriff of Suffolk County, 465 Mass. at 593; Ford Motor Co. v. Equal
7 Employment Opportunity Comm'n, 458 U.S. 219, 231 (1982) (duty to find comparable
8 employment does not require the employee to go into another line of work or accept a
9 demotion; rather, the employment must be substantially similar by offering similar long-
10 term benefits and opportunities for promotion as compared to the original position)).

11 While Murphy failed to either search or apply for jobs between May 14, 2013 and
12 December 31, 2014, the record shows there was only one, non-comparable
13 employment opportunity posted on October 24, 2013, and four non-comparable
14 opportunities posted in 2014—all of which were private sector, litigation jobs.
15 Additionally, despite Murphy's failure to apply for jobs between January of 2015 and
16 August of 2015, he became self-employed by returning to solo practice; and, as
17 established above, there were no discoverable opportunities for comparable
18 employment in Worcester or the surrounding areas during this time.

19 **Burden of Proof**

20 Finally, the Union asserts that it should not be held liable for the harm caused by
21 the Trial Court for its unlawful termination of Murphy because the Trial Court denied the
22 Union's right to have Murphy's termination heard by an arbitrator and gave specific

1 instructions not to grant any deadline extensions for arbitration based on its perception
2 that Murphy suffered from a mental illness, as alleged by Murphy in his federal court
3 complaint. It also asserts that the Trial Court's actions prevented the Union from having
4 a meaningful hearing on the merits of Murphy's termination before an impartial decision
5 maker and from effectuating its duty of fair representation.

6 The Union asserts further that the settlement agreement between the Trial Court
7 and Murphy evidences culpability on the part of the Trial Court. This is because the
8 agreement shows the Trial Court's only reason to reemploy Murphy after 6.5 years was
9 based on the belief that a federal court trial would result in a verdict that it violated state
10 and federal laws in discharging Murphy and would expose the Trial Court to substantial
11 damages. Thus, the Union maintains the settlement amounted to a "*de facto* admission"
12 that the Trial Court violated Murphy's rights, and holding the Union liable for all of
13 Murphy's damages would contravene principles of equity and fairness. For all these
14 reasons, the Union argues that the CERB should adopt a rule that apportions the
15 liability and damages owed to Murphy between the Union and the Trial Court.

16 Concerning the settlement agreement between the Trial Court and Murphy, I find
17 no evidence in the record to support the Union's assertions about the Trial Court's
18 alleged beliefs or culpability, or whether a federal trial would result in a verdict favoring
19 Murphy. Nor do I find any evidence that the agreement amounted to a "*de facto*
20 admission" that the Trial Court violated Murphy's rights.

21 Concerning apportionment, the Union cites to Section 301 of the Labor
22 Management Relations Act (LMRA), 29 U.S.C. § 185, which allow litigants to bring

1 "[s]uits for violation of contracts between an employer and a labor organization" in
2 federal district court. It also cites to certain cases¹²⁹ to show that other courts have
3 apportioned damages between a union and an employer after the employee satisfied its
4 burden of proving both the breach of contract and the breach of duty of fair
5 representation. However, that statute was enacted by Congress in 1947 as an
6 amendment to the National Labor Relations Act (NLRA), and those cases were heard in
7 jurisdictions outside of Massachusetts that have no effect on matters pertaining to
8 Chapter 150E. Moreover, the Trial Court was not a party to this case and was not given
9 a full opportunity to be heard, to examine and cross-examine witnesses, or to introduce
10 evidence. For all these reasons, I am unpersuaded by the Union's argument that the
11 CERB should apportion liability between the Trial Court and the Union.

12 CONCLUSION

13 Based on the record and for the reasons explained above, I conclude that the
14 Union has failed to show by a preponderance of the evidence that it complied with the
15 CERB's make whole order. Therefore, I conclude that Murphy is entitled to net back pay
16 in the amount of \$703,805.62 for the period beginning on May 14, 2013 and ending on
17 October 6, 2019, including all interest on that net back pay owed to Murphy at the rate
18 specified in G.L. c. 231, s.6l compounded quarterly in the manner specified in Office

¹²⁹ The Union cites to: United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981); Del Costello v. International Brotherhood of Teamsters, 1023 S. Ct. 2281 (1983); Vaca v. Sipes, 386 U.S. 171, 197 (1965); and Bowen v. United States Parcel Service, 459 U.S. 212 (1983); Dushaw v. Roadway Express, 816 F. Supp. 1226, 1228 (N.D. Ohio 1992); and Aquinaga v. United Food & Commercial Workers International Union, etc., 720 F. Supp. 862 (D. Kan. 1989).

1 and Professional Employees International Union, Local 6 (OPEIU), 44 MLC 196, 201
2 (2018).

3 ORDER

4 WHEREFORE, based upon the foregoing, the Office and Professional
5 Employees International Union, Local 6 (Union) shall:

- 6 1. Immediately pay to John F. Murphy's personal representative Collin
7 B. Murphy the sum of seven hundred and three thousand, eight
8 hundred and five dollars and sixty-two cents (\$703,805.62) plus
9 interest at the rate specified in M.G.L. c. 231, s.6I, compounded
10 quarterly, in the manner specified in OPEIU, 44 MLC at 201.
11
- 12 2. Immediately post signed copies of the attached Notice to
13 Employees in conspicuous places where notices to bargaining unit
14 employees are customarily posted, including all places in the Trial
15 Court, and including electronic postings if the Union customarily
16 communicates to members via intranet or e-mail. The Notice to
17 Employees shall be signed by a responsible elected Union Officer
18 and shall be maintained for a period of at least thirty (30)
19 consecutive days thereafter. Reasonable steps shall be taken by
20 the Union to assure that the Notice is not altered, defaced, or
21 covered by any other material. If the Union is unable to post copies
22 of the Notice in all places where notices to bargaining unit
23 employees are customarily posted in the Trial Court, the Union
24 shall immediately notify the Director of the DLR in writing, so that
25 the DLR can request the Trial Court to permit the posting.
26
- 27 3. Notify the DLR of steps taken to comply with this decision and order
28 by sending to the DLR a photocopy of the check (or disbursement)
29 to Colin B. Murphy in the amount of \$703,805.62; signed receipt of
30 the payment from Colin B. Murphy; and a signed affidavit from the
31 Union stating the date when it posted the attached Notice, the
32 location(s) posted, and the name of the person who signed the
33 Notice.

34 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

A handwritten signature in black ink, appearing to read "Kendrah W." followed by a stylized flourish.

KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, and 456 CMR 13.19 to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



**THE COMMONWEALTH OF MASSACHUSETTS
NOTICE TO EMPLOYEES
POSTED BY ORDER OF A HEARING OFFICER OF THE
MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF
MASSACHUSETTS**

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Office and Professional Employees International Union, Local 6 (Union) has failed to comply with an order of the Commonwealth Employment Relations Board (CERB) to make John F. Murphy whole for the loss of compensation that he suffered as a direct result of his termination from the Massachusetts Trial Court (Trial Court), and from the Union's subsequent unlawful conduct.

General Laws, Chapter 150E (the Law) gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The Union assures its members that:

- WE WILL immediately pay to John F. Murphy's personal representative Collin B. Murphy the amount specified in the Hearing Officer's Compliance Order plus interest at the rate specified in M.G.L. c. 231, s.6I, compounded quarterly, in the manner specified in Office and Professional Employees International Union, Local 6 (OPEIU), 44 MLC 196, 201 (2018).
- WE WILL notify the DLR of steps taken to comply with this decision and order by sending to the DLR: a photocopy of the check (or disbursement) to Colin B. Murphy in the amount specified in the Hearing Officer's Compliance Order plus interest at the rate specified in M.G.L. c. 231, s.6I, compounded quarterly, in the manner specified in OPEIU, 44 MLC at 201; a signed receipt of the payment from Colin B. Murphy; and, a signed affidavit from the Union stating the date when it posted the attached Notice, the location(s) posted, and the name of the person who signed the Notice.

Office and Professional Employees International Union, Local 6

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, 2 Avenue de Lafayette, Boston, MA 02111-1750 Telephone: (617) 626-7132.