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City Held Immune for Negligent Hiring of Police Officer:
Crete v. City of Lowell, 418 F.3d 54 (1st Cir. 2005).

In Crete v. City of Lowell, 418 F.3d 54 (1st Cir. 2005), the First Circuit Court of Appeals recently decided an immunity issue not yet addressed by the Massachusetts appellate courts – namely, is a municipality immune under M.G.L. c. 258, § 10(b), the “discretionary function” exception, for the negligent hiring of a public employee? The First Circuit ruled “yes,” Section 10(b) applies. Obviously, this decision, if adopted by the Massachusetts courts, could have a significant impact on future municipal liability by limiting the ability of plaintiffs to circumvent the immunity protections of the Massachusetts Tort Claims Act (“MTCA”) through artful pleading.

The Crete case arose out of plaintiff’s arrest by a Lowell police officer in March 1999. During the arrest, the officer allegedly “threw [the plaintiff] down onto the pavement” and “pushed [his] head onto the sidewalk three or more times.” The plaintiff (who claimed he was not resisting arrest) subsequently brought suit against the police officer for various intentional torts, as well as against the police’s employer, the City of Lowell, for negligence and under 42 U.S.C. § 1983 for the alleged violation of his civil rights. Both claims against the City were based on the allegation that Lowell either knew or should have known that the police officer had a prior criminal history, including a conviction for assault and battery, and, therefore, the City failed to exercise reasonable care in hiring him.

The District Court entered summary judgment in favor of the City on the civil rights claim and, after a jury trial, entered judgment in favor of the plaintiff on the negligence claim. (Plaintiff’s claims against the police officer were stayed after the officer filed for bankruptcy, then voluntarily dismissed by the plaintiff after trial.) Both parties appealed. On appeal, the First Circuit affirmed the dismissal of plaintiff’s civil rights claim, but vacated the negligence verdict and directed the entry of judgment for the
We should, in fact, hear from the Massachusetts Appeals Court on this issue very shortly. The pending case of LaSota v. Town of Merrimac, No. 04-P-1467, involves an attempt by the plaintiffs to circumvent the protections of Sections 10(b), 10(e) and 10(f) by faulting Merrimac’s negligent hiring and supervision of a building inspector who allegedly issued an occupancy permit for a structure despite multiple violations of the State Building Code. The case was argued before the Appeals Court on May 17, 2005. We will report on the outcome of the case in our next Newsletter. (Pierce, Davis & Perritano, LLP, represents the Town of Merrimac in this matter.)

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Massachusetts Courts Continue to Reject Intra-Governmental Constitutional Disputes:


In Boston Water & Sewer Commission v. The Commonwealth, the Appeals Court of Massachusetts once again reaffirmed the Spence Doctrine by refusing to allow the Boston Water & Sewer Commission to challenge the constitutionality of Legislative acts that controlled the type of consideration the Commission would receive for a proposed transfer of Commission land to the University of Massachusetts. The Spence Doctrine, based on the Supreme Judicial Court’s 1983 decision in Spence v. Boston Edison Co., prohibits a state agency from challenging the constitutionality of state statutes unless the agency “operates solely in a proprietary manner.” The Appeals Court’s decision emphasized that this “proprietary manner” exception is a narrow one that is available to government agencies only where there is “absolutely no public aspect” to the subject transaction. (A proprietary transaction occurs when a government agency is involved in a private commercial transaction – i.e., buying/selling goods or services – rather than a transaction that is a uniquely governmental, such as enforcing a zoning ordinance.)

The internecine dispute between the Commission and the University arose out of the planned transfer of Commission land to the University, as had been envisioned by the Legislature since it authorized the creation of the Boston campus in 1969. The 1969 act authorized the eminent domain taking of land on Columbia Point in Dorchester to create the Boston campus, with the exception of the “Calf Pasture,” a parcel of land that the City of Boston

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In vacating the negligence verdict, the First Circuit relied on the “discretionary function” exception of Chapter 258, Section 10(b). After following the familiar two-step analysis identified by the SJC – (1) does the governmental actor have discretion regarding what course of conduct to follow, and, if so, (2) is such discretion the kind for which Section 10(b) provides immunity? – the Court then looked for guidance to the Federal Tort Claims Act (“FTCA”) and the decisions interpreting it. “[T]he MTCA,” reasoned the First Circuit, “is modeled on the FTCA and construction of the MTCA is meant to parallel construction of the FTCA.” 418 F.3d at 64. Under the FTCA, courts have consistently ruled that employer decisions such as hiring, discipline and termination, fall within the discretionary function exception. Hiring decisions, in particular, “are susceptible to and involve policy analysis.” 418 F.3d at 65. How many to hire, whom to hire, and how to select from among several potential candidates are all decisions that involve “the weighing of individual backgrounds, office diversity, experience and employer intuition.” Id. citing Tonelli v. United States, 60 F.3d 492, 496 (8th Cir. 1995).

The First Circuit concluded that Lowell’s decision to hire a police officer with a criminal record involved the kind of discretion meant to be protected under Section 10(b). Therefore, the City remained immune from liability in tort to the plaintiff. And, because the City, as a matter of law, was not deliberately indifferent to the rights of third parties in hiring the officer, the dismissal of plaintiff’s civil rights claim on summary judgment was upheld as appropriate.

Tort claimants and plaintiffs frequently attempt to circumvent the immunity protections of Section 10 by maintaining that their claims against a public employer are not based on matters of policy making or planning (Section 10(b)), the issuance of a permit or license (Section 10(e)), negligent inspection of property (Section 10(f)), negligent firefighting (Section 10(f)) or negligent law enforcement (Section 10(g)). Rather, their claims are based (so they say) on the fault of the public employer in hiring an incompetent building inspector, firefighter, police officer or other public employee, and/or in failing to supervise that employee after he or she is hired. The Crete Court holds that such an attempt will not be successful. It is hoped the Massachusetts courts will hold likewise.
used as a sewer transfer station. The 1977 legislation that created the Boston Water & Sewer Commission gave to it responsibility for operation of the sewer station and ownership of the Calf Pasture.

In January of 1999, the University and Commission entered into a Memorandum of Understanding (MOU) that described the consideration the Commission would receive for transferring the Calf Pasture to the University, including $1 million in scholarships for Boston residents and the transfer of undesignated land to the Commission as replacement land for the sewer station. The Legislature intervened a few months later by special legislation that amended the 1969 act. The special legislation mandated the University fulfill the requirements of Chapter 79 of the General Laws (Eminent Domain) "as if it were the taking authority," and also adopted the provisions of the MOU, including those regarding the amount and type of consideration.

In 2002, while the University was attempting to secure a replacement parcel of land, the Legislature again intervened by passing the Hart Amendment. The Hart Amendment prohibited the University from conveying any land it already owned on Columbia Point to the Commission as replacement land. Instead, it required the University and Commission to agree on "other forms of consideration for the taking."

In January of 2003, with no progress towards an agreement on "other forms of consideration", the Commission sued the Commonwealth and the University, arguing that the 1999 Act and the Hart Amendment were "unconstitutional for vagueness and indefiniteness." The Commonwealth immediately moved for judgment on the pleadings on the strength of the Spence Doctrine. The superior court granted the motion and dismissed the Commission's suit.

On appeal, the Commission argued that its actions fell within the proprietary exception to the Spence Doctrine because its claim was one for breach of the MOU. The Appeals Court disagreed.

The Appeals Court reaffirmed the applicability of the Spence Doctrine in accordance with the basic principle that "governmental agencies do not enjoy constitutional guarantees." While acknowledging that an agency can raise such a constitutional challenge under the proprietary exception, the court emphasized that this exception applied only where the agency is engaged in "purely business or commercial transactions" regarding which there is "absolutely no public aspect."

The court found that, in general and with regard to this particular transaction, the Commission was not acting in a proprietary manner. The Legislature created the Commission in 1977 to maintain the sewer system, "an essential public function," "for the benefit of the city of Boston." While the Commission charges fees for the services it provides, these fees are to be set at "fair but sufficient rates" so that the water and sewer system is "financially self-sustaining." The Court characterized as "a clearly public mandate" the act’s requirement that any surplus money be used to reduce fees or for "such purposes as the city may appropriate." The court found that the Commission and the University were acting in their public capacities with regard to the land transfer, despite the MOU’s resemblance to a private transaction, as evidenced by the choice of scholarships for city residents as part of the consideration to the Commission and the fact that the land transfer was being accomplished as an eminent domain taking, "a quintessentially public function."

In affirming the lower court’s finding, the Appeals Court found that the breach claim implicitly raised a constitutional challenge, as the MOU would only have relevance if the Hart Amendment, which expresses the "Legislature’s final word on reparations," was first successfully challenged.

Boston Water & Sewer Commission underscores the need for governmental agencies to vigorously use the political process when their interests are likely to conflict with those of another governmental agency. An agency that loses the battle in the political arena cannot use the courts in a last-ditch effort to re-visit the fight via a constitutional challenge, or as a challenge to the constitutionality of another agency’s actions. While the proprietary exception to the Spence Doctrine remains available, the Appeals Court made clear that this is true only where there is “absolutely no public aspect to the transaction” at issue.

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Police Chief Cannot Overcome Dismissal by Claiming First Amendment Violation:

The First Circuit Court of Appeals recently heard an appeal by a police chief from Maine (“Tripp”) who claimed that the Town’s termination of him was retaliatory. Tripp claimed that the Town fired him because of conversations he had with a town manager and two selectmen. Tripp further claimed that his termination violated 42 U.S.C. § 1982.

In Tripp v. Cole, 425 F.3d 5 (1st Cir. 2005), the town manager (“Cole”) wanted Tripp to intervene in an affluent resident’s prosecution for an unleashed dog citation. Tripp told Cole that he was “not comfortable” in interfering with the prosecution. Cole purportedly made several requests to Tripp to speak to the district attorney on behalf of the resident. In a conversation with two selectmen a couple of months after Cole’s request, Tripp said that he believed his relationship with Cole had “cooled” because of Tripp’s refusal to intervene in the resident’s prosecution. A few months later, the Town suspended Tripp for reasons ostensibly unrelated to the dog leash violation. A few months after this suspension, Cole terminated Tripp purportedly because of Tripp’s failure to respond to a bank robbery. The board of selectmen upheld the termination.

At trial, Tripp accused the Town and Cole of retaliation in violation of 42 U.S.C. § 1983. Tripp claimed that the Town and Cole retaliated against him for speech protected by the First Amendment. A magistrate judge granted the defendants’ motion for summary judgment on all counts; Tripp appealed. He argued that the district court erred when it found that no retaliation for workplace speech occurred. Specifically, he claimed that his conversations with Cole concerning the summons and with the two selectmen concerning Tripp’s relationship with Cole were protected speech.

On appeal, the First Circuit Court of Appeals stated that the standard for determining whether an employer violated a public employee’s right to speech requires the application of a three-part test: (1) whether the speech involves a matter of public concern; (2) whether, when balanced against each other, the First Amendment interests of the plaintiff and the public outweigh the government’s interest in functioning efficiently; and (3) whether the protected speech was a substantial or motivating factor in the adverse action against plaintiff. See Tang v. State of R.I., Dep’t of Elderly Affairs, 163 F.3d 7, 12 (1st Cir. 1998).

The First Circuit Court of Appeals found that Tripp’s conversation with the two selectmen was an example of speech that related to “internal working conditions affecting only the speaker and co-workers.” The Court also concluded that the prosecution of an unleashed dog citation was not a matter of public concern. Tripp took a more global view of the issue and argued that the public is concerned with the even administration of justice without town officials granting favors to certain residents. The First Circuit found, however, that there was no specific statement made by Tripp to Cole concerning the issue of a public administrator interfering with the administration of justice. The only statement identified by Tripp as protected speech was Tripp’s statement to Cole to the effect he was “not comfortable” with Cole’s request to intercede with the resident’s prosecution. This statement, the Court found, was not one of “public concern,” as it simply conveyed Tripp’s preference not to interfere with the resident’s prosecution for the citation.

This case is important for public employers because it reaffirms a public employer’s ability to control its own workplace without undue fear of First Amendment prosecution. Even though Tripp was fired for other reasons, Tripp will be helpful to municipalities who do, in fact, terminate an employee for that employee’s unacceptable speech.

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Court Dismisses Claims of Plaintiff Who Provided Inadequate Presentment:

Pierce, Davis & Perritano, LLP
Counsellors at Law

TEN WINTHROP SQUARE
BOSTON, MA 02110-1257

TELEPHONE (617) 350-0950
FACSIMILE (617) 350-7760

A common issue in municipal litigation is the proper form and content of the presentment letter required by Section 4 of the Massachusetts Tort Claims Act (MTCA). Section 4 requires any potential plaintiff to present his tort claim in writing before bringing suit against a public employer. As reported in past newsletters, a recent flurry of caselaw has softened this burden with regard to content, but Garcia v. Essex County Sheriff’s Department (ECSD) strikes a welcomed blow in favor of public employers.

On February 1, 2002, the ECSD was transporting Manuel Garcia when its vehicle crashed causing injuries to Garcia. Garcia’s counsel sent three letters to ECSD’s chief fiscal officer. In the first letter, dated March 11, 2002, Garcia’s counsel informed ECSD that Garcia had been injured as a result of the automobile accident. Garcia’s counsel then inquired “of the procedure for payment of medical bills.” The second letter, sent on July 9, 2002, enclosed Garcia’s “complete medical treatment reports and expenses.” That letter requested that ECSD “kindly contact [Garcia’s counsel] to discuss possible settlement of this claim” once it had an opportunity to review the file. On July 19, 2002, Garcia’s counsel sent a third letter demanding $23,400.

An ECSD lawyer, in a letter written on ECSD letterhead and dated September 10, 2002, replied to Garcia’s demand by stating that a response would be forthcoming; ECSD was “in the process of investigating this matter and reviewing the” issue. On November 15, 2002, the ECSD offered to pay Garcia’s medical bills. Garcia rejected this offer and filed suit on August 25, 2003. ECSD denied any negligence and asserted various affirmative defenses, including Garcia’s failure to make adequate presentment. After the two-year presentment period expired, ECSD moved for summary judgment arguing Garcia’s presentment was flawed because it failed to disclose facts as to the incident, failed to allege a theory of liability, failed to reveal Garcia’s intent to file a tort claim, and failed to make presentment directly to Sheriff Cousins, ECSD’s “executive officer.” The superior court allowed ECSD’s motion, and Plaintiff appealed.

The Appeals Court focused on two issues: (1) whether the content of the presentment letters was adequate.

**Proper Person**

A party must present his claim directly to the executive officer of the public employer in order to provide notice to the highest ranking official with the ability to fully investigate, "arbitrate, compromise or settle" the claim. An exception to this general rule exists where the record shows that the proper person had actual notice of the claim. See Lopez v. Lynn Hous. Authy., 440 Mass. 1029, 1030-1031 (2003).

Sheriff Cousins, not the chief fiscal officer, was ECSD’s executive officer and, therefore, the appropriate person to notify. Garcia contends that Sheriff Cousins had notice and presentment was appropriate because (1) ECSD’s letterhead had the Sheriff’s name on it; and (2) the ECSD attorney responded to the claim as an agent of Sheriff Cousins with authority to investigate and settle the dispute. The Court disagreed holding the mere use of official letterhead insufficient to indicate that Sheriff Cousins had actual notice of the claim. Further, the Court held that "the Legislature did not intend presentment to a public employer's attorney to suffice under G. L. c. 258, § 4, unless it specifically so indicated." Holahan v. Medford, 394 Mass. 186, 189 (1985). There is no such statutory indication here.

As a last resort, Garcia argued that the ECSD should have been precluded from contesting the sufficiency of his presentment letters because the ECSD attorney lulled him into believing presentment was not an issue. Garcia claimed the ECSD attorney did so by writing that he would investigate the matter and subsequently make a settlement offer. The key fact in this case, the Court reasoned, was the absence of any indication that the executive officer – Sheriff Cousins – had received and considered the presentment letter. In order to “lull” a plaintiff into believing that presentment is not an issue, the defendant must affirmatively indicate that the presentment requirement has been met or is waived. See Vass v. Metropolitan Dist. Commn., 387 Mass. 51, 53 (1982). The evidence did not support such a conclusion here, so Garcia was not “lulled”.

**Content**

whether the content of the presentment letters was adequate.
The precise content of an acceptable presentment letter has never been made clear by the courts. Generally, a presentment letter "should be precise in identifying the legal basis of a plaintiff's claim" and should not be "so obscure that educated public officials should find themselves baffled or misled with respect to [the plaintiff']s assertion of a claim ... which constitutes a proper subject for suit." Rodriguez v. Cambridge Hous. Authy., 59 Mass. App. Ct. 127, 134 (2003).

The allegations contained in Garcia’s three letters were (1) that an automobile accident occurred (2) while the ECSD was transporting Garcia, (3) which resulted in his injuries. Absent from the letters was any statement explaining the legal basis of a claim against ECSD; nor was there a detailed description of the facts from which to infer the basis of the claim. Nowhere did Garcia's letters assert that his injuries were caused by ECSD's negligence; they did not even identify Chapter 258 as a basis of liability.

The Court concluded that Garcia’s letters were not “precise in identifying the legal basis” for Garcia's claim and, thus, were inadequate to fulfill the statutory purpose of the MTCA’s presentment requirement.

Garcia is strong precedent for public employers. By rejecting Garcia's letters on two fronts – form and content – the Appeals Court went a long way to resuscitating the notion that “strict compliance” with the presentment statute is required. Gilmore v. Commonwealth, 417 Mass. 718, 721 (1994) ("presentment letter should be precise in identifying the legal basis of a plaintiff's claim"). Garcia is also helpful in that it shows a plaintiff has a difficult burden when arguing he was “lulled” into believing that the presentment requirement was fulfilled. The strength of Garcia should also be tested when combating those plaintiffs who circumvented town officials in favor of dealing directly with insurance companies in pre-litigation communications.

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Firm Announcements

PD&P obtained favorable decisions in cases involving a site assignment for a solid waste transfer station and alleged handicap discrimination.

In our Summer 2003 Newsletter, we reported that Judge Janet Sanders of the Suffolk Superior Court, on an administrative appeal taken under Chapter 30A, had recently affirmed a decision by the Abington Board of Health to rescind a site assignment for a solid waste transfer station on Route 18. The site operator thereafter appealed Judge Sanders’ decision to the Appeals Court on the grounds that (1) the Board of Health (“BOH”) exceeded its authority; (2) the BOH was biased and predisposed to find against the site operator and, therefore, the plaintiff did not receive a full and fair hearing; and (3) the individual BOH members violated plaintiff’s civil rights through threats, intimidation or coercion. Pierce, Davis & Perritano, LLP, represented the BOH both in the Superior Court and on appeal.

On October 6, 2005, the Appeals Court rejected plaintiff’s arguments and affirmed the decision below. Abington Transfer Station, LLC v. Board of Health of Abington, 64 Mass. App. Ct. 1111 (2005). First, the Court ruled that the BOH had the statutory authority to conduct a public hearing at the time it did. Contrary to plaintiff’s arguments, the BOH was not required to wait until the previously-approved facility was “up and running” before deciding whether its operation or maintenance could result in a “threat to the public health and safety or the environment.” The Court reasoned that such an interpretation of the statute would be “illogical.”

Second, the Appeals Court agreed that the plaintiff was given a full and fair hearing by the BOH. The hearing was not tainted by bias, nor was the BOH’s fact-finding insufficient. At oral argument (held on June 14, 2005,) defense counsel stressed that the plaintiff was no longer contesting the BOH decision on the grounds it was unsupported by substantial evidence (as it had below). Thus, the plaintiff in effect conceded that the BOH reached the right decision; however, it did so (according to the plaintiff) through a flawed process. The Appeals Court did not miss the point: “Tellingly [wrote the Court], [the plaintiff] does not argue in this appeal that the decision was unsupported by substantial evidence.”

Third, the Appeals Court rejected plaintiff’s civil rights claim against the individual BOH members. The BOH decision was “nothing more than an adverse administrative action” and not part of a scheme of harassment. Moreover, in language particularly useful to future Boards of Health, the Court noted that the site assignment did not grant vested property rights to the plaintiff and was revocable “at any time.” Therefore, no constitutional “right” was implicated by the rescission.
The site operator did not seek further appellate review under Mass. R. Civ. P. 27.1.

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A former wastewater worker sued the Town of Mansfield at the Massachusetts Commission Against Discrimination ("MCAD") for terminating his employment allegedly due to his physical limitations. PD&P, representing Mansfield, argued that the Complainant could not make a *prima facie* showing of handicap discrimination because he suffered from no handicap. Even more, PD&P argued that the former employee had a poor attendance record during his probationary period and, during that same period, he showed that he was not qualified to perform the job.

PD&P pointed out that the term “handicap” means (1) an impairment which substantially limits one or more major life activities of a person; (2) having a record of having such impairment; or (3) being regarded as having such impairment. Recognizing a dearth of state caselaw discussing temporary handicaps, PD&P focused its argument on similar federal law. In that regard, applicable federal regulations make clear that not every impairment renders an individual disabled. "[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza.” 29 C.F.R. § 1630.2(j), app. at 339 (1996). Complainant was not disabled; rather, he suffered from a non-chronic impairment of short duration stemming from an allergen in the wastewater facility. Complainant was afflicted and cured of his allergic reaction within, at most, a 7-month period.

The MCAD agreed with PD&P's position and dismissed Complainant's Charge after it determined that there was no probable cause. The MCAD used different reasons to scuttle Complainant's claims, but the primary impetus came from his inability to prove he suffered from a handicap: "The mere fact that Complainant suffered a compensatory injury due to an allergic reaction to the chemicals in the work environment does not rise to the level of a disability," wrote the MCAD.

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**About Our Firm**

**Pierce, Davis & Perritano, LLP**

COUNSELLORS AT LAW

TEN WINTHROP SQUARE

BOSTON, MA 02110-1257

TELEPHONE (617) 350-0950

FACSIMILE (617) 350-7760