

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108

GERALD ALSTON,
Appellant

v.

D1-16-170

TOWN OF BROOKLINE,
Respondent

Appearance for Appellant:

Brooks A. Ames, Esq.
1309 Beacon Street, 3rd Floor
Brookline, MA 02446

Appearance for Respondent:

Douglas I. Louison, Esq.
Joseph A. Padolsky, Esq.
Louison, Costello, Condon & Pfaff, LLP
101 Summer Street
Boston, MA 02110

Patricia Correa, Esq.
Office of Town Counsel
333 Washington Street
Brookline, MA 02445

Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

A white Brookline Fire Lieutenant made the racist comment “fucking [n-word]” to describe a motorist who the lieutenant believed to be black or Hispanic. That racist comment inadvertently ended up on the voice mail of the lieutenant’s employee, Gerald Alston, an African American firefighter in the Brookline Fire Department.

Town officials responded with a minor, short-term suspension of the lieutenant followed by his almost-immediate promotion. Thereafter, Town officials: granted further promotions of the lieutenant; failed to prevent retaliatory behavior against Firefighter Alston; and enabled the lieutenant to use his position to lobby many other members of the force against Firefighter Alston and paint himself as the victim.

These actions by the Town were arbitrary, capricious, and in violation of Firefighter Alston’s rights under the civil service law to be treated fairly “... without regard to political affiliation,

race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for . . .basic rights outlined in [the civil service law] and constitutional rights as citizens . . .”
G.L. c. 31, § 1.

The Town’s own actions and inactions were the reasons that made it impossible for Firefighter Alston to return to work, which formed the basis of the Town’s decision to terminate his employment.

When a municipality’s own violation of a tenured employee’s rights has prevented the employee from returning to work, as here, the Town cannot use that inability to work as just cause for discharging the employee from his tenured position

For these reasons, Firefighter Alston’s appeal is allowed.

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Gerald Alston (Firefighter Alston) filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Appointing Authority, the Town of Brookline (Town), to terminate him as a firefighter from the Brookline Fire Department (Department). The Commission denied the appeal on April 13, 2017 in a summary decision. Firefighter Alston appealed the decision pursuant to G.L. c. 31, § 44. On April 11, 2018, the Superior Court (Wilkins, J.) vacated the Commission’s decision and remanded Firefighter Alston’s appeal for an evidentiary hearing. A pre-hearing conference was held on June 21, 2018. A full hearing was held over ten days between July 12, 2018 and August 30, 2018. A stenographer produced the official record of the proceedings by agreement of the parties. The hearing was declared to be public at the request of Firefighter Alston, except that exhibits were impounded pending this decision. Following the close of the hearing, proposed decisions were submitted by the parties on October 30, 2018.

FINDINGS OF FACT

A series of stipulated facts and 280 exhibits (Respondent 1-180 and Appellant 1-100) were entered into evidence at the hearing. Based upon the documents admitted into evidence, the stipulated facts, and the testimony of:

Called by Firefighter Alston:

- Gerald Alston (Firefighter Alston)
- Cynthia Carter, M.D. (Dr. Carter)
- Former (now-retired) Temporary Deputy Chief Paul Pender (Pender)¹

Called by the Town:

- Former (now-retired) Chief of Operations Michael O'Reilly (COO O'Reilly)
- Former (now-retired) Chief Peter Skerry (Chief Skerry)
- Former Human Resources Director Sandra DeBow (DeBow) (now employed elsewhere)
- Lieutenant Justin Robinson (Lt. Robinson)
- Firefighter Cormac Dowling (Probationary Firefighter Dowling)
- Firefighter Ryan Monahan (Firefighter Monahan)
- Former Chief Paul Ford (Chief Ford)
- Marilyn Price, M.D. (Dr. Price)
- Town Counsel Joslin Murphy (Murphy)
- Former Select Board Chair Kenneth Goldstein (Chairman Goldstein)
- Select Board Chair Neil Wishinsky (Chairman Wishinsky)

I make the following findings of fact:

Gerald Alston

1. Firefighter Alston, an African-American male in his late 40s, was born and raised in Boston. He has four children. Firefighter Alston comes from a close-knit family, including five siblings, and he credits the support of his family, particularly his mother and father, for his successes in life. Firefighter Alston's family has a tradition of public service; three cousins

¹ Paul Pender held four different titles with the Fire Department during the relevant time period (Lt. Acting Captain, Captain and Acting Deputy Fire Chief). To avoid confusion, the decision refers to him as Mr. Pender.

are firefighters and his uncle was a deputy superintendent in the Boston Police Department. (Tr. Vol. 1 at 32-33 (Alston)); Resp. 73, p. 5).

2. Firefighter Alston attended Natick High School as part of METCO, a voluntary desegregation program. He was an active participant in the school, playing on the football team and acting in school performances, and formed lifelong bonds with several of his classmates. (Tr. Vol. 1 at 33-36 (Alston)).
3. After graduating from Natick High School, Firefighter Alston pursued a singing career with the group, “Classic Example,” which toured with the “New Kids on the Block” in the early 1990s. After the group dissolved in the mid-1990s, Firefighter Alston worked as an administrative assistant at the Board of Registration of Medicine and a train operator for the MBTA before taking and passing the firefighter’s civil service examination. (Tr. Vol. 1 at 36-37 (Alston)).
4. Firefighter Alston became a Brookline Firefighter in August 2002 and served on a full-time basis for eleven (11) years. The Town’s Select board serves as the Appointing Authority for the Fire Department. (Stipulated Facts).
5. During his career, Firefighter Alston was regarded as a “very good firefighter.” (Tr. Vol. 6 at 794-795 (O’Reilly)).
6. At all times relevant to this appeal, Firefighter Alston was assigned to Group 2, Station 5, located in Coolidge Corner on Babcock Street in Brookline. That station includes a tower truck and an engine (pump truck). (Tr. Vol. 1 at 42 (Alston)).
7. During the Spring of 2010, Firefighter Alston suffered an on-duty injury (fractured tailbone) that put him out of work. (Tr. Vol. 1 at 56 (Alston)).

Paul Pender

8. Paul Pender joined the Brookline Fire Department in 1984. As of May 30, 2010, he was a fire lieutenant in Group 2, Station 5, serving as Firefighter Alston's supervisor. (Tr. Vol. 5 at 662 (Pender)). As will be referenced in findings that follow, Mr. Pender would subsequently be promoted to Temporary Fire Captain, Permanent Fire Captain and Acting Deputy Fire Chief.
9. Mr. Pender "... saw things in a fire that not all officers would as far as having that presence of mind of where he was, what was going on. He was a ... very good fire officer and firefighter." (Tr. Vol. 6 at 802 (O'Brien)).
10. Mr. Pender and others were commended by the Town for their acts of heroism that occurred at a fire on Harrison Street in Brookline in 2008. As recounted by Mr. Pender during his testimony before the Commission:

"It was a call for a man trapped on the second floor with a wheelchair so we had a lot of guys up there looking for him and the house was going pretty good and it got going to the point there was a back draft and the deputy called to evacuate the entire building and the entire building was evacuated. You do a personnel count and we were missing a guy; it turned out to be the deputy's brother. And I was standing right next to him and he said, 'Paul, my brother is missing' and I just ran up to the stairs, ran in, dove in with another guy and we were lucky enough he was only 10 or 15 – we couldn't see him because the fire was from the ceiling right to the floor but we were lucky enough to just kind of bump into him. He was facing us and lying like this on the floor and we saw the bright things, the fluorescent stuff, and we were able to get him out of there but we got burned up pretty bad." (Tr. Vol. 5 at 755-756 (Pender)).
11. During that fire, Mr. Pender received burns all over his face, head, ears, eyes, nostrils and throat. Four firefighters, including the rescued firefighter, went through the burn unit at Massachusetts General Hospital and were treated for Post Traumatic Stress Syndrome (PTSD). (Tr. Vol. 5. at 757 (Pender)).

12. Prior to May 30, 2010, Mr. Pender and Firefighter Alston had a good working relationship.

Firefighter Alston described it as follows:

“ ... Paul Pender was someone I attached to when I got on the job because he knew, as far as I could tell, everything about the station, everything about firefighting, everything about the ladder, everything about the engine ... I would ask certain questions and Paul always had the answer. He would go as far as, we had a white board in the back of the station and he would talk me through certain occasions, if a fire happened here or this happened ... he was a teacher .. we had a real nice relationship.” (Tr. Vol. 1 at 45-45 (Alston)).

*May 30, 2010 Voicemail Message*²

13. On May 30, 2010, Mr. Pender and his son had just completed repairing their lobster traps in

South Boston and were driving down Columbia Road in Dorchester. Mr. Pender was the passenger and his son was the driver. (Tr. Vol. 5 at 670-671 (Pender)).

14. While his son was driving, Mr. Pender placed a call to Firefighter Alston’s cell phone and the call went to Firefighter Alston’s voicemail. (Tr. Vol. 5 at 672)³

15. Mr. Pender thought he had terminated the phone call with Firefighter Alston. He had not. (Tr. Vol. 5 at 673)

16. Meanwhile, Mr. Pender’s son had been trying unsuccessfully to get out of a left hand turn-only lane in order to go straight up Columbia Road. Sensing a break in traffic, Mr. Pender told his son to switch lanes. The driver of the vehicle in the other lane, who Mr. Pender describes as “black or Hispanic”⁴, did not yield. Mr. Pender then said “that fuck”; his son

² I have not overlooked Firefighter Alston’s testimony that other firefighters had made racially charged comments to or in front of him in the past. For many reasons, including that Firefighter Alston was unable to recall a timeframe (i.e. – year) when these comments were made, I did not make a finding in this regard.

³ In his deposition testimony in the federal civil rights case, Mr. Pender alleged that the voicemail introduced into evidence had been “doctored” as it did not include a message that Mr. Pender left for Firefighter Alston checking in on his well-being. I credit Mr. Pender’s testimony that the purpose of the call was to check on Firefighter Allston’s well-being.

⁴ In his October 25, 2017 deposition related to the federal civil rights case, Mr. Pender stated that the driver of the other vehicle was a “young black kid.” (App Ex. 4 at p. 43) In his August 2, 2010 investigatory interview with Town officials, Mr. Pender stated that he couldn’t remember the ethnicity of the driver.

asks, “What?” at which point Mr. Pender said: “fucking [n-word].” (Tr. Vol. 5 at 674 (Pender); App. 1).⁵

17. Mr. Pender then realized that his racist comment may have been inadvertently left on Firefighter Alston’s voicemail, as he had not properly terminated the call on his cell phone. (Tr. Vol. 5 at 675-676 (Pender)).
 18. Firefighter Alston’s wife was the first to hear the racist comment on the voicemail message that day. (Tr. Vol. 1 at 56-57)
 19. When she heard the racist comment made by Mr. Pender, “her face changed, her whole expression changed” and she told Firefighter Alston “you want to hear this.” (Tr. Vol. 1 at 56-57 (Alston)).
 20. Firefighter Alston was shocked and hurt by the racist comment. (Tr. Vol 1 at 58-60 (Alston)).
- May 30, 2010 – July 27, 2010*
21. Not knowing whether Firefighter Alston had heard his racist comment, or had simply deleted the message without hearing it, Mr. Pender made multiple calls (including that day) to Firefighter Alston saying words to the effect, “we need to talk.” Firefighter Alston did not return his calls. (Tr. Vol. 5 at 676 (Pender)).
 22. Mr. Pender shared what had happened with other firefighters and “sort of expressed relief [to them] that, you know Gerald was my buddy and I’m sure nothing was going to happen.” (Tr. Vol. 5 at 679 (Pender)).

⁵ Firefighter Alston, in his post-hearing brief, argues that Mr. Pender’s testimony regarding the traffic incident is not credible. Rather, Firefighter Alston argues that Mr. Pender was referring to him (Firefighter Alston) when he said “fucking [n-word].” To the extent that it is relevant, I have, after listening (and re-listening) to Mr. Pender’s testimony, found Mr. Pender’s testimony in this regard to be credible.

23. After seeking the counsel of senior firefighters about what to do, Firefighter Alston, shortly after May 30, 2010, played the voicemail for Chief of Operations Michael O'Reilly (COO O'Reilly). COO O'Reilly did not report the incident to the Fire Chief or other Town officials. Rather, he and Firefighter Alston agreed that he (Alston) would reach out to Mr. Pender directly. (Tr. Vol. 6 at 796-798 (O'Reilly)).
24. On July 8, 2010, Mr. Pender, after learning through another firefighter that Firefighter Alston had reported the voicemail to COO O'Reilly, called Firefighter Alston. Mr. Pender told Firefighter Alston that the racist comment had not been intended for him, but for "some young gangbanger⁶" who cut him off in traffic. Firefighter Alston was offended by Mr. Pender's explanation and terminated the call. (Resp. 3; Tr. Vol. 1 at 62 (Alston)).
25. On July 10, 2010, Mr. Pender called Firefighter Alston again. After seeking to again explain the context in which he made the racist comment, Mr. Pender told Firefighter Alston words to the effect that his (Alston's) decision to report this matter to COO O'Reilly was the stupidest thing he (Alston) could have done and then asked Firefighter Alston "Do you want me to lose my job?" (App. 4 at 56-57)

Filing of Formal Complaint by Firefighter Alston & Discipline Against Mr. Pender

26. On July 28, 2010, then-Fire Chief Peter Skerry received a formal complaint letter with the Town's Fire Department about the voicemail and his subsequent interactions with Lt. Pender. Chief Skerry immediately notified the Town's Director of Human Resources at the time, Sandra DeBow (Ms. DeBow) (Tr. Vol. 6 at 833-834 (Skerry)).

⁶ Mr. Pender: "I recall saying a kid cut me off. Probably said something like a wise guy or something and he might have looked like a gang banger or something like that." (Tr. Vol. 5 at 683-684 (Pender)).

27. On July 30, 2010, a meeting was held which was attended by: Firefighter Alston, his wife, Chief Skerry, COO O'Reilly and then-Town counsel Jennifer Depazo to address the letter. (Tr. Vol. 6 at 837 (Skerry)). Ms. DeBow did not attend the meeting as she was out of town at the time. (Resp. 3 at p.3).
28. At the meeting, Firefighter Alston played the voicemail after questions were raised about precisely what Mr. Pender had said. After hearing the voicemail, Chief Skerry determined that Mr. Pender's racist comment constituted a firing offense and told Firefighter Alston that he would fight for Mr. Pender's termination. (Tr. Vol. 1 at 75-76 (Alston); Tr. Vol. 6 at 840 (Skerry)).
29. Firefighter Alston stated that he did not want Mr. Pender terminated. (App. 17, p. 8; Tr. Vol. 1 at 75-76 (Alston); Tr. Vol. 6 at 840 (Skerry)).
30. Although Chief Skerry testified he did not recall discussing Mr. Pender's eligibility for promotion to Captain during the meeting, I credit Firefighter Alston's testimony that Chief Skerry said that Mr. Pender would be ineligible for promotion. Chief Skerry's notes specifically reference (with a "?" next to it) Pender's ineligibility for promotion to Captain as a contemplated disciplinary consequence in his notes, and I find that Chief Skerry made this promise to reassure Firefighter Alston that the department took his complaint seriously. (Tr. Vol. 1 at 76, 80 (Alston); App. 17, p. 17)
31. That day (July 30, 2010), Chief Skerry transferred Mr. Pender to another station. (App. 17 at 2, 19 and 20; Tr. Vol 6 at 832, 836) (Skerry)).

32. Sometime after the July 30th meeting⁷, a three-way phone call took place between Firefighter Alston, then-local union President Shaun Fay and the Town's Director of Human Resources, Sandra DeBow. During that conversation, Firefighter Alston expressed concern that the Town's Human Resources Director was conducting the investigation into his complaint, rather than an outside counsel. Ms. DeBow disagreed. Ms. DeBow and Firefighter Alston engaged in a heated verbal exchange during which both of them used profane language. (Tr. Vol. 10 at 1840-1841 (Fay)).
33. On August 2, 2010, Mr. Pender admitted during an investigatory interview with Town officials that he said the word "[n-word]" heard on the voicemail, but that it was not intended for Firefighter Alston. (Resp. 3 at 6).
34. On August 16, 2010, HR Director DeBow released her investigation report which stated in part:
- "The facts here establish that Lt. Pender made a work-related call to a subordinate and left an inflammatory race-based message on FF Alston's cell phone. Using profanity and a well-recognized, racially-inflammatory term rises to the level of conduct unbecoming to a firefighter as it would tend to lower the service in the estimation of the Public, and further that such conduct is also prejudicial to good order." (Resp. 3)
35. The report concluded that while Mr. Pender had directed the racial comment at another driver on the road, he was still responsible for conduct unbecoming a firefighter. (Resp. 3 at 9-10; Tr. Vol 6 at 894-95 (DeBow)) The report recommended progressive discipline and Mr. Pender's permanent transfer, mediation between Firefighter Alston and Mr. Pender, development of an anti-discrimination policy, and anti-discrimination training including

⁷ Firefighter Alston testified that this phone call took place before the July 30th meeting. To me, it appears that the phone conversation took place sometime after the July 30th meeting. However, given the passage of time (over 8 years), there is uncertainty about this date (and others) for which there is no written record.

regarding supervisors' duty to report. (Resp. 3 at 10-12; Tr. Vol. 6 at 891, 895-96, 1056 (DeBow))

36. On August 17, 2010, the Select Board conducted a closed-door disciplinary hearing for Mr. Pender. Firefighter Alston was not called as a witness. After hearing from Mr. Pender and his counsel, the Board authorized the Town to enter into a disciplinary agreement with Mr. Pender that included serving a two (2)-tour suspension (42 hours of lost pay) with two tours held in abeyance, pending no further misconduct, along with a permanent transfer out of Station 5. The agreement also required mediation with Firefighter Alston, anger management and diversity training. The Board rejected the Fire Chief's proposal that Mr. Pender serve all four tours of the suspension. (App. 21).

37. On August 26, 2010, Mr. Pender and Firefighter Alston engaged in mediation. Firefighter Alston recalled the mediation as follows:

“ ... Paul Pender, his demeanor was not too good; it seemed like he wasn't really happy. At one point the mediator asked Paul why he was so angry with me and I remember Paul saying I think this guy is trying to take my job.”

(Tr. Vol. 1 at 79 (Alston)).

38. On August 27, 2010, Chief Skerry issued a special order regarding Mr. Pender's discipline stating that that Mr. Pender had committed “conduct prejudicial to good order.” Mr. Pender was suspended for two tours between August 30, 2010 and September 6, 2010 resulting in a loss of 42 hours of pay⁸. (App. 22).

⁸ The Town, via a settlement agreement dated March 21, 2013, agreed to “place 42 hours in Lt. Pender's vacation bank.” Mr. Pender testified that this was unrelated to his loss of 42 hours of pay in August 2010, but, rather, related to longstanding issues related to vacation accrual. I left the record open for the Town to provide additional documents that may support this contention, but received none. Based on the limited information available, I was unable to reach a conclusion regarding whether the two events were related or not.

Pender Promotion to Temporary Captain

39. On September 10, 2010, the Town made a series of promotions due to the absence of then-Deputy Chief Robert Ward. As part of these promotions, Mr. Pender was promoted to Temporary Fire Captain. (App. 30 at 2)
40. On September 15, 2010, Firefighter Alston found the general order announcing Mr. Pender's promotion to temporary Captain on the station bulletin board. (App. 30 at 2) Firefighter Alston was "not happy" when he saw the general order, particularly in light of the statement made at the July 30, 2010 meeting that Mr. Pender would not be receiving any promotions. He immediately called Ms. DeBow and voiced his objection. (Tr. Vol. 1 at 82-85 (Alston)).

Firefighter Alston's Return to Work

41. On September 17, 2010, in anticipation of Firefighter Alston's return to work the following week, Chief Skerry met with officers. (App. 23; Tr. Vol. 6 at 847-48 (Skerry)) At the time, Chief Skerry's impression was that there had been rumors about and some backlash against Firefighter Alston after Mr. Pender's transfer from the station, and he wanted to make certain that it stopped. (Tr. Vol. 6 at 847-48, 863 (Skerry)) Chief Skerry reminded the officers that the Town has zero tolerance for discrimination and *retaliation*, that a firefighter had exercised his right to file a complaint, and that he was coming back to work and was to be treated cordially. (App. 23; Resp. 20 at 4; Resp. 160; Tr. Vol. 6 at 820-21 (O'Reilly))
42. Soon after discovering that Mr. Pender had been promoted, Firefighter Alston learned that Mr. Pender would be receiving a medal of valor at the White House on September 22, 2010 for his heroism in the previously-referenced 2008 fire. Firefighter Alston believed that Mr. Pender deserved the medal but that it was not appropriate for the Town to "parade" him so soon after his discipline for the racial slur. Firefighter Alston believed that Mr. Pender was

being built up in a way that detracted from the seriousness of his offense. (Tr. Vol. 1 at 81-82 (Alston)).

43. On September 21, 2010, Firefighter Alston returned to work. (Resp. 20)

44. On September 23, 2010, two (2) days after Firefighter Alston's return, Firefighter Joseph Canney, posted a derogatory message on the Union's blog which I find was referring to Firefighter Alston. The post stated:

“FACELESS COWARD

by Joe Canney

To the faceless coward who for no good reason, except of course his own self interest leaked to the media about one of our BROTHER'S (sic) alleged acts of misconduct on what should have been the proudest day of their professional lives is _____. I honestly can't even find an appropriate word for it. I have been around this job a long time and seen and heard a lot, but this even exceeds my wildest expectations of someones (sic) having a personal agenda to destroy another. This union went through this type of personal, meritless attacks before and it almost destroyed us, don't let this ever happen again, for all our sakes!” (Firefighter Alston 9, Attachment 2).

45. On September 27, 2010, Firefighter Alston reported the message to Chief Skerry. The Town did not conduct an investigation regarding whether this message constituted retaliation against Firefighter Alston. Rather, Chief Skerry indicated that he would call the Union President and ask him to have the posting removed. (Tr. Vol. 6 at 832 (Skerry)).

46. On October 5, 2010, Chief Skerry informed his deputy chiefs that Mr. Pender was not to be assigned to supervise Firefighter Alston under any circumstances. (App. 24).

47. On October 12, 2010, Chief Skerry called Firefighter Alston to “check-in” on his wellbeing. According to Chief Skerry's hand-written notes, Firefighter Alston “... was extremely agitated that Town let him down with ‘slap on the wrist’ suspension and Pender Temp

Promotion. Last 30 seconds was screaming that Pender called him ‘a f... n....’ then hung up the phone.” (App. 17 at 3)

48. That same day, Chief Skerry penned a letter to Firefighter Alston stating in part:

“After our phone conversation earlier today I felt compelled to write and offer my thoughts on several issues. We spoke of the difficulties you’ve faced over the past several months while you’ve been both recovering from your injury and attempting to reconcile the offensive act that you experienced in late May. After today’s conversation it is my belief that you would benefit from speaking with a counselor either through the Town’s EAP or one that your physician can recommend.”
(App. 31)

Visits / Evaluations at Beth Israel Deaconess Medical Center (BIDMC)

49. On October 14, 2010, Firefighter Alston visited Beth Israel Deaconess Medical Center

(BIDMC) in Boston. A physician’s note from BIDMC states:

“Pt. seen and discussed with Dr. Meyer. Pt. comes into to transfer / establish care and to get note for work as he is very angry / upset and worries about hurting someone at work or otherwise losing control.” (Resp. 35 at 123)

50. The physician at BIDMC had Firefighter Alston see a social worker by the name of Elizabeth Simpson that same day. (Resp. 35 at 132)

51. Ms. Simpson penned a series of notes regarding her observations of Firefighter Alston on October 14, 2010, including the following:

“ ... Pt is a local firefighter and reports that he is experiencing racism at work. He states a particular incident occurred in May where he was the target of racist comments by a co-worker. He relays how this has been responded to by his supervisors and colleagues, and he feels their response has only exacerbated his anger over the situation. He states that lately, he has become increasingly upset by this, and he has decided to consult with an attorney about it on Monday as he is considering pursuing legal action [H]e states that recently, he has felt so upset that he has had passing thoughts of hurting his co-workers. He firmly denies homicidal plan and intent. He states repeatedly that he does not want to hurt anyone and that he has been trying to control his anger and impulses in various ways ... Pt states he has no history of psychiatric treatment or counseling, though OMR indicates one initial SW eval by [LS], LICSW in 2004.” (Resp. 35 at 128)

52. A physician at BIDMC issued a note excusing Firefighter Alston from work until October 19, 2010. (Resp. 35 at 124)
53. On October 18, 2010, Firefighter Alston had a follow-up visit with Social Worker Simpson at BIDMC. At that time, Ms. Simpson diagnosed Firefighter Alston with “Adjustment Disorder, unspecified.” During this visit, Firefighter Alston requested “... additional time off work (one week) to continue to stabilize mood and manage sometimes overwhelming affect.” (Resp. 35 at 132-133)
54. On October 21, 2010, a physician at BIDMC excused Firefighter Alston from work through October 27, 2010 due to “Psychosocial stressors.” (App. 32)
55. On October 25, 2010, Firefighter Alston had another follow-up visit with Social Worker Simpson at BIDMC. Her notes state in part:
- “... He [Firefighter Alston] states he is planning to return to work on Wednesday and he is trying to ‘stay positive’ about this. He speaks of how it has continued to feel supportive to spend time with family, and uncle in particular, this past week ... He speaks of the ‘unresolved’ quality of the situation as being especially hard, and unusual for him.” (Resp. 35 at 133)
56. On November 24, 2010, Firefighter Alston, while at work, became upset by driving assignments made by Lt. Justin Robinson pertaining to Firefighter Alston, FF Mike Bresinski, and a probationary firefighter who is the nephew of Mr. Pender. Lt. Robinson made the assignments based on a desire to spread senior firefighters among the two apparatuses and to develop Firefighter Alston’s driving experience.⁹ (Resp. 13 at 3-4; Tr. Vol. 1 at 94-98, 207-09 (Alston); Tr. Vol. 7 at 1066-69, 1074-77, 1103-5, 1155-57 (Robinson))

⁹ I considered Firefighter Alston’s suggestion that the assignment here was motivated by other factors. After reviewing all relevant exhibits and testimony, I don’t believe it was. Rather, the decision, although ill-timed, was a routine scheduling decision.

57. FF Bresinski assured Firefighter Alston that the assignments had nothing to do with Mr. Pender, but the mention of Mr. Pender's name increased Firefighter Alston's agitation. (Tr. Vol. 1 at 99 (Alston); Tr. Vol. 7 at 1076, 1112 (Robinson); Resp. 13 at 4-5, 9-10) Given his level of agitation, Firefighter Alston agreed to be transported by ambulance to BIDMC (Tr. Vol. 1 at 98 (Alston) Tr. Vol. 7 at 1077, 1120 (Robinson); Resp. 8; Resp. 13 at 5).
58. Then-incoming Union President Shaun Fay visited Firefighter Alston at the hospital on November 24, 2010. At that time, Firefighter Alston's wife told Captain Fay that Firefighter Alston had recently lost forty (40) pounds which she attributed to stress at work. (Resp. 13 at 15)
59. At the BIDMC, Firefighter Alston tested positive (urine test) for cocaine. According to the physician's notes, "... [H]e [Firefighter Alston] ... said he used cocaine yesterday with friends in his neighborhood. He says this is the first time in 20 years and he does not want to use cocaine again." (Resp. 35 at 8, 20, 21, 22, 25, 24-25)
60. Also, while at the BIDMC on November 24, 2010, Firefighter Alston stated that: "... he began smoking marijuana in July to deal with [his] anger and anxiety ..." (Resp. 35 at 24)
61. Notes from a psychological evaluation completed at BIDMC that day state in part:
- "Patient was able to discuss essentially feeling singled out at his job for bringing up issues around being openly discriminated against. This situation has impacted patient's appetite to the point that he has lost 40 pounds over past several months. His weight loss has probably also been brought up by his tendency to work on walking away when he feels stressed or angry. He frequently takes long walks to control his anger. He has also had some trouble sleeping. Unfortunately, he has also turned to marijuana to make him feel calmer since this seemed like the only option. More recently, he tried cocaine because a friend thought it might help his anxiety (not really clear that it did)." (Resp. 35 at 27)
62. As part of his evaluation that day, Dr. Eva Matthews, MD, at BIDMC, diagnosed Firefighter Alston with "Adjustment Disorder with depressed mood." Dr. Tina Lusignolo, MD, wrote,

“Mr. Alston may be suffering from some s/o adjustment d/o related to his current stressors, but, in my opinion, he does not have a major mental illness that would require more secure containment.” (Resp. 35 at 28)

63. Between December 14, 2010 and January 15, 2011, Firefighter Alston was excused from work duties for evaluation and treatment for “psychosocial stressors.” (Resp. 35, pp. 144-149)

64. On December 16, 2010, Firefighter Alston attended an individual psychotherapy session with Social Worker Simpson at BIDMC. Ms. Simpson’s notes from that session state in part:

“Gerald presents with overwhelmed mood and tearful affect. Towards beginning of session, he speaks of how he is ‘done’ with his work situation and considers resigning from his position. He verbalizes feelings of anger, frustration and a wish to disengage from his struggle with this over the past several months. He speaks of how saddened he is to observe the emotional toll it seems to be taking on his family and on himself and identifies feeling especially protective of his family. He denies SI/HI. He continues to endorse occasional violent thoughts, but he denies any plan or intent to act on them and contracts for the safety of himself and others. Explored the range of Gerald’s thoughts and feelings about this situation and the meaning it might have for him. Supported him in identifying how he might like to proceed with either pursuing FMLA, resigning or continuing to work while trying to cope (he states he does not have a short-term disability policy to use). By the end of today’s session, he states he is still unsure what he wants to do and will continue to give it thought and talk it over with his family who remain a strong support for him. Reiterated my support re the FMLA option if this is what he chooses.”

Under the “diagnosis” section, Ms. Simpson wrote: “Adjustment Disorder with mixed disturbance of emotion and conduct.” (Resp. 35 at 145)

Training / Adoption of Anti-Discrimination Policy

65. Beginning in October 2010, through the Spring of 2011, MCAD trainers conducted discrimination prevention training for Town employees. (Resp. 7)

66. In January 2011, the Town’s Select Board approved an anti-discrimination policy which was distributed to all Town employees. (Resp. 14)

February 2011 Conversation between Firefighter Alston and Paul Pender

67. On February 8, 2011, while off-duty, Mr. Pender was driving a plow in Brookline with another off-duty firefighter when Firefighter Alston flagged him down to have a conversation. (App. 4, Attachment 1)

68. After the conversation, Mr. Pender penned a transcript-like summary of his version of the conversation. (App. 4, Attachment 1) Approximately two years later, as referenced in findings below, Mr. Pender would submit this document to HR Director Sandra DeBow stating in part words to the effect: “Here is the kind of people you are dealing with.” (App. 4 at 63 (Pender Deposition)).

69. The document prepared *by Mr. Pender* states:

“Alston: Hey man, I just want to tell you we’re good.

Pender: What do you mean, “We’re good?”

Alston: You know, all this shit that’s going on...I just want you to know that me and you we're good.

Pender: Well, I don’t really understand what you mean Gerald, I just want to move on from this.

Alston: Well just so you know, between me and you is good.

Pender: I don’t know how we can be good Gerald, you destroyed my life and ruined my career. But I’m glad you’re good.

Alston: Good, I’m not good, I’m getting a divorce.

Pender: Well Gerald, I tried to tell you when we talked on the phone that if you went to the Chief this would create a huge shit storm.

Alston: Yah man, I know.

Pender: I begged you and I apologized to you up and down, not to do what you did. You could see that this was gonna happen.

Alston: Well, there's a bunch of shit gonna happen, and I just want you to know, when it does, you and me are good.

Pender: What do you mean, "there's a bunch of shit gonna happen?" What's that mean?

Alston: I got fucking lawsuits against the Town and everybody.

Pender: Gerald, what are you talking about.

Alston: They all been fucking me over man.

Pender: What are you talking about?

Alston: The fucking town, that cunt Sandra DeBow and that fucking asshole Skerry.

Pender: Oh, that's great Gerald, you're going to bring this all up again. Where do you think that's gonna leave me?

Alston: You're going to be fine. This got nothing to do with you.

Pender: Gerald, you can't be that naïve. Look, I gotta go.

Alston: All right man, I'll see you."

(App. 4, Attachment 1)

2011 Counseling Sessions with Dr. Kahn

70. In 2011, Firefighter Alston participated in multiple counseling sessions with Dr. Michael Kahn, a doctor at BIDMC who specializes in psychiatry. (Resp. 127)

71. During the initial visit on January 3, 2011, Dr. Kahn wrote in part:

“[Firefighter Alston] does appear to be very stressed and overstimulated by the ongoing psychosocial stressors related to his job, experiencing symptoms of automatic hyperarousal and difficulty sleeping. Pt would benefit from an agent that would improve his sleep (such as trazadone), as well as something to control autonomic hyperarousal (such as clonidine or indural).” (Resp. 127 at 37)

72. During this initial visit, Dr. Kahn diagnosed Firefighter Alston with “Adjustment disorder NOS”. (Resp. 127 at 38)

73. On January 20, 2011, Firefighter Alston contacted Dr. Kahn via telephone and indicated that he “is interested in trying clonidine to help with explosiveness.” (Resp. 127 at 34)

74. Dr. Kahn’s notes from a January 25, 2011 counseling session with Firefighter Alston state:

“Mr. Alston is back at work, but continues to be quite upset about his perception of the way he was treated. Several days ago, we began clonidine [] to help with anger management and he has found this helpful. I discussed with him strategies to put in perspective his difficulties and to keep first and foremost the fact that he wants to be a good husband and provider for this family.” (Resp. 127 at 33)

75. On February 14, 2011, six (6) days after the previously-referenced encounter with Mr.

Pender, Firefighter Alston contacted Dr. Kahn “to say he was very depressed, anxious, sleeping badly, crying, not focusing ... will try citalopram ...” (Resp. 127 at 32)

76. Dr. Kahn’s notes from a February 22, 2011 counseling session state in part:

“He [Alston] is obviously having a very hard time dealing with the events of the past several months at work as well as with the new breakdown in his marriage. He will continue in supportive counseling and will also continue with Celexa, and I will see him in one month.” (Resp. 127 at 31)

77. Dr. Kahn’s notes from a March 22, 2011 counseling session state in part:

“Gerald seemed much less angry than in our last few meetings. He has been using the clonidine and citalopram with good benefit, and has been seeing his therapist weekly ... He showed his sense of humor again for the first time in several weeks.” (Resp. 127 at 30)

78. Dr. Kahn’s notes from a May 17, 2011 counseling session state in part:

“Gerald is back at work ... and is much less angry. He discontinued all of his psychiatric medication, and really does not want to continue it or therapy. I was struck by his being much less rageful during our meeting today, and he seems at least for the time being to have made peace with the recent events at the fire department, and plans to make the best of a difficult situation ...” (Resp. 127 at 29)

2012: New Fire Chief / Filing of MCAD Complaints / Continued Counseling

79. On May 29, 2011, Chief Skerry retired; the Select Board appointed Paul Ford as his

successor on November 7, 2011. (Resp. 16 at 4) Chief Ford previously worked for the City

of Fall River's Fire Department, starting in 1983. He worked his way up the ranks in Fall River, eventually serving as the City's Fire Chief up until the time he accepted the Fire Chief's position in Brookline. (Tr. Vol. 8 at 1352 (Ford)).

80. On May 17, 2012, Chief Ford, together with then-Chief of Operations (COO) Robert Ward met with Firefighter Alston (App. 37; Resp. 15). "Chief Ford asked [Firefighter Alston] how things were going regarding Lt. Pender. [Firefighter Alston] said fine, he had no problems; he moved on from that situation. [Firefighter Alston] explained he went through a lot and just wanted to move on. Chief Ford said he was glad to hear that. [Firefighter Alston] said he did not know if Pender had moved on; he said he once stuck his hand out to Pender to shake and that Pender did not shake his hand. [Firefighter Alston] repeated he has moved on ..." (App 37 (Ward hand-written notes regarding meeting)).

81. On May 24, 2012, Firefighter Alston filed a pro se complaint with MCAD alleging that the Town had discriminated against him by promoting Mr. Pender after Mr. Pender made the racist comment on his voicemail. The MCAD complaint also references the May 17th meeting with Chief Ford, stating:

"On May 17, 2012, I was called into meet with Chief Paul Ford and he asked me 'If I still was going to have problems with the (sic) Paul Pender if I we were ever to be assigned to work together?' I feel as though the Town of Brookline has not handled the situation in the way they would have had it been an employee of a different race. I feel as though as a result of this situation supervisors and coworkers are treating me. (sic)"

(Resp. 15)

82. On August 22, 2012, Firefighter Alston had what appears to be the first counseling session with Dr. Kahn since the Spring of 2011. Dr. Kahn's notes from this session state in part:

"Gerald came in today to blow out steam ... he continues to obsess about the way he was treated in the department and his perception of the department has been insufficiently attentive to making changes. We discussed this at some length, and it appears that many of

those close to him tell him to just ‘move on’ but he has been unable to do so. He and his wife are in the process of a divorce, which is obviously quite stressful, and when he works at his home fire house, he has no problems. However, when he is assigned to another fire house temporarily, he believes he is getting the ‘cold shoulder’ from other firefighters, which is intensely distressing to him. He is not interested in medication, nor do I necessarily think it is indicated. He does find it helpful to vent once in a while as he has no other opportunity to do so.” (Resp. 127 at 26)

83. On August 24, 2012, the Town filed its Position Statement in response to Firefighter Alston’s May 24, 2012 MCAD Charge, arguing in part that Firefighter Alston had not been subjected to an adverse employment action and that most of the allegations fell outside the 300-day statute of limitations for filing an MCAD complaint. (Resp. 16; Tr. Vol. 6 at 918 (DeBow))

84. On September 5, 2012, Firefighter Alston had another counseling session with Dr. Kahn. Dr. Kahn’s notes state in part:

“Continues to deal with his sense of being wronged, and I continue to urge him to try to put matters in perspective and focus on moving on with his life. We will keep open the possibility for p.r.n., clonidine or trazadone.”
(Resp. 127 at 25)

85. On September 11, 2012, Firefighter Alston called Dr. Kahn to “say he was losing his temper too easily and wants to try some medication for it ... ” (Resp. 127 at 24)

86. On October 5, 2012, Firefighter Alston called Dr. Kahn. According to Dr. Kahn’s notes:

“He was in tears, and apparently had discovered that he was not granted a sick leave. It was difficult to understand what he was saying, but he was obviously upset. I encouraged him to come in to our meeting at 10:40 but he chose to remain at home. He is obviously feeling overwhelmed, and feeling he is being treated poorly by the department ... He felt that the clonidine was not helpful in managing his impulses, and I phoned him some Risperdal ... and we will check back with him later in the day.” (Resp. 127 at 22)

87. On October 11, 2012, Firefighter Alston called Dr. Kahn to tell him that the Risperdal had “worked wonders.” (Resp. 127 at 21)

88. On November 19, 2012, Firefighter Alston, now represented by counsel (not the same attorney who is representing him before the Civil Service Commission), filed an Amended

Charge of Discrimination with MCAD. The Amended Charge alleged in part that, since reporting the racist comments left by Mr. Pender on his voice mail, that Firefighter Alston:

a) “ ... has been shunned, isolated and mocked by his fellow firefighters at the direction and instruction of his superiors for three years with significantly worsening conditions”; and b) had “made repeated complaints to his chiefs and human resources on a monthly, if not weekly basis through the entire year of 2011 and up until May 2012; and c) there was no intervention by management. (Resp. 17)

89. By letter dated December 5, 2012, the Town’s HR Director notified Firefighter Alston that the Town, based on the allegations in the amended MCAD complaint, had initiated an investigation. In this letter, Ms. DeBow asked Firefighter Alston to participate in an interview, at which time he could provide more detailed description of the alleged offensive conduct. (Resp. 18)

90. On December 7, 2012, Ms. DeBow sent an email to Fire Captain Shaun Fay, the Union President, stating:

“forgot to give you a buzz. I sent Alston a letter indicating I will be moving forward with an investigation based on his amended complaint at the MCAD alleging retaliation by his co-workers who are ignoring him, etc. and the failure of his supervisors and the Town to respond to his complaints.

The letter went out yesterday. I expect to hear from his attorney next week. I will give you a heads up as to the process going forward, after I confirm the process with the Chief.” (App. 39)

91. Dr. Kahn’s notes from a December 11, 2012 counseling session with Firefighter Alston state:

“Overall, Gerald has continued to struggle with his sense of grievance with the town of Brookline, and I am trying to help him put it into perspective. His anger gets overwhelming at times, and although responded well to Risperdal, this medication is too expensive for him instead we will use some p.r.n. Vistaril.” (Resp. 127 at 20)

92. On December 17, 2012, counsel for the Town sent an email to Firefighter Alston's then-counsel to determine if his client (Alston) would participate in an interview, as requested via letter on December 5th. (Resp. 19)
93. On December 20, 2012, Firefighter Alston's then-counsel replied, stating: "The case is being investigated by the MCAD and the Town has no authority to force him to consent to an interview regarding pending litigation." (Resp. 19)
94. Also on December 20, 2012, the Town filed an "Amended Position Statement" with MCAD, asking, in part, for pre-determination discovery in light of Firefighter Alston's decision not to participate in an interview. (Resp. 20)
95. On December 27, 2012, Firefighter Alston's then-counsel withdrew the MCAD complaint in order "to file a private right of action in civil court." (Resp. 21)
96. Dr. Kahn's notes from a December 28, 2012 counseling session state in part:
- "Gerald continues to be quite upset about his treatment in the department ... he gets along well with his co-workers in his local fire house, but feels that when he goes elsewhere, people look at him with ill feelings. He apparently revised his complaint with MCAD and it was accepted, and this has opened something of a 'can of worms.'" (Resp. 127 at 19)

2013

97. On January 4, 2013, Lt. Ron Cronin (a firefighter through mid-2013 (Resp. 163)) wrote to COO Ward asking permission to assign Firefighter Alston to work under his direct supervision at street level, since Firefighter Alston claimed he did not feel safe. (App. 5 (Ford Dep. Ex. 1) Chief Ford rejected the proposal in a January 7, 2013 response, as he was concerned that a change in assignment following an MCAD complaint would be viewed as retaliatory, Firefighter Alston's current assignment worked well operationally and Firefighter

Alston had not come to him directly with concerns, and his claims were ambiguous. (App. 5 at 193-205 and Ex. 2 thereto)

98. In connection with the investigation, Lt. Robinson told HR Director DeBow that he was not aware of shunning or any other safety concern but he wanted to change Firefighter Alston's assignment during the pendency of the investigation. Lt. Robinson explained in his testimony that he felt that Fire Firefighter Alston's expression of safety concerns reflected poorly on him as a supervisor. (Tr. Vol. 6 at 1054-55 (DeBow); Tr. Vol. 7 at 1084-86, 1122, 1124, 1140, 1143-44, 1168-69, 1176-77 (Robinson)). HR Director DeBow warned Lt. Robinson that a change in assignment could be viewed as retaliatory. (Tr. Vol. 7 at 1122 (Robinson))

99. On January 18, 2013, HR Director DeBow issued her investigatory report concerning the Amended MCAD Charge. (Resp. 22) The report stated that the shunning allegations could not be corroborated based on the information available without Firefighter Alston's participation. (Resp. 22 at 8-11)

100. On May 1, 2013, Chief Ford wrote to the Select Board through the Town Administrator recommending Paul Pender for a permanent promotion to Captain. (Resp. 119) In regard to whether he considered that Mr. Pender had left a racist comment on Firefighter Alston's voicemail, Chief Ford stated in part: "I mean, we all know that he said something he should [not] have. Whether we can all agree or not that he didn't say it directly to Gerald – I looked at that he was disciplined, so, sort of paid his price." (App. 5 (Ford Dep. at 189)).

101. On May 7, 2013, the Select Board permanently promoted Mr. Pender to permanent Captain. (Resp. 118 at 8, 18-19; Resp. 120; Tr. Vol. 10 at 1911-15 (Goldstein); Tr. Vol. 10 at 1965-66, 1991 (Wishinsky))

102. Mr. Pender served as Captain of Training. According to Mr. Pender, as the Captain of Training, “you run a lot of training sessions, you keep everyone up to date on all of the current changes in firefighting. And during the recruit classes, you are like the second in command under the deputy, up there, in charge of training new guys.” (App. 4 (Pender Dep. at 94))
103. While training new recruits, Mr. Pender would tell the recruits: a) “my side of the story” regarding the matter involving Firefighter Alston; and b) what they read in the local paper about this matter “is a bunch of lies.” (App. 4 (Pender Dep. at 95)).
104. Mr. Pender recalled discussing the matter involving Firefighter Alston with five new recruits that were former Fall River firefighters, stating: “... we had five guys from Fall River, who were all minorities, and I told them as a group, because they were – we had them, just the five of them, for like a week or two or something. And they were pretty shocked that it had turned into what it had turned into, you know ... That something they thought was so benign is going on seven-and-a-half years later. At the time, it was only three or four years later, but ...” (App. 4 (Pender Dep. at 97-98)).
105. On May 14, 2013, Firefighter Alston attended a counseling session with Dr. Kahn whose notes state in part:
- “Gerald called me to say that he had taken a few days off of work because of stress and needed a letter clearing him for return to work. Apparently, someone had come to work in the fire station, who, he felt, was spreading malicious rumors about him. Gerald said up until this point, he has been doing well, but this aggravated him, and he wanted to take time off before he erupted verbally ...” (Resp. 127 at 16)
106. On June 17, 2013, Firefighter Alston’s then-counsel filed a discrimination complaint against the Town in Norfolk Superior Court based on the same claims asserted in his MCAD action. (Resp. 23).

107. On June 19, 2013, Leslea Noble, Assistant HR Director, wrote to Firefighter Alston asking to interview him about certain complaints he had made to coworkers. (Resp. 24; App. 44). He did not respond. (Tr. Vol. 2 at 347-48, 366 (Firefighter Alston))
108. On June 24, 2013, Ms. Noble met with COO Ward and Lt. Robinson to discuss Firefighter Alston's complaint. As part of that meeting, it was stated that Firefighter Alston had no problem working with anyone in his station, but that when he worked at other stations he had concerns about "what he was walking into." (App. 46).
109. In late August 2013, the Brookline TAB published a story detailing the allegations of Firefighter Alston's discrimination complaint against the Town. (App. 90)
110. On September 12, 2013, Firefighter Alston's attorney in the discrimination action responded to the Town's request for an investigatory interview of Firefighter Alston in connection with his state court complaint. He proposed that the meeting be videotaped or transcribed and that Firefighter Alston be permitted to have an attorney present and to refuse to answer certain questions on the grounds of the pending litigation. He asked the Town to forward a counter-proposal if those terms were not acceptable. (App. 52).
111. On October 31, 2013, Firefighter Alston was attending a training session being held by Mr. Pender at which time Firefighter Alston asked to speak with Mr. Pender. Mr. Pender prepared a detailed, transcript-like summary of their conversation. Mr. Pender's notes state in part:
- "I asked him [Alston] what he needed to talk to me about and he stated 'all this stuff that's going on, it's not personal.' I asked how it could not be personal since it was my name and my families' names that were being dragged through the mud. And that my wife, mother and mother-in-law had cried a river over the weekend that it came out in the papers. He told me that I didn't understand what was going on and that it had nothing to do with me. He said that it was about respect and that he had a lot of respect for me and that the lawsuit was against the town. At this point I told him that I had read the lawsuit and that as far as I could

see it was a bunch of lies. He then stated ‘you are not reading it right’ I told him I read exactly what it said and that there was very little truth in it. I stated that ‘you know I didn’t make those comments to you and that it was a mistake that I had apologized profusely for.’ He acknowledged that I had apologized many times but said ‘ this is against the town and had nothing to do with me.’ He said ‘how do you think I liked hearing [n-word] on my phone?’” Again I told him I was sorry and that it wasn’t directed at him, it was road rage from a traffic incident, which can be a side effect of PTSD which I had been treated for after a bad fire the previous year. He stated that the town had screwed us both over and that he was doing this for both our benefits. I told him I understand his benefit because the lawsuit had a dollar figure attached to it, to which he stated ‘fuck the money.’” He then said it was the MCAD’s fault which I did not understand.

Mr. Alston was getting agitated and raising his voice, I told him he would have to calm down or I would have to end the conversation. He did calm down and continued to tell me that I didn’t get what was going on. I asked him about the quote in the lawsuit that stated in January 2011 he started telling people that I should not be promoted to Captain. He told me that I had misread the lawsuit and that was not what it said. Again he began raising his voice.”

(App. 4, (Pender Dep. Attachment 2)

112. That same day (October 31, 2013), Firefighter Alston spoke with Dr. Kahn via phone.

Firefighter Alston reported to Dr. Kahn that he felt like “beating someone up”. According to Dr. Kahn’s notes, Firefighter Alston remained: “very focused on his wanting to get retribution and satisfaction for his having been called a racial slur allegedly two to three years ago.” (Resp. 127 at 14)

113. On November 7, 2013 Ms. Debow, via email, asked Chief Ford whether the Alston matter “was about to explode or quiet?” and Chief Ford responded: “So, so ... never know but I do think it’s a powder keg.” (App. 53)

114. On November 19, 2013, Mr. Pender submitted his summaries of the February 2011 and October 2013 conversations with Firefighter Alston to Ms. DeBow. (App. 4 (Pender Dep. at 63-65)).

115. On or about December 6, 2013, John Martin, Esq., Firefighter Alston's counsel in the Norfolk Superior Court case, supplied answers to the Town's First Set of Interrogatories.

Firefighter Alston's Answers stated in part:

"I was sent to Station 4 in December of 2011 or January of 2012. When I arrived I entered the kitchen and said 'good morning guys.' One of several firefighters replied. I approached one firefighter to shake his hand at which point he stood up and walked away. I worked twenty-four hours. Prior to finishing my shift I went to the dining area to find out when dinner would be held. I found all of the firefighters on duty eating together as is the norm. I asked why I hadn't been told that dinner was happening and they replied 'what are you talking about.'"

The next morning I woke up and went to breakfast where several firefighters were sitting with Lt. Pender. Again, I stated 'good morning guys' and once again no one responded. When I began to prepare my breakfast they left the room. This was the standard response each and every time I worked in a station other than my usual Station Five for several years, until recently when this case was publicized in a local newspaper article.

....

Prior to the incident with Lt. Pender I attended many family social events for my fellow firefighters including weddings, parties, cookouts, Baptisms, graduations etc., etc. After the Lt. Pender incident I was never invited to those events. Before the Lt. Pender incident I was proud and privileged to serve as the singer of the national anthem at graduations and retirement services. After the Lt. Pender incident, to this day, I have never been invited to participate in those ceremonies in any way."(Resp. 27, Answer to Interrogatory No. 5).

December 2013 LEAVE Incident

116. On December 18, 2013, after Lt. Robinson spoke to Firefighter Alston about his late arrival for work that day, Firefighter Alston told Lt. O'Leary that he planned to put in for a transfer to another station. (Tr. Vol. 7 at 1165-66 (Robinson); Resp. 39 at 15-16)

117. On December 19, 2013, as he was going to get his gear at the end of his shift, Firefighter Alston found the word "Leave" written on the door to his seat on the fire engine under his jacket. Firefighter Alston photographed the message and informed the officer at the watch desk, Lt. Patrick Canney, about the writing. Firefighter Alston asked Firefighter Ryan

Monahan and another firefighter on the floor, Probationary Firefighter Cormac Dowling, to come over and see the writing. Both Monahan and Dowling saw the word “Leave” written on the door to Alston’s seat. (Tr. Vol. 1 at 124-126, 134, 139 (Alston)).

118. While speaking with two (2) firefighters, Firefighter Alston made statements to the effect that he was not going to put up with this anymore, he had kept quiet for a long time, and he said something to the effect of shooting up the place. (Tr. Vol. 7 at 1191-93, 1197, 1202, 1207-08 (Dowling); Resp. 39 at 24, 32)¹⁰

119. On Sunday, December 22, 2013, Firefighter Alston returned for his next shift and addressed the group about the past, beginning with the Pender 2010 voice mail through the “leave” writing. (Tr. Vol. 1 at 127-29 (Alston)) He became very agitated and said, to the effect, “people go postal over matters like this”. (Tr. Vol. 7 at 1092-93, 1160-61 (Robinson)) Lt. Robinson conferred with Lt. O’Leary. The two decided that Firefighter Alston was probably just blowing off steam, but reported the statement and their conclusion to the Deputy Chief. (Tr. Vol. 7 at 1092-93, 1160-61)

120. Chief Ford called Lt. Robinson on the morning of December 22, 2013 to request that he obtain reports about December 19 from all group members. (Tr. Vol. 8 at 1367-70 (Ford); Resp. 158 at 1) Lt. Robinson reported to him Firefighter Alston’s “going postal” comment to the group that morning, and that immediately afterward, FF Dowling reported that Firefighter Alston had made “shooting” statements on December 19. (App. 5 at 135-38; Tr. Vol. 7 at 1094, 1162-64, 1180 (Robinson); Resp. 158 at 1) After the Deputy Chief obtained confirmation from FF Monahan of Firefighter Alston’s December 19 “shooting” statements,

¹⁰ While Firefighter Alston maintains that he never referred to shootings and had only made a remark about “going postal”, he acknowledged on cross-examination to explicit “shooting” statements. (Tr. Vol. 1 at 139 (Firefighter Alston); Tr. Vol. 2 at 218, 220, 222 (Firefighter Alston))

Chief Ford updated the Town Administrator and the Police Chief and drove to the station. (App. 5 at 128-29, 135-36; (Tr. Vol. 8 at 1345-46 (Monahan); Tr. Vol. 8 at 1368-69, 1375 (Ford); Resp. 158 at 1)

121. Upon his arrival at the station that night (December 22), Chief Ford reviewed the reports and met with Firefighter Alston, Lt. Robinson, Lt. O’Leary, and Deputy Nelson. (App. 5 at 135-36; Tr. Vol. 7 at 1094-95 (Robinson); Tr. Vol. 8 at 1370 (Ford); Resp. 29) During the meeting, Firefighter Alston discussed the original 2010 incident and was, at times, very agitated. (App. 5 at 122; Tr. Vol. 8 at 1371 (Ford)) Firefighter Alston admitted making a “going postal” statement that morning. (Tr. Vol. 8 at 1371 (Ford)) He pointed to Chief Ford and the Deputy and said to Chief Ford, while extremely agitated, “Look, he’s my friend, and you’re my friend, and even you could get caught in a cross-fire.” (App. 5 at 126-28; Tr. Vol. 2 at 221-22 (Firefighter Alston); Vol. 8 at 1372 (Ford)) Chief Ford felt that Firefighter Alston was very angry and aggrieved and could pose a danger to himself or coworkers, and told him to go home (with pay) and to come see him the next day (on December 23, 2013). (App. 5 at 122-23, 127-28, 134; Tr. Vol. 8 at 1369-70, 1372, 1396 (Ford); Resp. 158 at 1-2)
122. Chief Ford met with Firefighter Alston on the afternoon of December 23, 2013. (Tr. Vol. 8 at 1377-78 (Ford)) Chief Ford reviewed with Firefighter Alston that he had made inappropriate “going postal” and shooting comments. (Resp. 158 at 2 (12/23/2013); Tr. Vol. 8 at 1369-70 (Ford)) Firefighter Alston agreed that he was not in good mental shape and was receptive to evaluation by the Town’s psychiatrist, Dr. Andrew Brown. (Tr. Vol. 1 at 131-33 (Firefighter Alston); Tr. Vol. 8 at 1380, 1382 (Ford)) Firefighter Alston was continued on paid leave. (Tr. Vol. 1 at 140 (Firefighter Alston); Resp. 29)

123. On December 27, 2013, Chief Ford telephoned Firefighter Alston and informed him that he was not to be on Town property pending Dr. Brown's evaluation. (Tr. Vol. 1 at 134 (Firefighter Alston); Tr. Vol. 8 at 1385-86, 1388-89 (Ford)); App. 5 at 142-43, 156-57, 251)

124. After Chief Ford issued the order, the Police Department internally circulated a flyer to all sworn Brookline police officers. The flyer included two (2) color photographs of Firefighter Alston and a color photograph of the type of vehicle he drives. Underneath the photographs, the flyer includes Firefighter Alston's name, address, date of birth and height.

The flyer then states in part:

Overview: Brookline Firefighter Gerald ALSTON (DOB: [redacted]) has made statements referring to 'going postal', obtaining a firearm and returning to a firehouse to cause harm. He is assigned to Station 5 on Babcock St. ALSTON has been advised to stay away from all Town of Brookline property until certain steps have been completed. BFD supervisors have been made aware of the situation and have been advised to call police should ALSTON appear on Fire Dept. property."

The flyer went on to state that although Firefighter Alston "does not have a LTC/FID", he "does have an expired (2000) FID Card."
(App. 86)

2014

125. On January 6, 2014, Firefighter Alston was evaluated by the Town's psychiatrist, Dr. Andrew Brown, at the Town's public safety building to determine whether he was a risk for workplace violence. Dr. Brown told Chief Ford and Ms. DeBow that Firefighter Alston did not pose any threat to himself or others. Soon after, Chief Ford informed Firefighter Alston that the stay away order against him had been withdrawn. (App. 5 (Ford Dep. Ex. 15); Tr. Vol. 1 at 138, 140 (Alston)).

126. Via letter dated January 13, 2014, Ms. Debow informed Firefighter Alston that: a) the Town was conducting an investigation to determine who wrote the word "leave" on the

Engine; and b) the Town was conducting an investigation regarding the “shooting” comments allegedly made by Firefighter Alston. (Resp. 32)

127. On January 21, 2014, Dr. Brown issued a report to the Town regarding his Fitness for Duty (FFD) Evaluation of Firefighter Alston. Dr. Brown’s 19-page report states in part:

“Impairment in the domain of emotional regulation is present to an extent that it would compromise FF Alston’s capacity to consistently perform the duties of a Firefighter for the Town of Brookline Fire Department.

FF Alston is in need of psychiatric treatment to address the impairment that presently precludes his capacity to work as a Firefighter for the Town of Brookline.” (Resp. 33 at 15-16)

128. On January 28, 2014, Firefighter Alston attended a counseling session with Dr. Kahn. Dr. Kahn’s notes state in part that Firefighter Alston spoke about the leave incident, the allegations against him regarding whether he made threatening statements and that:

“Gerald was quite upset about this, would like to return to work, and was emphatic with me that he has absolutely no intention of harming anyone else ...”

....

Overall, Gerald is obviously quite upset by the recent turn of events, and is quite focused on achieving what he calls ‘zero tolerance’ for racial discrimination within the department ...” (Resp. 127 at 9-10)

129. On January 31, 2014, Dr. Brown issued a report to the Town summarizing his communications with Firefighter Alston’s treating psychiatrist, Dr. Michael Kahn. (Resp. 34; Tr. Vol. 6 at 935-37 (DeBow); Tr. Vol. 8 at 1398-99 (Ford)) The report stated that the two doctors agreed that Firefighter Alston’s work capacity was contingent on his adherence to an appropriate medication regimen and that a reevaluation should be scheduled after at least 2 weeks on medication. (Resp. 34)

130. On February 11, 2014, Chief Ford called Firefighter Alston. Chief Ford's written notes of that conversation state:

"I called Gerald today and told him that the 2 doctors had conversed and come up with a plan to return him to duty asap. He was to call Dr. Kahn and make an appointment. He stated they had already called and made on (sic) for the end of the month.

Gerald told me he wasn't happy with Chief Ward. During their last call Gerald mentioned that guys had been calling him, asking what was going on and how he was. The chief mentioned they shouldn't be harassing him. This got Gerald upset as he didn't view it as harassing. (Chief ward said the reason Gerald called was because he felt he was being harassed.)

...
...

Like always, he went right back to the original incident and the subsequent promotion." (Resp. 158 at 6)

131. On February 13, 2014, Dr. Brown sent an email to Dr. Kahn which stated in part:

"I met with the Fire Department leadership and HR at Brookline yesterday. From what I hear from them I have the idea that high levels of paranoia persist. I have the idea that consistent adherence to treatment probably is not occurring. I am concerned that if there is no improvement I will not be able to clear him to return to full duty as early as we would both like." (Resp. 127 at 8)

132. On March 17, 2014, Dr. Kahn and Firefighter Alston had the following email exchange:

Dr. Kahn: Gerald-How are things going?

Alston: Could be better, I do need to see you. I've been feeling very depressed lately, I'm not sure what it is, but it's not good.

Dr. Kahn: Would Tuesday or Wednesday next week be soon enough? Call [] asap to make an apt if it is.
(Resp. 127 at 6)

133. On March 19, 2014, Firefighter Alston submitted a written request for a transfer to a smaller station, asking for Station 4 if possible. (Resp. 37).

134. In approximately mid-March 2014, in connection with discovery in Plaintiff's Norfolk Superior Court Chapter 151B case, the Town obtained Firefighter Alston's medical records from the BIDMC revealing his admitted cocaine and marijuana use. (Resp. 35; Tr. Vol. 6 at 1051-52 (DeBow))
135. The Town provided Firefighter Alston's BIDMC records to Dr. Brown on or about March 21, 2014. (Resp. 38 at 9; Tr. Vol. 6 at 1051-52 (DeBow))
136. On or about April 5, 2014, Dr. Brown submitted to the Town a report concerning his reevaluation of Firefighter Alston on or about March 19, 2014, his review of the records received since the last reevaluation, and his finding that Firefighter Alston was not fit for duty. (Resp. 38 at 15-17, 20; Tr. Vol. 6 at 938 (DeBow); Tr. Vol. 8 at 1404-05, 1409 (Ford))
137. On or about May 14, 2014, HR Director DeBow issued investigatory reports under the Town's workplace safety policy into Firefighter Alston's "shooting" statements and under the anti-discrimination policy into the "leave" writing. (Resp. 39; Resp. 40; Tr. Vol. 6 at 944 (DeBow))
138. The May 14, 2014 report under the anti-discrimination policy concluded that it could not be determined who wrote "leave" or why.¹¹ (Resp. 40; Tr. Vol. 6 at 945, 947-48 (DeBow); *see also* Tr. Vol. 7 at 1166-67 (Robinson); Tr. Vol. 7 at 1237 (Trahon); Tr. Vol. 8 at 1346 (Monahan); App. 5 at 178)
139. The May 14, 2014 report under the workplace safety policy concluded that Firefighter Alston had violated the policy by his inappropriate "shooting" and "going postal" statements,

¹¹ Ms. DeBow's report states in part: "Finally, the possibility cannot be discounted that the word 'Leave' was written by a member of the MIT fraternity to which the truck had made a run the previous evening or some other neighbor or member of the public passing by who saw a ready canvas of salt and sand and took the opportunity to write the word 'leave'. Again, there is no evidence to establish that this scenario occurred nor is there any evidence that it did not occur."

which were repeated and not inadvertent and which “caused his co-workers to be reasonably afraid of violent acts in the workplace.” (Resp. 39 at 11-12)

140. That day (May 14, 2014), HR Director DeBow, Chief Ford, and Town Counsel Joslin Murphy met with Firefighter Alston, an attorney from Attorney Martin’s office, and a union representative to discuss the results of the investigations, the discipline to be imposed under the workplace safety policy (a 2-tour suspension), and a return-to-work plan for Firefighter Alston. (Tr. Vol. 4 at 628 (Stipulation); Tr. Vol. 6 at 949-51 (DeBow); Tr. Vol. 7 at 1269 (Trahan); Tr. Vol. 8 at 1422-24 (Ford); Tr. Vol. 9 at 1707 (Murphy))

141. On May 14, 2014, Chief Ford wrote to Firefighter Alston summarizing the investigation results and Dr. Brown’s report. In regard to Dr. Brown’s report, Chief Ford’s letter to Firefighter Alston states:

“Findings – Fitness for Duty Evaluation: In consultation with your treating psychiatrist Dr. Michael Kahn, the Town’s Psychiatrist Dr. Andrew Brown has found that you are not presently fit for duty as a Brookline Firefighter because of the ‘high level of risk that functional impairment in the domains of behavioral control, emotional regulations and judgement would compromise your capacity to consistently and reliably perform the duties of a firefighter’ in the event you were return to work. Moreover, it is his opinion that the presence of any ongoing use of cocaine or marijuana will further compromise your capacity to sustain job performance in the line of duty.[].

Required Actions to Return to Duty: Based on the foregoing, in order to return to duty as a Brookline Firefighter, you must do the following:

1. Seek regular and ongoing psychiatric treatment to address the functional impairment described by Dr. Brown under a treatment plan that is recommended by Dr. Kahn or other Massachusetts licensed mental health provider.
2. Execute a release authorizing the Town of Brookline’s Occupational Health Nurse to discuss your treatment and progress with your provider for the purpose of monitoring your compliance with the recommended treatment plan.
3. Successfully complete an Anger Management course, approved by the Town’s Human Resources Department.

4. Satisfactory re-evaluation of your fitness to return to duty by the Town's psychiatrist.
 5. Upon your return to work, undergo random urine drug testing for a period of 24 months or longer as recommended by your treatment providers."
(Resp. 41 at 2)
142. Chief Ford's May 14, 2014 letter also stated that Firefighter Alston's request for a transfer to another fire station "will be addressed upon your return to duty." (Resp. 41 at 3)
143. During the Summer of 2014, Firefighter Alston successfully completed an Anger Management course. (Tr. Vol. 1 at 147 (Alston)).
144. Firefighter Alston also executed a medical release. (Inference from Resp. 45)
145. Subsequent to Chief Ford's May 14, 2014 letter, Firefighter Alston had counseling sessions with Dr. Kahn on: August 7, 2014; September 2, 2014; and October 7, 2014. (Resp. 46-48)
146. On July 8, 2014, on procedural grounds and without addressing the merits, the Norfolk Superior Court entered Final Judgment Against Firefighter Alston. (Resp. 44)
147. In regard to Firefighter Alston's October 7, 2014 visit with Dr. Kahn, the Town's Occupational Health Nurse penned the following email on October 9th:
- "Sandra / Chief:
- Dr. Kahn returned my call today regarding his last evaluation of GA on 10-7-14. Dr. Kahn expressed concern that GA is 'not in good shape.' 'has had a decline since last visit one month ago.' Dr. Kahn stated GA is angry at everyone. Did not refill medication. Dr. Kahn states GA tells him he is in desperate financial straits and that he is living out of his car. Dr. Kahn does NOT feel that he would harm anyone however GA feels he is badly treated by everyone. Angry that lawsuit was dismissed. Feels that his attorney is lying to him as is Dr. Brown. Dr. Kahn is meeting with GA again in one week. At EARLIEST he feels RTW would be November 1st but this is only a fluid date. He will update me after next evaluation date." (Resp. 48)
148. On October 23, 2014, the Town sent correspondence to Firefighter Alston stating in part:

“I have been informed by your department that you have exhausted all available leave and are currently not receiving a pay check. You can continue to make contributions to your health insurance at the 17% contribution rate, so that you can maintain your health and basic life-insurance coverages. Below are the details of the payments that will be required to ensure uninterrupted coverage.” (Resp. 49)

149. On November 3, 2014, Ms. DeBow wrote the following to Firefighter Alston:

“Dear Gerald:

You have been on authorized medical leave. However we want to make you aware that your Family Medical Leave expired on or about August 10, 2014. We have not heard recently as to when you believe you will be returning to work. Therefore, we would like to meet with you to discuss your ongoing leave status.

The Town of Brookline, in accordance with Federal and State law, makes reasonable accommodations for employees who are on medical leave due to a serious condition. Although not definitive, it appears that you may have a physical or mental impairment which substantially limit you in one or more major life activities and therefore had this protection. We will continue to work with your physician to determine the nature, severity and duration of such impairment(s) and what, if any, reasonable accommodations would enable you to perform the essential functions of your job for the Town. And, while a short-term leave or modified work assignment may be one option for a reasonable accommodation, a leave of an indefinite duration may not be a reasonable accommodation.

We have scheduled a meeting for Monday, November 10, 2014 @ 10:00 P.M. (sic) in Room 214 located at Town Hall to discuss whether there are any reasonable accommodations your physician may suggest that would allow you to perform the essential functions of your job in the near future.” (emphasis added) (Resp. 50)

150. On November 10, 2014, Chief Ford wrote the following letter to Firefighter Alston:

Dear Gerald:

You were informed by the Human Resources Office by letter dated November 3, 2014 that the Human Resources Director and I sought to meet with you regarding your ongoing leave status. You did not appear at that meeting nor did you contact us indicating you would not attend. I understand your attorney told you not to attend the meeting, but please note, for future reference, that when the Town or Fire Department requests that an employee is required to attend and a failure to attend or at least contact your supervisor or department could result in discipline.

I was happy to hear that you will be evaluated by Dr. Kahn on November 18, 2014. I am hopeful that will have some news about a target date for you to return to duty. I have scheduled a meeting with you and Sandra DeBow, Director of Human Resources for Monday, November 24th at 10:00 in the Fire Department conference room on the third floor.

At that meeting we will discuss your ongoing status, a target date of return and whether there are any reasonable accommodations your physician may suggest that would allow you to perform the essential functions of your job in the near future even if on a modified duty basis.

We look forward to speaking with you on Monday, November 24th.” (Resp. 51)

151. On or about November 10, 2014, Attorney Ames (counsel in the instant appeal before the Commission) sent a letter to Select Board Chair Ken Goldstein stating: “This letter will confirm that I am representing Gerald Alston in all matters relating to his employment with the Town of Brookline. I look forward to meeting with you on Wednesday. (Resp. 52)

152. On November 12, 2014, First Assistant City Solicitor Patricia Correa wrote to Attorney Ames suggesting that the meeting with Chair Goldstein be rescheduled for a date after Attorney Ames has obtained an opinion from the State Ethics Commission about his representation of Firefighter Alston against the Town, given his prior involvement with Firefighter Alston’s issues on behalf of the Town (as a Town committee member).¹² (Resp. 53 at 2, 3, 9 (re: racial climate review))

153. After Firefighter Alston’s November 18, 2014 visit with Dr. Kahn, Nurse Payton communicated to HR Director DeBow and Chief Ford the following:

“I spoke with Dr. Kahn today who met with GA yesterday (11-19-14). Synopsis of this conversation:

1. GA ‘drew the line in the sand’ about NOT taking any medications.
2. GA maintains that he has been treated badly by the Town of Brookline.

¹² Attorney Ames served on the Town’s Human Relations/Youth Resources Commission from April 17, 2012 through June 11, 2014, at which time he resigned. At that time, he was serving as the Commission’s Chair.

3. GA focuses on his 'crusade' that he has been wronged.
4. GA states he wants to do his job and be left alone.
5. GA maintains that 'there is nothing wrong with me.'

Dr. Kahn states Dr. Brown has emailed the criteria that must be met for GA to return to work as a firefighter and Dr. Kahn will respond to Dr. Brown.

Dr. Kahn's opinion is:

1. GA is not suicidal or homicidal.
2. GA is not too depressed or angry to work at this time but he cannot predict the future. GA could return and 'keep his head down' or maybe not.
3. Dr. Kahn cannot say if GA could return to work as a firefighter successfully.
4. Dr. Kahn does not feel the GA will 'change' therefore he cannot predict the outcome of his return to work

Will evaluated (sic) him again in one month." (Resp. 54)

154. On November 24, 2014, Firefighter Alston and Attorney Ames appeared for the meeting with Chief Ford and HR Director DeBow accompanied by supporters. (Tr. Vol. 8 at 1432-33 (Ford)) Because Firefighter Alston and Attorney Ames insisted that the third parties also attend, the meeting did not take place. (Tr. Vol. 2 at 273-74 (Firefighter Alston); Tr. Vol. 6 at 955-56 (DeBow); Tr. Vol. 8 at 1433 (Ford)) Attorney Ames handed the Town officials a November 24, 2014 letter from Firefighter Alston to Select Board Chair Ken Goldstein stating that he (Firefighter Alston) was appealing certain matters under the Town's anti-discrimination policy, requesting an outside attorney to conduct a review, and requesting a racial climate review of the Fire Department. Firefighter Alston's letter also asked for paid leave. (Resp. 55; Resp. 158 at 7 (11/24/2014); Tr. Vol. 2 at 233-35, 268-69 (Firefighter Alston); Tr. Vol. 6 at 956 (DeBow); Tr. Vol. 8 at 1369-70, 1433-34 (Ford))
155. On November 25, 2014, Ms. DeBow sent a letter to Firefighter Alston that: a) faulted Firefighter Alston for not attending meetings "to discuss your return to work with or without reasonable accommodations; b) established a deadline of *December 4, 2014* for Firefighter

Alston to identify reasonable accommodations; and c) notified Firefighter Alston that he was required to attend a follow-up fitness for duty evaluation with Dr. Brown on *December 5, 2014*. (Resp. 56)

156. After Firefighter Alston informed the Town that he no longer trusted Dr. Brown¹³, the Town scheduled a re-evaluation of his fitness for duty with Dr. Marilyn Price for February 12, 2015. (Tr. Vol 1 at 156-157)

157. On December 19, 2014, Select Board Chair Ken Goldstein wrote to Firefighter Alston stating that the Town would retain an outside attorney in connection with certain of the items cited in Firefighter Alston's November 24, 2014 as the basis for a claimed appeal, and request the outside attorney to review the Town's processes with respect to the remainder of the items cited by Firefighter Alston that were not appealable under the policy. Mr. Goldstein agreed to a racial climate review of Town Departments. (Resp. 59)

158. In Mr. Goldstein's December 19, 2014 letter to Firefighter Alston, he writes in part:

"The Board of Selectmen acknowledged more than four years ago, and this Board acknowledges today, that unspeakable words were left on your voicemail that should never have been said. We acknowledge the deep hurt that those words caused you, and we acknowledge the wrongdoing of your supervisor. We are also informed that the supervisor who uttered those words to you and was formally disciplined for the incident offered his apology to you, and has since repeatedly expressed remorse and regret for his conduct." (Resp. 59)

159. On February 12, 2015, Firefighter Alston participated in the psychiatric reevaluation with Dr. Price. (Resp. 73 at 1; Tr. Vol. 4 at 635 (Stipulation))

¹³ According to Firefighter Alston, his concern was based in part that Dr. Brown did not disclose that he had once been a student of Dr. Kahn's.

160. On February 13, 2015, the Town restored Firefighter Alston to paid leave. (Resp. 71; Resp. 138 at 19; Tr. Vol. 1 at 155 (Firefighter Alston); Tr. Vol. 2 at 280-81, 292 (Firefighter Alston))

161. On March 24, 2015, Ms. DeBow sent Select Board member Nancy Daly an email stating:

“Nancy – I just want you to be aware, if you were not, that the Union voted to remove Gerald from the union when he did not pay the union dues. He is aware of this and expressed his discontent with Trahon. He is not happy with the union, which is very different from his fellow firefighters, and view his removal from the union and it’s protection as another reason that he cannot trust the Union. (And unfortunately for the union, I believe they did this after he came back on the payroll and was, in fact, a dues paying member.)

I think the firefighters have a lot of mixed feelings about this matter and the majority of them want to just move forward and put it behind them. You should take what the union says with a grain of salt, as they have put themselves in a very difficult situation when they removed Gerald from the union. And I know the president’s remarks are not always representative of the unions, or the memberships.

That said, we have a lot of work to do in preparing the workplace for his return, if it occurs.” (App. 77)

Dr. Price’s Evaluation and Report

162. Dr. Marilyn Price is board certified in psychiatry as well as forensic psychiatry. She is an assistant professor at Harvard Medical School where she is the associate director of the forensic training programs. Dr. Price has written published articles on various topics in forensic psychiatry. She was the corroborator to the American Academy of Psychiatry and Law Guidelines on disability and was the co-author of the section addressing fitness for duty of the police officers. Dr. Price has written numerous chapters on fitness for duty in various publications. (Tr. Vol. 9. at 1530-1532 (Price)).

163. Dr. Price has specific experience working with public safety employees (approximately 50) that have been diagnosed with adjustment disorder. (Tr. Vol. 9 at 1534 (Price)).

164. Dr. Price described “adjustment disorder” as follows:

“Adjustment disorder is a DSM-5 diagnosis in which a person has a psychological response to specific stressors, however the response is more severe or lasts longer than one would normally expect. And there can be symptoms such as anxiety, depression, you can have mood disorder, but, again, in contrast to depression this is seen as being a response to specific stressor.

....

In terms of bereavement, for example, it’s generally a six month period that one has serious stress. The issue is if there continue to be – there is the initial stressor and then there are continued to be again more and more stressors, the symptoms can persist and still be called an adjustment disorder because they’re in response to the --- another new or some other continued stressor that’s occurred.

(Tr. Vol. 9 at 1534-1535 (Price)).

165. Dr. Price has done “one or two” fitness for duty evaluations *per month* over the past approximately twenty (20) years. She had never worked for the Town of Brookline before being retained to conduct an evaluation of Firefighter Alston, for which she was compensated at a rate of \$450 per hour. (Tr. Vol. 9 at 1536-1537 (Price)).

166. Dr. Price, at the request of the Town, provided an opinion regarding three (3) questions:

1) whether Firefighter Alston was able to perform the essential functions of his job with or without a reasonable accommodation; 2) whether Firefighter Alston was now “able to control his behavioral outbursts at work”?; and 3) whether Firefighter Alston had “sufficient insight, the ability to regulate his emotions and the ability to exercise sound judgment on the job so that he will be able to function under the stress of responding to fire calls and medical emergencies, working side by side with other firefighters.” (Resp. 73 at 1-2; 40 and Tr. Vol 9 at 160 (Price)).

167. Dr. Price met with Firefighter Alston for approximately three (3) hours, reviewed all medical notes and other information, including those from BIDMC and prior evaluations

completed by Dr. Brown; spoke directly with Dr. Kahn and reviewed the duties and responsibilities of a Brookline firefighter. (Tr. Vol 9 at 1541-1543 (Price)).

168. Dr. Price was not provided with Mr. Pender's summary of the 2011 conversation between him and Firefighter Alston. (Tr. Vol. 9 at 1615 (Price))

169. Dr. Price was not provided with Mr. Pender's summary of the 2013 conversation between him and Firefighter Alston. (Tr. Vol. 9 at 1615 (Price))

170. I infer that Dr. Price was not provided with information regarding Mr. Pender's role as Training Captain during which he (Pender) gave "his version of events" to new recruits. (Inference, Tr. Vol. 9 (Price))

171. Dr. Price viewed her role as: "to say can he [Alston] go back and work and under what circumstances can he go back to work ..." (Tr. Vol. 9 at 1612 (Price)).

172. On March 19, 2015, Dr. Price sent HR Director DeBow her report. (Resp. 73; App. 99)

173. Dr. Price's report states in part that:

"Firefighter Alston did not have any history of psychiatric treatment prior to the 2010 incident other than some marital counseling years earlier. Hearing a racial slur from a Lieutenant he trusted, was especially troubling to Firefighter Alston because it called into question how he was really perceived by his fellow firefighters and raised concern about whether others would have his back in dangerous situations.

There is evidence that Firefighter Alston developed psychological symptoms in response to hearing the racial slur from his Lieutenant ..."

(Resp. 73 at 41-42)

174. Dr. Price identified the following four (4) stressors experienced by Firefighter Alston:

- 1) The May 2010 voice mail message from Mr. Pender;
- 2) Upon returning to work in September 2010, discovering that Mr. Pender had been promoted to Temporary Captain;

3) The reference to the Pender incident by a superior officer in November 2010 regarding a change in assignments;

4) Discovering the word “leave” under his jacket on the engine in December 2013. (Tr. Vol. 9 at 1598-1599 (Price)).

175. Dr. Price diagnosed Firefighter Alston with Adjustment Disorder. During her testimony, Dr. Price confirmed that she was making a diagnosis of adjustment disorder *as of February 2015* stating:

“... the reason was that over that time there was a lot of – there were a lot of issues that he [Alston] was having, should he go back, who should see him. He was having evaluations – Dr. Brown’s, I think the last one was in 2014. There was interaction about his going back with the town and as a result you have this incident in the end of 2013, but it’s perpetuated because there are legal issues, there are negotiations during the whole period that keep the stressor alive, essentially.” (Tr. Vol. 9 at 1597-1598 (Price)).

176. It weighed heavily on Dr. Price that Firefighter Alston, during the three (3) hour interview, stated that he wanted to come back to work stating:

“That played very heavily in terms of my recommendation. If he said he couldn’t come back then I would have looked at whether or not he was permanently unfit to come back and what would the – what would be the factors in that whether or not he could come back after it. That’s not what he said to me.” (Tr. Vol. 9 at 1622-1623 (Price)).

177. Dr. Price states in her report that:

“In my opinion Firefighter Alston would be able to return to work full time if a plan can be arranged with sufficient accommodations to reduce his stress and if Firefighter Alston commits to appropriate treatment.”
(Resp. 73. At 47)

178. Dr. Price identified three (3) conditions for Firefighter Alston’s return to work. (Resp. 73 at 47-59)

179. The first condition was that Firefighter Alston be in treatment with a psychiatrist (monthly) and therapist (weekly) starting at least one month prior to his return in order to have support in place, with compliance monitoring for at least one year and execution of a

release by him to permit monitoring. (Resp. 73 at 47-48; Tr. Vol. 6 at 965 (DeBow); Tr. Vol. 8 at 1476 (Ford); Tr. Vol. 9 at 1563, 1577, 1580, 1666-69 (Price)).

180. The second condition recommended by Dr. Price states, in its entirety:

“Recommendations for workplace accommodations:

During the interview, Firefighter Alston mentioned that there had been problems, especially when assigned to other fire stations. He was given the opportunity to recommend specific accommodations that would decrease the level of stress, such as avoiding contact with certain firefighters in addition to Captain Pender, or minimizing work at other stations or being assigned to work with a specific person whom he trusts. It would be helpful for Firefighter Alston to have a designated workplace monitor to whom he can bring concerns so that issues can be addressed.

Firefighter Alston has not cooperated with investigations regarding his allegations of continued discrimination. As a result he has not named those persons whom he believes have engaged in discriminatory conduct. If he had done so this would help in assigning him to a Station where he would be most likely to succeed.

It would be very difficult for Firefighter Alston, or any firefighter to work effectively and feel secure that he would be backed up in dangerous situations if he/she does not trust member of the team. Firefighter Alston would like the Town to take further steps to prevent any racial discrimination for all its employees and thus make the working environment safe. However, there would need to be a plan specifically tailored for Firefighter Alston so that he is not assigned to work with persons whom he perceives as acting previously in a discriminatory manner. Unless there can be accommodations so that Firefighter Alston feels safe in returning, then there would be a continued risk of Firefighter Alston displaying the types of behavior that led to this evaluation.

Unless the work environment can be modified so that Firefighter Alston’s level of stress is decreased, it is very unlikely that he would be able to work effectively and have the level of trust of his fellow firefighters that is required. Irritability and anger would interfere with his ability to respond effectively in dangerous situations.

If a less stressful work environment cannot be arranged with Firefighter Alston’s input, then it is likely that symptoms of the Adjustment Disorder would intensify and Firefighter Alston would be at greater risk of behavioral outbursts.” (Resp. 73 at 48-49)

181. The third condition was that Firefighter Alston undergo random drug screens for two (2) years calculated from his pre-return to work drug screen. (Resp. 73 at 49)

182. On March 25, 2015, Fire Chief Ford wrote to Firefighter Alston enclosing Dr. Price's report and notifying him of an April 2, 2015 meeting to discuss it. (Resp. 74; Tr. Vol. 2 at 290, 295, 347 (Firefighter Alston); Tr. Vol. 4 at 636 (Stipulation))

183. On April 2, 2015, Firefighter Alston and Attorney Ames appeared for the meeting with Chief Ford with two other individuals. Chief Ford's notes of that meeting state the following:

"At approximately 1:30PM Firefighter Gerald Alston arrived for our pre-arranged meeting. He had with him his attorney Brooks Ames [and two others]. I greeted them in the lobby area of my office. I asked Gerald if we could speak alone first. Mr. Ames was very cordial, but notified me that they were not really there to meet with me but rather to deliver a message. He acknowledged and appreciated my willingness to meet and discuss the findings of Dr. Price. However, he suggested that I had no authority to negotiate any of the stipulations in the report and therefore we would just be 'spinning our wheels'."

We spoke candidly about the findings in the report, which he described as basically more of the same (my words). He told me he had requested a meeting with all the people who had the authority to discuss this report and negotiate a resolution. He reiterated several times that while he wished I had the power to settle this, I don't, and therefore a meeting with me would not prove fruitful.

I asked him directly 'can I then assume that you've read the report, read the recommendations, and do not agree with or plan on fulfilling those stipulations?' He confirmed that was the case.

As they prepared to leave Gerald asked me if we could speak alone. We went into my office. Gerald told me in no uncertain terms he was not going to agree to drug testing and was not going to agree to therapy (though he said he was already seeing a therapist). He said to do either would be a lie, and he wasn't a liar. He related it to pleading guilty to a lesser charge, a crime you didn't commit, in order to get a reduced sentence. It would be a lie and he wasn't raised like that.

Gerald is very angry and doesn't understand why the Town wants him to go to anger management. He thinks the Town has done nothing in the way of resolving any part of this whole issue. He told me he never threatened anyone and the Town never investigated it. I explained the 'other side' to him. I explained that if he did do the testing he would prove to everyone that he wasn't on drugs. Nope! I told him there isn't a person who doesn't think he was subjected to an event that has triggered all of this. He said he was fine when he got on the job and he's fine now. I explained that everyone would agree he had an event that was

basically job related, it changed him and now he needs help dealing with it. Nope! Not being an expert, I would say the anger is blinding. He truly believes what he says.

I told them I would report back to the Town their desire to sit down with all those who had the decision making authority.” (Resp. 158 at 9-10)

184. No union representative attended this or any similar meeting regarding Firefighter Alston’s potential return to work. According to Chief Ford, there was a “strained relationship” between the union and Firefighter Alston. Chief Ford compared the lack of union involvement here with another firefighter who was in jeopardy of losing his job, stating: “ ... I had the union in my office saying what the heck can we do to save this guy’s job, they were willing participants in whatever it’s going to take, let’s not let him lose his job. I had zero interaction with the union as far as they being Gerald’s representative.” (Tr. Vol 8 at 1483-1484 (Ford)).

185. On April 10, 2015, Town Counsel Murphy wrote to Attorney Ames summarizing her understanding of the position asserted by Firefighter Alston and Attorney Ames at the April 2, 2015 meeting. (Resp. 76)

186. In May and June 2015, Town Counsel Murphy enlisted the assistance of Juan Cofield of the New England NAACP and Kim Gaddy of MAMLEO to serve as intermediaries between the Town and Attorney Ames and Firefighter Alston. (Tr. Vol. 8 at 1278-1330 (Cofield); Tr. Vol. 9 at 1736-37 (Murphy)) Mr. Cofield and Ms. Gaddy “ ... both felt that Mr. Alston had been wronged by the Town in the first initial [incident], and we talked about the town’s efforts to address the issue of Mr. Alston’s concern and we felt that the town had not taken sufficient steps to address Mr. Alston’s concerns.” (Tr. Vol. 8 at 1288 (Cofield)). I asked Mr. Cofield whether, as of 2015, he felt that the Town’s response to the initial voice mail message had been sufficient. He replied: “Well, they couldn’t undo the promotion of the

firefighter who was promoted who made the comment, they couldn't undo that, that had already happened. I thought that they were making concessions to address the other issues that Mr. Alston had stressed concern about. When I say they couldn't undo, in reality they couldn't demote him, for all practical purposes." (Tr. Vol. 8 at 1329-1330 (Cofield)).

187. Firefighter Alston told Mr. Cofield that he did not intend on complying with Dr. Price's conditions. (Vol. 8 at 1295-97 (Cofield)). Mr. Cofield felt impasse was reached when Firefighter Alston and Attorney Ames unreasonably insisted on negotiating directly with the Select Board. (Tr. Vol. 8 at 1298-1302, 1305-07, 1318-20 (Cofield))

188. On June 11, 2015, Attorney Ames filed a motion in Firefighter Alston's Norfolk Superior Court Chapter 151B case seeking relief from the Court's July 8, 2014 Final Judgment. (Resp. 79)

189. On June 24, 2015, Firefighter Alston wrote to Select Board Chair Neil Wishinsky. That letter stated in part:

"I am writing to request a one-on-one meeting with you in an effort to resolve the stalemate that has occurred between me and the Town. Right now the Town is asking me to comply with a number of conditions in order to return to work, but the Town is not agreeing to make changes that will make the fire house safe for me and for all Brookline firefighters.

This is not about my not wanting to comply with reasonable conditions. I have always been willing to play by the rules, and I will comply with the rules if I am allowed to return to work. But it is absolutely necessary for me to know that the rules apply to everyone and protect everyone. You cannot promote my supervisor, Paul Pender, after he leaves a voice mail for me saying 'fucking [n-word]' and then tell me the Town has a 'zero tolerance' policy for racism. You cannot expect me to believe that Paul Pender or anyone else has learned a lesson about zero tolerance. Paul Pender approached me years after the incident and told me that I had a vendetta against him and that I should have sued 'Jay Z' for using the n-word. He refused to shake my hand.

This is about my life. I have to know that my fellow firefighters will have my back in a fire. The last time I was in the fire house one of my fellow firefighters left a message on my door that said 'Leave'. He did not have the courage to say it to my face. I do not know who that firefighter is but I am being asked to put my life in his hands. Do you think that is fair?

My lack of trust in the work environment will not be changed by therapy, treatment or monitoring. It is not being caused by something in my head but by real incidents like having 'Leave' written on my door. The way that incident was handled give me no confidence that I will be fairly treated by the human resources department and the office of town counsel if another incident comes up.

...

...

The report written by human resources claims that the message 'Leave' on my door could have been written by someone from the MIT fraternity across the street. Please think about whether that sounds reasonable to you and think about why human resources would write something so ridiculous.

I love being a firefighter and I want to return to work. I only ask that I be treated fairly and you give me an opportunity to be heard.”

(Resp. 80)

190. On July 10, 2015, the Norfolk Superior Court denied Firefighter Alston's relief from judgment in his Chapter 151B case. (Resp. 84)

191. Sometime in July 2015, Firefighter Alston stopped by and spoke one-on-one with Chief Ford. A few weeks later, on August 7, 2015, Chief Ford memorialized that conversation in an email to Firefighter Alston as follows:

“Gerald,

Thank you for stopping by a few weeks ago, it's always good when we get the chance to talk. I wanted to reiterate some our conversation and please let me know if I understood you correctly.

We discussed the requirements placed upon you, by the Town, in order for you to return to work. We discussed each of the items, and as I remember, we came to a mutual understanding on each item.

- While you thought the length of time you would be required to undergo drug testing was excessive, you agreed to do it. You mentioned that you had nothing to hide and when we discussed the length of time as compared to other situations you seemed to be understanding and willing to do it.

The other two items that the Town has imposed (all of which are on the advice of Dr. Price and others) is that you see a psychologist weekly and a psychiatrist monthly. You told me you felt this was unnecessary as you were already seeing someone. I asked you if you would be willing to agree to the terms if the person you are now seeing was Board certified and acceptable to the Town and you could stay with him. You stated that you hadn't seen him in 30 days and I mentioned that you would, in all likelihood, be required to see him more often, especially in the beginning, and later less frequently if that is what he determines. Of course the Town would need to be privy to the information from him, not so much of exactly what was going on but rather that you were complying with his recommendations. You seemed more than willing to do this. Could you also provide me with the name of the gentleman you are seeing?

- On the Town's side, the racial climate review must be, and is being started. I know the Town has engaged an independent organization to get this going. Whatever recommendations come out of the review will be implemented.
- On my end, I tried to get Ron Marlow involved in some department-wide training that would focus on both standard refresher training of appropriate behavior in the workplace and also spend time on your re-entry into the stations and what behavior is acceptable and what behavior will not be tolerated. While Ron was not able to do it himself, he did provide me with some recommendations and I am in discussions with several of them at this time. The training will be accomplished.

Please let me know if you agree with this, and if so, I will present this to the Town in order to get you returned to work ASAP, where I know you want to be.

I look forward to speaking with you again. Stop by my office the next time you're at headquarters.

Paul D. Ford
Fire Chief
Brookline, MA" (Resp. 85)

192. On September 4, 2015, Chief Ford again emailed Firefighter Alston asking him about his treatment provider. (Resp. 86; Tr. Vol. 4 at 641-42 (Stipulation)) Firefighter Alston responded by emailing Chief Ford with a blank email that attached the CV of Dr. Cynthia Carter. (Resp. 87; Tr. Vol. 4 at 447 (Carter); Tr. Vol. 4 at 641-42 (Stipulation); Tr. Vol 8 at 1456-57 (Ford))

193. On September 30, 2015, COO Ward emailed the link to the Town's racial climate review to all Fire Department personnel. Firefighter Alston forwarded the email to Attorney Ames on October 2, 2015 but did not participate in the survey. (Resp. 129; Tr. Vol. 2 at 307-09, 315 (Firefighter Alston))
194. In mid-November, the Town's racial climate review consultant provided a summary of the results, which Attorney Ames obtained. (Resp. 88; Tr. Vol. 2 at 234, 306 (Firefighter Alston); Tr. Vol. 8 at 1458-59 (Ford))
195. On December 1, 2015, Firefighter Alston filed a complaint in the United States District Court alleging discrimination and retaliation by the Town. (Resp. 89; Tr. Vol. 9 at 1745 (Murphy))
196. Also on December, 1, 2015, Firefighter Joseph Canney wrote an email to Ms. Debow stating in part:
- “As for the matter of Mr. Alston when will this matter be resolved. Despite the fact that Mr. Alston threatened to shoot his co-workers he continued to be payed (sic) for longer than most can even remember.” (App. 80)
197. In December 2015, an outside trainer conducted refresher anti-discrimination training for the Fire Department that was developed on a custom basis at Chief Ford's request to specifically address Firefighter Alston's concerns and requests. (Tr. Vol. 8 at 1455, 1461-62 (Ford); App. 5 at 164, 168-70, 172; Resp. 96)
198. On January 8, 2016, Town Counsel Murphy wrote to Attorney Ames asking him to provide her with the psychiatric opinion finding Firefighter Alston fit for duty that he referenced in Firefighter Alston's federal court complaint. (Resp. 90) Attorney Ames did not respond. (Tr. Vol. 9 at 1745-46 (Murphy))

199. On February 5, 2016, Town Counsel Murphy wrote to Attorney Ames. The letter makes no reference to the communication between Chief Ford and Firefighter Alston in July /

August 2015. Rather, the letter states in part:

“In her March 2015 report ... Dr. Price established certain conditions for Mr. Alston’s return to work, which the Fire Chief sent to him on March 25, 2015. Thereafter, I wrote to you on April 10, June 29 and July 3, 2015, seeking to move forward with Mr. Alston’s return to work in light of these conditions. In view of this, and in particular the amount of time Mr. Alston has been on paid administrative leave without any reported progress or further communications from you, the Town is now anticipating his return to work as a Brookline Firefighter on March 7, 2016”.

(Resp. 91)

200. In the letter, Town Counsel Murphy states that Firefighter Alston and/or his counsel must take the following steps:

1. Identify and execute a release from Firefighter Alston’s treating psychiatrist by February 10, 2016;
2. By February 10, 2016, provide Town Counsel with an acceptable date for Firefighter Alston to meet with Chief Ford “to discuss reasonable accommodations”;
3. Attend a “pre-return toxic drug screen” at New England Baptist Hospital at 8:00 A.M. on February 10th.

(Resp. 91)

201. Firefighter Alston did not appear for the February 10, 2016 drug test. (Tr. Vol. 4 at 647 (Stipulation))

202. On February 16, 2016, the Town’s Board of Selectmen met in Executive Session. The minutes from this meeting state:

“Attorney Murphy requested authorization to terminate Gerald Alston’s leave pay. He has been placed on administrative leave for over a year, and some conditional requirements were to be met for a return to work status. Some of the conditions were prompted by Dr. Price’s

report that he was unfit for duty. The Town gave him a timeline to complete the obligations and to date he has not done any of them.

Attorney Murphy gave a brief update of the case and provided a memo in support of partial motion to dismiss amended complaint.

The board discussed how long Mr. Alston has been on paid leave. Chief Ford gave a brief status of his leave and sick time.

On motion it was,

Vote 4-0 termination of Administrative Leave for Gerald Alston effective February 17, 2016 (8:00 A.M.)

Roll Call:

Aye: Wishinsky

Fanco

Heller

Greene

Absent: Daly”

(App. 5, Attachment 19)

203. On February 17, 2016, Town Counsel Murphy wrote to Attorney Ames notifying him that Firefighter Alston’s paid leave was terminated due to Firefighter Alston’s non-compliance with the return-to-work process. The Town subsequently allowed Firefighter Alston’s request to be placed on sick leave. (Resp. 92; Resp. 94; Resp. 138 at 39)

204. On February 23, 2016, Attorney Ames and Firefighter Alston addressed the Select Board during the public comment portion of the hearing. Firefighter Alston told the Board that his health was deteriorating, he could not afford his medication for diabetes and thyroid cancer and, referring to the racial slur by Mr. Pender, said: “I just need him to know what he did was wrong, and now it appears that anyone can say what they want and get promoted ...” (Resp. 93)

205. On or about March 15, 2016, HR Director DeBow wrote to Select Board Chair Wishinsky and Town Administrator Melvin Kleckner enclosing proposed amendments to the Town's anti-discrimination policy as recommended by Juan Concepcion in his March 2015 report. (Resp. 95)
206. On March 15, 2016, Chief Ford wrote to Firefighter Alston notifying him that the racial climate review was completed in December 2015 and that an outside trainer provided MCAD refresher training to the Fire Department. (Resp. 96; Tr. Vol. 2 at 318-19 (Firefighter Alston))
207. On March 22, 2016, Firefighter Alston telephoned Chief Ford distraught, stating that the Town had done nothing to return him to a safe working environment and that he wanted to meet with the Select Board. (Resp. 158 at 11 (3/22/2016); Tr. Vol. 2 at 319 (Firefighter Alston); Tr. Vol. 8 at 1369-70, 1460-61 (Ford))
208. On March 24, 2016, April 15, 2016, and April 26, 2016, First Assistant Town Counsel Correa wrote to Attorney Ames informing him that the Town had retained Charles Walker, former MCAD Chair, to hear Firefighter Alston's appeal issues raised in his November 24, 2014 and January 6, 2015 letters, and that the Select Board would personally hear these matters after receiving Mr. Walker's reports. (Resp. 97; Resp. 98; Resp. 100) Attorney Ames wrote to the Select Board on April 25, 2016 and April 29, 2016 calling Mr. Walker's participation a "kangaroo court" and stating that Firefighter Alston would not participate. (Resp. 99; Resp. 100; Resp. 101; Tr. Vol. 2 at 320-21 (Firefighter Alston); Tr. Vol. 4 at 649-50 (Stipulation); Tr. Vol. 10 at 1955 (Wishinsky))
209. On May 5, 2016, Town Counsel Murphy emailed Attorney Ames stating that, under Fire Department rules, the Town could not accommodate Firefighter Alston's request to work in

an outside job while he was on sick leave, but offered that Chief Ford was available to discuss reasonable accommodations and asked for Firefighter Alston's availability between May 9 and May 13. (Resp. 102; Resp. 139 at 6 (Ch. 5, S. 3); Tr. Vol. 1 at 163-64 (Firefighter Alston); Tr. Vol. 6 at 996-97 (DeBow)) Attorney Ames did not respond. (Tr. Vol. 9 at 1750 (Murphy))

210. On May 11, 2016, Fire Chief Ford wrote to Firefighter Alston asking him to meet on May 18, 2016 at 10 a.m. (Resp. 103) Firefighter Alston did not appear. (Resp. 158 at 12 (5/18/2016); Tr. Vol. 2 at 323 (Firefighter Alston); Tr. Vol. 8 at 1369-70 (Ford))

211. On May 19, 2016, Fire Chief Ford telephoned Firefighter Alston and left a voice mail message asking Firefighter Alston to call him back. Firefighter Alston did not respond. (Resp. 158 at 12 (5/18/2016); Tr. Vol. 8 at 1369-70 (Ford))

212. Fire Chief Ford retired effective May 20, 2016. (Tr. Vol. 8 at 1465 (Ford))

213. On May 25, 2016, Acting Fire Chief Robert Ward wrote to Firefighter Alston notifying him of a meeting on June 1, 2016 at 10 a.m. (Resp. 104; Tr. Vol. 4 at 650 (Stipulation)) Firefighter Alston did not appear. (Tr. Vol. 4 at 651 (Stipulation))

214. Also on May 25, 2016, the Town notified Firefighter Alston that he had exhausted his accrued leave and that he was no longer being paid by the Town. (Resp. 105)

215. Firefighter Alston met with Acting Chief Ward on June 9, 2016. Chief Ward's notes from that meeting state:

"Gerald arrived on time, he was pleasant with his greetings, we spoke for a little over 20 minutes.

He mentioned that his attorney had just called him and said his Dr. report came back and that his attorney would call him again after he read it. I believe he said psychologist.

I told him that I could not give him permission to work on the side and he asked ‘because the town considers me sick’ and I said yes.

I asked Gerald if he wanted to return to work in a modified duty position, he said yes and asked what he had to do – I told him I would have to speak to town counsel about what exactly was needed but that that at the least he would have to be cleared (sic) by a medical professional like everyone else that comes back on modified duty.

He told me he had to see his surgeon that took the ‘cancer out’ to fix the scar that was left, I asked him if he ever checked into a cancer disability. He said he started to but wanted to come back to work as a firefighter., he said he would speak to his attorney and get back to me real soon about modified duty.

He then said he likes being a firefighter but that he recently talked to Church (retired f.f.) and that Church told him to look into all the injuries and stress he has had on the job and think about disability.

I told Gerald that he could file for stress, he then told me he had high blood pressure also.

I told him to check with his doctor and see if between the stress and blood pressure if his Dr. thought he would qualify for a job related disability.

He said he would, I told him I could help him with that but if he felt more comfortable he could call Chief Riley – Gerald said he trusts me and that he has known Chet since he was a teenager and thinks Chet is a good guy.

We shook hands and Gerald again said he would get back to me as soon as he could.” (App. 81)

216. On June 14, 2016, Town Counsel Murphy emailed Attorney Ames asking Attorney Ames to provide to the Town’s occupational health nurse the psychiatric evaluation report Firefighter Alston had mentioned to Acting Chief Ward and a signed copy of a release she attached to her email. (Resp. 106) Attorney Ames did not respond. (Tr. Vol. 9 at 1751-52 (Murphy))

217. On June 16, 2016, Acting Captain Ward wrote to the Select Board and Town Administrator informing them that he was recommending the promotion of Mr. Pender to Temporary Deputy Fire Chief. He wrote in part that:

“In making this recommendation, I note that Captain Pender was disciplined for an off duty incident that occurred in 2010 ... This incident has been the subject of significant public debate and is in litigation. Following this incident, then Lieutenant Pender willingly fulfilled all of the obligations outlined in the agreement. In addition to willingly participating in diversity training and mediation with Firefighter Alston he openly apologized to him and has expressed and continue to express remorsefulness for what has occurred. For those reasons and his good work record following the incident, he was promoted to Captain in 2013 by the Board of Selectmen with the then Fire Chief and Human Resources Director’s recommendation.” (Resp. 123)

218. On June 21, 2016, the Town’s Board of Selectmen met in Executive Session with Mr. Pender to discuss his potential promotion. Captain Pender read a written statement to the Board which began by apologizing to the Board “for any repercussions, you as a board, have faced because of me.” Mr. Pender told the Board that he had “apologized countless times for my action that day” and reviewed his compliance with the agreement at the time which included a suspension, diversity training and mediation.” Mr. Pender then told the Board that:

“ ... it seemed like we resolved the incident and it was behind us. I don’t know what happened back then between Mr. Alston and the Town, but apparently he felt slighted somehow. His course of action, which gets the most attention, is to drag me into it all over again. He and his attorney, Mr. Ames, are using the same tactic to this day. I can’t believe it’s six years later. I am deeply sorry that something I said in frustration and quite likely in the aftermath of a PTSD diagnosis after a serious fire in 2008, gave someone that type of ammunition to sully the Towns, my own and my families’ reputations.” (App. 10, Attachment 17 at p. 4)

219. Mr. Pender’s statement goes on to talk about what he believes had been unfair, intrusive media coverage of him and his family. He then stated:

“I have addressed this issue with many of the firefighters over the last 6 years. I addressed the issue with all new recruits I was training. Surprisingly, the conversations weren’t as uncomfortable as you may think. The overwhelming sentiment is that this should have been settled with an apology and handshake.” (App. 10, Attachment 17 at p. 5)

220. Mr. Pender went on to detail what happened on May 30, 2010 when he left the racist comment on Firefighter Alston's voicemail, stating "I have told the truth since Day 1. My story has not changed or evolved, as has theirs." He then stated that over 100 fellow firefighters in Brookline had signed a petition supporting his promotion. In closing, he told the Board:

"I would like to say that I feel I deserve this job, that I've earned it. I have certainly been punished enough. I have been a loyal soldier for this town for almost 32 years. I have maintained silence for the past 6 years through some very difficult personal attacks, as the town requested of me. If you vote against this, you will be voting for Brooks Ames and his untruthful agenda. You will in fact validate the lies he has told about me and the Town. I ask you, beg you, to do the right thing. Thank you."
(App. 10, Attachment 17 at p. 6)

221. The minutes of the June 21, 2016 Executive Session minutes state in part:

"Selectman Greene asked Captain Pender to review what he has learned from this incident and how he would react should it happen again within the Fire Department in the future.

Captain Pender explained how the department has evolved and there is no place for discrimination at all, and there have been no incidents. Should an incident occur, he would follow policy and if required charges brought up for conduct unbecoming.

Selectman Greene asked about his experience in this position in responding to racist, sexist comments.

Captain Pender responded that the department is a big happy family going in the same direction, he does not witness comments like that.

Selectman Greene asked why he believes he deserves this promotion.

Captain Pender replied that he will let his colleagues address that [at] public comment session in open session.

Selectman Greene noted that the replies are vague and non-specific, and asked for specific details on what Captain Pender has done in the past 5 years to address his actions.

Captain Pender responded since he was promoted to Captain, he has had the opportunity to train this young group of guys from all ethnic backgrounds, and has become a more open person, because in training you deal closely with everyone. He has also attended diversity and mediation sessions.

Selectman Heller added that this journey needs to continue to evolve, noting that Captain Pender took the punishment and has taken important steps forward.”
(App. 10, Attachment 17 at 1-2).

222. On June 23, 2016, Select Board Chair Wishinsky forwarded an email to other members of the Board with a link to an article in the local paper titled: “Brookline Firefighters Stand Up for Paul Pender.” Select Board member Greene sent a reply email to Chair Wishinsky stating:

“Neil:

The article says ‘the Selectmen chose to hold a vote?’ When was that?

My position remains that no vote is necessary. Chief Ward has the authority to promote Pender temporarily. He informed us of his decision to do so and provided a reasonable explanation of why he believes it is in the department’s best interest to promote Pender. We appropriately did our due diligence and, in my opinion, did not uncover anything that would justify our countermanding Ward’s recommendation. There is nothing left to do but let Chief Ward do his job. For the Selectmen to vote (whether yes or no) is an intrusion into his area of responsibility and politicizing an administrative decision.

Some staff seem to think that the Selectmen should draw the political heat from Ward and take a public vote to support his recommendation, thereby putting the bulls-eye on our backs. Chief Ward will not draw political heat, so what’s the point?

The Selectmen will take the heat from whatever we do so there is no point deviating from the normal procedure. We should respect Chief Ward’s authority in this matter. If it’s on the agenda, I will abstain and present my objection.

Bernard.”

(App. 10, Attachment 18 at 1-2)

223. Chair Wishinsky forwarded Mr. Greene’s email to the Town Administrator with the following message:

“fyi. I spoke with him and emphasized that we need to have a public discussion and he agreed. His point is that Chief Ward’s recommendation (sic) we are reacting to and if Chief Ward thinks he is going to escape the fallout, he is mistaken. This is Chief Ward’s decision and he needs to take ownership.

We may need to thread the needle with a vote as I suspect at least 1 Selectman will want to be on record against it. The vote may need to be something like voting not to overturn Chief Ward's recommendation or something like that. Obviously, more to come.

Would be helpful to get that summary of actions Mr. Pender has taken and been subjected to as a result of the incident.”

(App. 10, Attachment 18 at 1)

224. During the public comment portion of the Select Board's June 21, 2016 meeting, several current and former Town firefighters spoke in favor of Mr. Pender's promotion to Temporary Deputy Fire Chief. Each spoke passionately about Mr. Pender's character, work ethic and heroism, including the firefighter whose life Mr. Pender helped save in 2008. The speakers also spoke about the “narrative fabricated” against Mr. Pender and the Town and the “agenda” against the Town and Mr. Pender. Deputy Chief Corbett stated that “we should have all moved on” and lamented the “smear campaign” being orchestrated by “a few people with a separate agenda.” A retired firefighter recounted his activism in the civil rights movement, but said that Brookline was “not the place” for these battles. At the end of the public comment period Chair Wishinsky stated that no vote would be taken on Mr. Pender's promotion that night. (Resp. 108)

225. On July 12, 2016, the Select Board met in public session. During the public comment period, a few citizens spoke against the promotion of Paul Pender to Temporary Deputy Fire Chief. One of those citizens read a “letter to the editor” of a local newspaper sent by Firefighter Alston opposing Mr. Pender's promotion. The letter stated in part:

“ ... My life has been ruined and my family has split because of Brookline's refusal to deal honestly with racism and reprisals against me for reporting it. My health is deteriorating.

....

I needed Paul Pender to understand what he did was wrong. And I needed the punishment to be severe enough the next person would think twice before they did something racist.

(App. 95)

226. Later at the July 12, 2016 public meeting, under the agenda item “Temporary Fire Promotion Process”, Chief Ward stated in part:

“The collective bargaining agreement between the Town and the Brookline Fire union mandates that vacancies be filled once the Department is aware that a vacancy will last for more than 30 days. It is the Department’s longstanding practice to make temporary promotions by offering the top candidate on the civil service list. It is my intent to follow this process when making these temporary promotions. Please be assured that any future permanent promotions will follow a formal civil service process and be approved by the Board of Selectmen.

The following individuals will be appointed temporarily.

To Deputy Chief – Captain Paul Pender
To Captain – Lieutenant Todd Cantor
To Lieutenant – Firefighter Joseph Canney

Unless I am advised differently by the Board, I intend to make these temporary promotions effective July 18, 2016. “ (App. 95)

227. In response, Chair Wishinsky stated in part that he was “willing to let the process continue” and that: “ ... my concern is when someone has done everything that was asked of them to do, how long do we continue to punish them, especially given leadership quality and public statements of his colleagues.” (App. 95)¹⁴

228. Select Board member Daly stated in part: “ ... We have heard from almost every minority of the department with the exception of Gerald Alston either through a petition or spoken before us, and they all indicated that they have not found Captain Pender to be a

¹⁴ All of the quotes from this public meeting come from the official minutes of the meeting.

racist, and in fact has gone out of his way to help many minorities in training, and he reached out and apologized for the statements he has made.” (App. 95)

229. Select Board member Franco appeared to suggest that while the punishment against Mr. Pender in 2010 was not severe enough, “... Brookline needs to move on and cease debating past rights and wrongs. A better future is not possible if we remain trapped in conversations about perceived past misdeeds or mistakes ...” (App. 95)

230. Selectman Greene stated in part that: “... The unforgiving view prevalent in this Town that we should have ‘zero tolerance’ for any use of the N word, or any of the other words that have vile and hurtful histories and usages, would not be good policy where that use is a one-time and isolated act. Such an act warrants discipline, but the use of racist slur six years ago, without more, cannot be justification to permanently preclude someone from the benefits of employment he would otherwise be entitled to receive.” Selectman Greene also noted that Mr. Pender: “... after having made this grievous mistake, did come around and begin to repair the damage he caused and sought to become a better human being.” (App. 95)

231. The Board took no vote and the promotions became effective July 18, 2016. (App. 95; Tr. Vol. 5 at 724, 762 (Pender); Vol. 10 at 1991-92 (Wishinsky))

232. On July 21, 2016, Ms. DeBow penned a letter to Firefighter Alston “regarding your ability to perform outside work” stating in part: “... given your representation that you have some work capacity, we have a scheduled a return to work evaluation at New England Baptist Occupational Health ...” The letter went on to state: “This evaluation will include a physical examination and a toxic screen. I am also working with Dr. Marilyn Price’s office to schedule a return to duty examination. Once the medical evaluation, drug screen and psychological evaluation are complete we can work with you to determine which modified

duty, if any, may be appropriate for you ... Please report to New England Baptist ... on Tuesday August 2, 2016 at 11:00 A.M. for your medical evaluation and toxic screen.” (Resp. 109)

233. Firefighter Alston did not appear at the New England Baptist Hospital on August 2, 2016 for the evaluation and drug test. (Tr. Vol. 2 at 261, 326 (Firefighter Alston); Tr. Vol. 4 at 653 (Stipulation))

234. On August 17, 2016, Town Administrator Melvin Kleckner wrote to Firefighter Alston notifying him of contemplated discharge and the reasons therefor and of a hearing before an outside hearing officer scheduled for August 30, 2016. The letter stated in part:

“Our last medical / psychological evaluation of March 2015 indicated that you are unable to perform the essential functions of your job as a Brookline firefighter, unless certain conditions were met. Unfortunately, to date you have not provided any medical documentation that indicates you have complied with these conditions or may have some work capacity. (Resp. 111)

235. On August 30, 2016, an outside Hearing Officer conducted a pre-termination hearing. Firefighter Alston submitted a written statement that Attorney Ames read into the record. (Resp. 112 at 5, 11-12, 136 (tr. at 92-93); Tr. Vol. 2 at 328-29 (Stipulation))

236. Town Administrator Kleckner wrote to Firefighter Alston on September 30, 2016, enclosing the hearing officer’s report and attachments and notifying him that the Board of Selectmen would take up the question of his termination on October 5, 2016. The enclosed report from the hearing officer found just cause for termination based on Dr. Price’s opinion regarding Firefighter Alston’s non-fitness for duty unless certain conditions were met, which, according to the Town and the hearing officer, Firefighter Alston did not meet. (Resp. 112)

237. On October 5, 2016, the Select Board held a hearing concerning the question of Firefighter Alston's termination. The Board voted to terminate Firefighter Alston based on the hearing officer's report and recommendations. (Resp. 114)

238. That same day, the Town issued a press release outlining their position on why Firefighter Alston was terminated. In response to an online newspaper article published that day, the Town's in-house legal counsel penned the following email to the reporter:

"I have read your article concerning Firefighter Gerald Alston and see that it includes none of the important facts that we outlined in the press release you were given. In particular, the article make no reference to Mr. Alston's threatening behavior at work or his cocaine use, both of which are incompatible with employment as a public safety employee. Nor does the article report any of the facts of what the town has done and tried to do over the last almost three years to work with Mr. Alston to return to work. The decision to omit this information is unfair to the town and does not paint an accurate picture. Will you be including these points when you update the story? If not, I need to speak to you or your editor as soon as possible. Regards, Joslin Murphy."

The reporter responded three (3) hours later with the following:

"We have expanded the story this afternoon and emphasizes the town's position he was fired for just cause and the reasons behind that position. I have also passed along your note to my editor [] so she is aware of your concerns."

(App. 6, Attachment 14)

Town's Argument

The Town argues that there was just cause for terminating the employment of Firefighter Alston after Firefighter Alston failed to demonstrate his fitness for duty by failing to comply with return-to-work conditions established by Dr. Price that would permit his safe return to work. The Town argues that Firefighter Alston "steadfastly refused" to comply with the conditions, including the required drug testing, notwithstanding his admitted use of cocaine.

The Town argues that the Commission lacks jurisdiction to rule on whether the work environment was discriminatory or retaliatory, but, rather, can only rule on whether there was

just cause for the termination. In addition, the Town argues that any claims of discrimination or retaliation pre-dating July 8, 2014 are precluded by the Norfolk Superior Court judgment on Firefighter Alston's discrimination and retaliation claims and that and that his discrimination and retaliation claims more generally, are barred by the Chapter 151B doctrines of the exclusivity of remedies, statutes of limitations, and administrative exhaustion.

Finally, the Town argues that, even if the Commission had such jurisdiction, all of its steps were focused on returning Mr. Alston to work by ensuring that he complied with sound return-to-work conditions established by psychiatrists, and that there is no evidence that the Town's implementation of such conditions were discriminatory or retaliatory.

Firefighter Alston's Argument

Firefighter Alston makes multiple arguments regarding why the Town did not have just cause for terminating his position. He argues that the Town terminated him for declining to prove his ability to return to and endure an unlawful, racially hostile environment. Therefore, according to Firefighter Alston, the Town acted in bad faith, without just cause and in violation of basic merit principles in terminating him.

Firefighter Alston argues that the Town failed to meet their obligation to ensure a safe working environment for his return and actually made it worse. Firefighter Alston cites several examples of the Town's action and inaction in this regard including, but not limited to, failing to act on his complaint in a timely manner, failing to sufficiently discipline Mr. Pender and promoting him multiple times.

Firefighter Alston then argues that he has not been found unfit for duty, but that no treatment or accommodation would have permitted him to return safely to work because the stress of racial hostility had left him unable to trust his fellow firefighters in life-threatening situations.

Alternatively, Firefighter Alston argues that the return to work conditions were either too vague or unreasonable for him to be found in non-compliance of the conditions. He argues that the Town was not justified in requiring random drug testing and that the Town itself failed to comply with the return-to-work conditions.

Firefighter Alston asks the Commission to conclude that no treatment or accommodation would have permitted him to return safely to work because the stress of racial hostility had left him unable to trust his fellow firefighters.

Finally, Firefighter Alston asks the Commission to order his reinstatement to his civil service position without loss of pay or benefits, retroactive to his termination date of October 5, 2016 and for him to be placed on paid administrative leave “until further notice from the Commission.

Civil Service Law / Just Cause Standard

The Civil Service Commission is charged with ensuring that employment decisions are made consistent with basic merit principles. Basic merit principles requires, among other things:

“... retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected”; and ... assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens” and; “assuring that all employees are protected ... from arbitrary and capricious actions.” G.L. c. 31, § 1. (emphasis added)

G.L. c. 31, § 41 states in part:

“Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days ...”

G.L. c. 31, § 43 states in part:

“If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission ...”

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.” (emphasis added)

To determine whether “just cause” existed to terminate Firefighter Alston, the Commission:

“ ... must focus on the fundamental purpose of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions ... and to protect efficient public employees from political control. When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the Commission ...” Boston Police Dept. v. Collins & another, 48 Mass.App.Ct. 408 (2000), citing Cambridge v. Civ. Serv. Comm., 43 Mass.App.Ct. 300, 304 (1997) (citations omitted). (emphasis added)

Jurisdiction

As a preliminary matter, the state’s anti-discrimination law does not preclude the Civil Service Commission from determining whether there was just cause to terminate Firefighter Alston from his permanent, tenured civil service position as a Brookline Firefighter. As stated above, the Legislature explicitly charged the Commission with ensuring adherence to basic merit principles, which includes assuring fair treatment of public employees in all aspects of personnel administration without regard to various factors, including race. The Court has also stated unequivocally that intervention by the Commission is warranted when objectives unrelated to merit standards (i.e. – race) result in an employee’s termination.

It is not necessary to conclude whether the Town violated the state’s anti-discrimination law to decide this appeal and I have not attempted to do so here. The Commission is not mandated to

function as an alternative to MCAD or the Court as an adjudicator of the rights of those who have experienced discrimination or retaliation in violation of their civil rights or other laws. However, when a civil service appointing authority commits acts which are fundamentally unfair and fall within the penumbra of the prohibited conduct of those laws, it is appropriate for the Commission to take notice of that misconduct in order to fulfil the statutory mandate to assure “fair treatment” of civil service employees, free from “arbitrary and capricious” acts, “without regard” for an employee’s “race” or other protected status, and “with proper regard” for civil service law and an employee’s “constitutional rights, as citizens.” G.L. c. 31, § 1. It is with this framework in mind that I turn to the merits of Mr. Alston’s appeal.

Just Cause Analysis

This case began with the ugly racial epithet, “fucking [n-word]” being spoken by a white fire lieutenant in the Brookline Fire Department, which ended up on the on the voice mail of his employee, Gerald Alston. Town officials have repeatedly noted that the vile comment was not meant for Firefighter Alston. To the extent that it matters, Mr. Pender acknowledges that the comment *was* made in reference to a motorist who Mr. Pender believes was black or Hispanic. As referenced by Dr. Price, the fact that Mr. Pender would make this racist comment made Firefighter Alston question how he was really perceived by his supervisor, who Firefighter Alston considered a mentor. Also, to the extent that it is relevant, no evidence was presented to support Mr. Pender’s repeated assertions that making the racist comment could be attributed to PTSD.

Prior Civil Service Commission decisions have stated unequivocally that racist behavior by a public employee is grounds for termination, stating in Duquette v. Department of Correction, 19 MCSR 337, 341 (2006): “One would have hoped that this century’s workplace had been purged

of such offenses ... There is no place for such behavior in the workplace and there is no place for [Mr. Duquette] – or others that would engage in such behavior at the Department of Correction.” When the Appellant in that appeal argued that employees who engaged in similar behavior were not terminated in the past, the Commission stated that it would not “ ... use those cases as a guide (or moral compass) to lower the bar on what is considered appropriate discipline against individuals who use racist statements ...” Duquette at 340.

In Green v. Harvard Vanguard Medical Associates, Inc., 79 Mass.App.Ct. 1 (2011), the Appeals Court, describing the word “[n-word]” as a “ ... racial epithet that is widely regarded as the most hateful and offensive in our culture”, concluded that “ ... as a matter of law, a supervisor’s use of an offensive and racial epithet in a single, brief conversation was sufficiently severe or pervasive to give rise to a claim of a racially hostile work environment ...” See also, Augis Corp. v. MCAD, 75 Mass.App.Ct. 398, rev. den., 455 Mass. 1105 (2009);and Thomas O’Connor Constructors, Inc. v. MCAD, 72 Mass.App.Ct. 459 (2008).

After reviewing all of the evidence, including the testimony of Firefighter Alston, I have concluded that Mr. Pender’s use of the racial epithet “fucking [n-word]”, coupled with subsequent actions and inactions by Town officials at all levels, which compounded the racist comment into an avalanche of unfair, arbitrary, capricious and retaliatory behavior that infringed on Firefighter Alston’s civil service rights, made it impossible for him to perform his job as a Brookline firefighter.

I credit those portions of Dr. Price’s report in which she concluded that “ ... hearing a racial slur from a Lieutenant he trusted was especially troubling to Firefighter Alston because it called into question how he was really perceived by his fellow firefighters and raised concern about whether others would have his back in dangerous situations. There is evidence that Firefighter

Alston developed psychological symptoms in response to hearing the racial slur from his Lieutenant ...”

I also credit those portions of Dr. Price’s report in which she diagnosed Firefighter Alston as of 2015 with “Adjustment Disorder”, the same diagnosis issued by Firefighter’s Alston’s own psychiatrist (Dr. Kahn) and social worker (Ms. Simpson) shortly after the racist comment was left on his voice mail.

When an Appointing Authority relies on scientific evidence provided through expert witnesses, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert’s opinion was grounded on an adequate foundation, either by establishing “general acceptance in the scientific community” or by showing that the evidence is “reliable or valid” through an alternative means, e.g., Canavan’s Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) citing Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by “education, training, experience and familiarity” with special knowledge bearing on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990).

Dr. Price was well qualified to make her diagnosis. She has extensive education and experience regarding fitness for duty evaluations of public safety employees; she reviewed the duties and responsibilities of a Brookline firefighter; she reviewed relevant medical and other documents related to Firefighter Alston and she met with Firefighter Alston for three (3) hours. Finally, during her testimony before the Commission, she was able to answer questions in a coherent manner that showed a command of the subject matter.

I did not rely on the testimony of Dr. Carter, a psychiatrist hired by Firefighter Alston. She does not have education or experience regarding fitness for duty evaluations; she did not review the duties and responsibilities of a Brookline firefighter; and, during her testimony before the Commission, she effectively acknowledged that her goal here was to provide a conclusion that was helpful to Firefighter Alston, as opposed to an independent review of Firefighter Alston's fitness for duty as a Brookline firefighter.

While I have accepted and credited the conclusions of Dr. Price referenced above, I did not find that the evidence supported her conclusion that Firefighter Alston would be able to return to work upon meeting the conditions outlined in her report. I am not required to accept all parts of Dr. Price's testimony, even if Firefighter Alston failed to offer expert testimony to the contrary. (See Police Department of Boston v. Jill Kavaleski, 463 Mass. 680 (2012) citing Daniels v. Board of Registration in Medicine, 418 Mass. 380, 392 (1994), quoting Commonwealth V. DeMinico, 408 Mass. 230, 235 (1990) ("[t]he law should not, and does not, give the opinions of experts on either side of . . . [a]n issue the benefit of conclusiveness, even if there are no contrary opinions introduced at the trial"). See also Boston Gas Co. v. Assessors of Boston, 334 Mass. 549, 579 (1956) ("That a person qualifies as an expert does not endow his testimony with magic qualities").

Dr. Price's evaluation was thorough and based on sound medical evidence, but she simply did not have the benefit of the entire record that was presented to the Commission through two hundred eighty (280) exhibits and fourteen (14) witnesses over ten (10) days of hearing. While Dr. Price was able to specifically identify four (4) "stressors" that contributed to Firefighter's Alston ongoing diagnosis of Adjustment Disorder, the entirety of the record shows multiple other actions and inactions of Town officials and employees that served as "stressors" which Dr. Price

was not aware of and which resulted in Firefighter Alston being permanently unable to serve as a Brookline firefighter. Those actions and inactions included the following additional intolerable behavior:

- A. Failing to comprehend the seriousness of Mr. Pender's use of the racial epithet and failing to take the necessary steps to repair the damage Mr. Pender had done that would have enabled Firefighter Alston to return to the workplace.
 - B. Enabling retaliatory behavior against Firefighter Alston by Mr. Pender and others and enabling Mr. Pender to paint himself as the victim.
 - C. Attacking Firefighter Alston's credibility and taking other actions that appeared to lack bona fides and proper regard for fundamental fairness and good faith.
- A. *Failing to comprehend the seriousness of Mr. Pender's use of the racial epithet and failing to take the necessary steps to repair the damage Mr. Pender had done that would have enabled Firefighter Alston to return to the workplace.*

The Town's failure to respond to the report of the racial epithet in a timely manner; their failure to impose a proper level of discipline; and their decision to repeatedly promote Mr. Pender showed that the Town failed to comprehend the seriousness of Mr. Pender's use of the racial epithet and the damaging impact it had on Firefighter Alston.

The Town failed to act on Firefighter Alston's report of the racist comment for four (4) to five (5) weeks. As noted in the findings, Firefighter Alston played the voice mail message for the Fire Department's Chief of Operations shortly after May 30, 2010. It was not until July 8, 2010, after Firefighter Alston filed a written complaint, that the Town finally took action against Mr. Pender. This caused Firefighter Alston legitimate concern that the Town did not take this matter seriously.

Even more troubling, Town officials, at the time and on later occasions, would suggest that their actions were taken in accord with Firefighter Alston's wishes. This is simply not true. Firefighter Alston's only input on the level of discipline was to tell Town officials that he didn't want Mr. Pender to be terminated. Town officials may have received more clarity on this point had they actually conducted a bona fide local disciplinary hearing regarding Mr. Pender's misconduct, which would have included hearing from witnesses including, but not limited to, Firefighter Alston. That didn't happen. Rather, Town officials, during an Executive Session, engaged in what turned into an informal discussion with Mr. Pender and his attorney, focusing on turning this event into a "learning moment". In the end, even Chief Skerry's recommendation for a relatively short-term suspension of four (4) tours of duty was rejected by the Board. The Board should have taken more serious steps to discipline Mr. Pender for his racist comment and to prevent any retaliation by Mr. Pender against Firefighter Alston (i.e. – a demotion; ineligibility for promotion for 5 years; and a last chance agreement stating that any retaliation against Mr. Alston would result in immediate termination.) Throughout these proceedings, the Town sought to equate other actions taken (i.e.- mediation and diversity training) as a form of discipline. They are mistaken. The Town's failure to issue discipline commensurate with the seriousness of the offense caused Firefighter Alston to question if they understood the impact the racist comments had on him and his family.

Further, in one of the more perplexing actions taken in the aftermath of this incident, the Town promoted Mr. Pender to Temporary Fire Captain *less than two weeks after the effective date of his two-tour suspension* for making the racist comment. Firefighter Alston was in shock. So am I. The promotion gave Firefighter Alston further grounds upon which to reasonably conclude that the Town was not taking the matter seriously. The Town's attempt to cloak its decision as

somehow being required by the civil service law (since Mr. Pender was at the top of the eligible list) is disingenuous. The Town had, for example, the option of bypassing Mr. Pender for this temporary appointment for the time being in favor of someone else who had not been disciplined two weeks prior for making a racist comment, a decision that has long been permitted by well-established civil service law.

For many of the reasons already discussed above, the Town's decision to permanently promote Mr. Pender to Captain on May 1, 2013 was another sign to Firefighter Alston that the Town failed to recognize the seriousness of what occurred here.

Finally, the Town's decision to further elevate Mr. Pender to Temporary Deputy Fire Chief in July 2016 took the overtones of bad faith to yet another level by using that promotional process to orchestrate a public rebuke of Firefighter Alston condoned and sometimes led by Town officials, that served as a final message to Firefighter Alston that he was not welcome in the Brookline Fire Department.

In preparation for a public meeting where the promotion to Temporary Deputy Fire Chief would be discussed, the Chair of the Town's Select Board penned an email to the Town Administrator stating in part, "... Would be helpful to get that summary of actions Mr. Pender has taken and been subjected to as a result of the incident" (in reference to comments Mr. Pender had made during an Executive Session.) Six years later, the narrative of what occurred here had officially been turned on its head, with the Town portraying Mr. Pender as the victim.

During the public comment session, Town officials and employees repeatedly referenced the remorse and apologies of Mr. Pender and appeared to explicitly call out Firefighter Alston for his inability to "move on". One member of the Select Board stated that "... Brookline needs to move on and cease debating past rights and wrongs. A better future is not possible if we remain

trapped in conversations about *perceived* past misdeeds or mistakes.” While subtle, it is noteworthy that Town officials were now apparently referring to the racist comment left by Mr. Pender as a “perceived” past misdeed or mistake.

Another Board member stated that “... the use of a racist slur, six years ago, *without more*, cannot be justification to permanently preclude” Mr. Pender from being promoted. At this point, the Board had information, discussed more below, showing that *in addition to making the racist comment*, Mr. Pender had, on multiple occasions, verbally attacked Firefighter Alston for reporting the incident and repeatedly minimized his misconduct to fellow firefighters, including all new recruits.

Another Board member explicitly stated that “... We have heard from *almost every minority of the department with the exception of Gerald Alston ...*” stating their support for Mr. Pender.

Members of the Department spoke about the “narrative fabricated”, with the Town’s Deputy Fire Chief stating that “we should have all moved on” and lamenting the “smear campaign” against the Town.

The collective message from the Select Board and the Town’s Fire Department was clear: Gerald Alston stood alone.

B. Enabling retaliatory behavior against Firefighter Alston by Mr. Pender and others and enabling Mr. Pender to paint himself as the victim.

On multiple occasions, including during Mr. Pender’s initial “apology” and after all Department employees were purportedly provided with diversity training, Mr. Pender and others repeatedly engaged in retaliatory behavior against Firefighter Alston, leading him to reasonably question whether he could ever return to the Brookline Fire Department.

When Mr. Pender first spoke to Firefighter Alston to “profusely apologize”, he compounded the problem by seeking to turn the tables on his employee and attacking Firefighter Alston’s decision to report the racist comment, telling Firefighter Alston words to the effect that it was “the stupidest thing [Alston] had ever done”. To drive home the point, Mr. Pender asked Firefighter Alston, “do you want me to lose my job?” It is difficult to imagine a more stressful situation for an employee than when a supervisor, who had recently made a racist comment, is now attacking the employee for reporting it. The Town never took any action against Mr. Pender for attacking Firefighter’s Alston decision to report him and, remarkably, never seemed to grasp that Mr. Pender was engaging in retaliatory behavior against Firefighter Alston.

Only two (2) days after Firefighter Alston’s return to work, fellow firefighter Joseph Canney posted a derogatory message on the Union’s blog referring to Firefighter Alston as a “FACELESS COWARD”. While the posting does not explicitly identify Firefighter Alston, it is painfully clear who he is referring to. Again, the Town took no action to investigate whether Firefighter Canney’s posting constituted retaliation against Firefighter Alston. Commonsense dictates that this posting caused further stress on Firefighter Alston, as it raised real questions regarding whether he was being ostracized by members of the Department.

Only months after making the racist comment, Mr. Pender, in February 2011, again verbally attacked Firefighter Alston for reporting it, telling Firefighter Alston, “ ... you destroyed my life and ruined my career ...”. Mr. Pender told Firefighter Alston that he had “begged” him [Alston] “not to do what he [Alston] did.” Rather than recognizing that his comments could be construed as retaliatory, Mr. Pender actually documented the conversation in a transcript-like summary and hand-delivered the summary to the Town’s Human Resources Director. Again, the Town took no action against Mr. Pender for his verbal attack on Firefighter Alston. Had the Town taken the

reasonable step of requiring a last chance agreement months earlier, and had the Town recognized Mr. Pender's comments for what they were (retaliation), there would have been no justification for continuing Mr. Pender's employment with the Town at this point.

Further, just prior to a training session in October 2013, presumably in which Firefighter Alston was required to receive training from the person who had left a racist comment on his voicemail, Mr. Pender once again verbally attacked Firefighter Alston, this time for filing a lawsuit that, according to Mr. Pender, "was full of lies." Mr. Pender discounted his use of the racist comment years earlier, chalking it up to "road rage" and "a side effect of PTSD." To me, it is noteworthy that Firefighter Alston felt the need that same day to reach out to his treating psychiatrist. It reinforces the correlation between the actions of Town officials and the adverse psychological impact on Firefighter Alston.

On December 19, 2013, Firefighter Alston found the word "Leave" written on the door to his seat on the fire engine. While the Town appeared to take appropriate steps to investigate this serious matter, the suggestion by the Town that the word could have been written by members of an MIT fraternity seemed to defy commonsense and understandably cause Firefighter Alston to again question whether the Town was seeking to find an acceptable, alternative explanation to what appears to be a clear message that Firefighter Alston was not welcome in the Brookline Fire Department.

In March 2015, the union voted to remove Firefighter Alston from the union for not paying dues, even after, according to Ms. DeBow, he had come back on the payroll and was, in fact a dues-paying member. While the Town has no role in actions taken by the union, this event is yet another example of how Firefighter Alston could reasonably conclude that he was being

ostracized by fellow firefighters for reasons related to his reporting Mr. Pender's use of the racial comment heard on his voice mail.

Finally, in December 2015, fellow Firefighter Joseph Canney penned a letter to Ms. DeBow stating in part that: "Despite the fact that Mr. Alston threatened to shoot his co-workers, he continued to be payed (sic) for longer than most can even remember." This is yet another example that supports Firefighter Alston's reasonable fear that, upon his return, he may not have the support of his fellow firefighters.

After being promoted, Mr. Pender used his position as Captain of Training to tell his "side of the story" regarding the incident to *all new recruits*, telling them that what they read in the local paper about this matter was "a bunch of lies". In a remarkable statement during his deposition in the federal lawsuit, Mr. Pender recounted talking to five new recruits from Fall River, "who were all minorities". Presumably after telling them "his side of the story", Mr. Pender stated that "... they were pretty shocked that it had turned into, you know ... that something so benign is going on seven and a half years later ...". This was not a momentary misstatement by Mr. Pender. Rather, both at the time, and years later, he would repeatedly make comments suggesting that his racist comment was overblown and, in turn, that Firefighter Alston had overreacted to the racist comment. Most troubling is that, over a period of years, Mr. Pender would reinforce that message to every new recruit of the Brookline Fire Department. Put another way, Mr. Pender was telling *every new recruit*, that if and when a supervisor is heard making a racist comment, it should be considered benign; it should not be reported; and it should be settled in-house with a handshake. Equally as troubling, by labeling reports of the incident as "a bunch of lies", Mr. Pender was arguably leaving the impression with every new recruit that Firefighter Alston was a liar who could not be trusted. This could help explain the shunning by fellow firefighters that

Firefighter Alston referenced in his December 2013 court filing in Norfolk Superior Court. In that filing, Firefighter Alston talks about being ostracized by fellow firefighters when he was assigned to other stations, including firefighters excluding him from dinner or leaving the room when he entered to eat breakfast. He also lamented that he was no longer invited to sing the national anthem at firefighter-sponsored events, something Firefighter Alston said he was “proud and privileged” to do for many years prior to reporting the racist comment to Town officials.

C. Attacking Firefighter Alston’s credibility and taking other actions that appeared to lack bona fides and proper regard for fundamental fairness and good faith.

Numerous other actions and inactions by the Town called into question whether they were acting in good faith regarding their stated goal of returning Firefighter Alston to the Town’s workforce.

In February 2014, “Fire Department leadership” and the Town’s HR Director met with Dr. Brown. Based on what he heard from those Town officials about Firefighter Alston, Dr. Brown opined that “high levels of paranoia exist”. To me, this was part of a subtle, ongoing narrative that Town officials had settled on by February 2014 in which the Town was suggesting Firefighter Alston’s concerns regarding being shunned and ostracized were a figment of his imagination. As referenced previously, some of Firefighter Alston’s fears were well-founded, including Mr. Pender’s ongoing discussion of his side of the story to all new recruits that may work side-by-side with Firefighter Alston. The evidence does not support the suggestion that Firefighter Alston was suffering from paranoia.

In October 2014, only sixteen (16) days after learning from Firefighter Alston’s psychiatrist that Firefighter Alston “had a decline ... did not refill medication ...” and was “ ... in desperate

financial straits ... living out of his car ...” the Town notified Firefighter Alston that he was effectively being removed from the Town’s payroll as he had exhausted all of his available leave.

In December 2014, the Town’s then-Chair of the Select Board penned a letter to Firefighter Alston stating in part that: “ ... We are also informed that the supervisor who uttered those words to you and was formally disciplined for the incident offered his apology to you, *and has since repeatedly expressed remorse and regret for his conduct.*” Again, this narrative, which is not consistent with what actually occurred, was now enshrined as the Town’s official version of events. As discussed previously, rather than “repeatedly expressing remorse and regret”, Mr. Pender had repeatedly subjected Firefighter Alston to verbal attacks for reporting the matter to Town officials and “ruining his career” over making “benign” comments that, according to Mr. Pender, were likely attributable to PTSD and should have been settled with a handshake. To me, this repeated misrepresentation of events by Town officials was another action that constituted a “stressor” upon Firefighter Alston.

These collective actions and inactions by the Town, many of which Dr. Price was unaware of, prevented Firefighter Alston from returning to a workplace where he would be isolated, even if he satisfied the conditions outlined by Dr. Price in her report.

In sum, the Town chose not to impose meaningful discipline on Mr. Pender for use of the racist comment (which the evidence demonstrated was clearly insufficient to remediate his behavior), chose to overlook the initial and ongoing retaliation against Firefighter Alston by Mr. Pender and others, and actively promoted a false narrative that painted Firefighter Alston as a paranoid employee who simply couldn’t “move on” from racist comments made by a purportedly remorseful supervisor years earlier. By these errors and omissions, the Town acted in bad faith and in a manner prohibited by basic merit principles which requires, in relevant part,

“fair treatment of . . . employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for . . . basic rights outlined in this [civil service] chapter and constitutional rights as citizens . . .” When a municipality’s own violation of a tenured employee’s rights has prevented the employee from returning to work, as here, the Town cannot use that inability to work as just cause for discharging the employee from his tenured position.

Conclusion

For all of the above reasons, the Town of Brookline has failed to show just cause for terminating Gerald Alston from employment.

As referenced above, G.L. c. 31, § 43 states:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.” (emphasis added)

As stated in part by the Superior Court in Alston v. Civ. Serv. Comm’n & Town of Brookline, Suff. Sup. Crt. No. 2017-1489 (2018):

“ . . . The question of remedy is . . . not up to the Commission, because the statute itself prescribes the remedy: ‘the person concerned shall be returned to his position without loss of compensation or other rights.’ G.L. c. 31, § 43. If the Legislature wanted the Commission to withhold decision upon ‘just cause’ whenever the agency was concerned about remedy, it would certainly have chosen different language . . .

In any event, a mandatory reinstatement remedy creates, at most, a cost or an inconvenience in this case, but no real inconsistency with the law. If the Commission [finds] a lack of just cause and order[s] reinstatement to Alston’s position, with pay,

that would not necessarily require a return to duty in Brookline ... The status of firefighter on leave with pay [is] not unfair to a Town that violates the ‘just cause’ and ‘basic merit principles’ requirements. Such a status arguably ... treat[s] fairly an employee who is a victim of racial bias in violation of the civil service laws ...”

Accordingly, as the Town has failed to show just cause for terminating Firefighter Alston, the Commission hereby *allows* Firefighter Alston’s appeal under Docket No. D1-16-170, reverses the action of the Town of Brookline and orders that Firefighter Alston be returned to his position without loss of compensation or other rights.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 14, 2019.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:
Brooks Ames, Esq. (for Appellant)
Joseph Padolsky, Esq. (for Respondent)
Douglas Louison, Esq. (for Respondent)