PIERCE, DAVIS & PERRITANO, LLP FALL 2009 NEWSLETTER

DEVELOPMENTS IN MUNICIPAL LAW

Case Comments

Stricter Pleading Standard in Civil Cases Affirmed: Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)

Building on its decision in Bell Atlantic Corp. v. Twombly, 550 U.S. 1955 (2007), the Supreme Court recently held that Federal Rule of Civil Procedure 8(a), which sets out the rules for federal civil pleadings, requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."

In 2004, Javaid Iqbal, a Pakistani Muslim convicted, jailed, and deported on charges of fraud and conspiracy, filed a so-called Bivens claim against federal officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Iqbal alleged that his constitutional rights were violated when federal officials subjected him to harsh conditions of confinement due to his religion, race, and/or national origin. Iqbal's civil complaint alleged constitutional violations grounded in conduct meted out by lower-ranking officials who acted under the direct auspices of policies designed by Attorney General Ashcroft and adopted and

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The partners of PD&P bring more than a century of litigation and trial experience to the firm. Our team of experienced and diverse associates is well-trained. We guarantee a quick and thoughtful response to each client's particular needs, as well as creative solutions to litigation.

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executed by FBI Director Mueller. In the United States District Court for the Eastern District of New York, Ashcroft and Mueller filed a Rule 12(b)(6) motion to dismiss on the grounds that Iqbal's claim lacked sufficient factual support. The motion was denied. Ashcroft and Mueller then filed an interlocutory appeal with the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed the District Court's ruling and stated that, in accordance with the pleading standard established by Twombly, Iqbal's claim was "plausible" on its face and possessed sufficient facts to state a claim for unlawful discrimination that could withstand the defendants' qualified immunity defense. The Supreme Court granted certiorari.

In Ashcroft v. Iqbal, by a vote of 5-4, the Supreme Court reversed the Second Circuit's decision, but declined to remand the case to the District Court so that Iqbal could enhance his deficient Bivens claim. Writing for the majority, Justice Kennedy concluded that because the District Court's order to deny the defendants' Rule 12(b)(6) motion to dismiss – a prejudgment order reviewable under the collateral-order doctrine – "turned on an issue of law," it was subject to the Supreme Court's jurisdiction as "a final decision 'subject to immediate appeal.'" The Court did not decide Iqbal's Bivens action except to say that under Federal Rule of Civil Procedure 8(a)(2), as interpreted by the Twombly decision, it failed to state a plausible claim and therefore was not entitled to pass into the discovery phase of litigation. Dissenting, Justice Souter argued that the Court misapplied the rules of pleading by not accepting Ashcroft's and Mueller's concession, concerning the fact that they had adopted and issued the "policies" in question, as a satisfactory statement of a claim. In so doing, the dissent argued, the majority had undermined the doctrine of supervisory liability. Justice Breyer also wrote separately in dissent to warn against interpretations of the Federal Rules of Civil Procedure that create "alternative case-management tools" which he believes may conflict with the Federal Rules themselves.

While Iqbal involved a rather unusual setting, that is, a Pakistani man's civil suit against former Attorney General John Ashcroft and FBI Director Robert Mueller, the Supreme Court did not confine its ruling to "terrorism" cases. The Court's ruling gives the defense bar another avenue for seeking dismissal of a case prior to discovery by filing a motion under Rule 8(a). Of course, even when such motions are allowed, a plaintiff is often given leave to file an amended complaint to cure the deficiencies in his original pleading. Still, the Court's ruling in Iqbal is advantageous to defendants. No doubt recognizing this, various pro-plaintiff groups have started to fight back. United States Senator Arlen Specter has already introduced a bill in the Senate designed to roll back pleading standards to the pre-Twombly days. As of this writing, the Judiciary Committee has not yet acted on Senator Specter's bill, currently entitled the "Notice and Pleading Restoration Act of 2009."

ADEA Does Not Authorize Mixed-Motives Age Discrimination Case: Gross v. FBL Financial Services, Inc., 129 S.Ct. 2343 (2009)

In a recent 5-4 opinion authored by Justice Thomas, which proved to be a victory for employers, the Supreme Court held that the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a), does not authorize a mixed-motives age discrimination claim. Instead, the Court ruled that an employee bringing a disparate treatment claim against an employer based on age must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged employment action. Unlike in a

discrimination case brought under Title VII of the Civil Rights Act of 1964, the burden of persuasion under the ADEA at no time shifts to the employer to show that it would have taken the action regardless of age. This holds true even when a plaintiff has produced some evidence that the employer's decision was motivated, in part, by age.

Petitioner Jack Gross began working for FBL Financial Group, Inc. in 1971. In 2003, Gross, then age 54, was reassigned from his position as Claims Administration Director to a new position as Claims Project Coordinator. At the time of the reassignment, FBL also transferred many of Gross's job responsibilities to a younger employee who Gross previously supervised. While both employees received the same compensation from FBL, Gross considered the reassignment an unlawful demotion. Gross filed suit in the United States District Court for the Southern District of Iowa, alleging that his reassignment violated the ADEA. At trial, the District Court judge instructed the jury to enter a verdict for Gross if he proved, by a preponderance of the evidence, that he was demoted, and that his age was a motivating factor in FBL's demotion decision. Upon such proof, the judge instructed the jury that the burden would then shift to FBL to show that it would have demoted Gross regardless of his age.

The jury returned a verdict for Gross. FBL appealed to the United States Court of Appeals for the Eighth Circuit, which reversed and remanded the case based on what it viewed as incorrect jury instructions. The Eighth Circuit's decision turned on the improper allocation of the burden of persuasion. Finding the burden-shifting framework of Title VII controlling, as set forth in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Eighth Circuit held that the jury should have been instructed that Gross needed to present direct evidence sufficient to support a finding that age actually motivated FBL's adverse employment action against him. Only then would the burden shift to FBL.

On certiorari, the Supreme Court held that the burden-shifting framework in Title VII cases does not apply in the context of the ADEA. In ADEA cases, the burden of proving causation remains with the employee and never shifts to the employer. The Court's decision was based, in part, on the statutory construction of the ADEA, which provides that it is unlawful for an employer to discriminate against an employee "because of" such individual's age. The Court read the ADEA's "because of" language as requiring an employee to prove that age was the "but-for" cause of the employer's adverse decision. Accordingly, any lesser showing of proof – such as that the employer was motivated in part by the employee's age – is insufficient. In reaching its decision, the Court also analyzed the divergent legislative histories of Title VII and the ADEA. While Congress amended Title VII to expressly allow a plaintiff to establish discrimination in a mixed-motives setting, contemporaneous Congressional amendments to the ADEA did not contain such language regarding mixed-motives. "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."

The Gross decision will no doubt assist employers in defending ADEA claims, as it makes clear that plaintiffs alone bear the burden of persuasion in age discrimination actions.

Losing The Battle After Winning The War, Transgender Employee Loses Groundbreaking Discrimination Case On The Merits: MCAD v. Lutco, Inc., MCAD Docket No. 98-BEM-3695 (2009 WL 2151780)

A male-to-female transgender complainant in a groundbreaking discrimination case before the Massachusetts Commission Against Discrimination ("MCAD") recently lost her case on the merits. In a complaint filed with the MCAD in 1998, complainant Charlegne Millet claimed her employer, Lutco, Inc., harassed her, subjected her to disparate treatment, and retaliated against her because she is transgendered. Lutco moved to dismiss the complaint on the grounds that discrimination based on an individual's transsexual status does not constitute sex discrimination under Massachusetts' anti-discrimination statute, M.G.L. c. 151B, §§ 1, et. seq. The full Commission of the MCAD concluded in 2001, however, for the first time, that a transgender employee is protected from sex discrimination under the provisions of Chapter 151B.

The case then proceeded to a public hearing on the merits. In support of her allegations, Millet claimed her supervisor listened to music that contained the word "queer" in the lyrics and, when Millet objected, her supervisor responded, "they're singing about you." The only other evidence proffered by Millet in support of her claim was that fellow employees shunned her at work and she was fired shortly after circulating a memorandum that criticized her supervisor's job performance. In its defense, Lutco introduced evidence that it acted swiftly to address the supervisor's insulting remark, demanding he treat Millet with respect. There were no further incidents involving the supervisor. Lutco also accommodated Millet's requests for leave to undergo medical procedures relating to her gender reassignment surgery and openly demanded that all employees treat Millet with respect throughout the reassignment process. As for her termination, Lutco offered evidence that Millet was hired for a specific assignment that had been completed, her performance was deteriorating, she publicly criticized her supervisors and co-workers (even after being warned not to do so), and often announced openly her desire to work elsewhere.

The MCAD Hearing Officer found for Lutco and dismissed Millet's complaint. Millet appealed to the full Commission, which affirmed on July 10, 2009. The Commission held that the Hearing Officer's finding was substantially supported by the record, which revealed that Lutco acted swiftly and effectively in response to the supervisor's singular, inappropriate remark. Lutco also acted with compassion and support during Millet's transformation. The MCAD further observed that the co-workers' impolite behavior did not amount to discrimination, but rather suggested that they were uncomfortable with Millet's admitted tendency to openly discuss her physical anatomy and personal sex life. Finally, the Commission agreed with the Hearing Officer that the complainant's memorandum criticizing her supervisor's work could not be the

subject of a retaliation claim because it did not reference discrimination and, thus, was not a "protected activity."

Millet may have lost her personal battle, but she undoubtedly won the war. The 2001 MCAD decision was a landmark ruling for transgender employees throughout the Commonwealth, guaranteeing, at least for the time being, that when it comes to workplace discrimination, transsexuals will be afforded protected status. When and if Massachusetts appellate courts interpret M.G.L. c. 151B, § 4, in the same context, it remains to be seen whether they will adopt the same expansive meaning of the term "sex" as the MCAD.

Housing Appeals Committee Further Expands Chapter 40B Safe Harbors: In the Matter of Bourne Zoning Board of Appeals and Chase Developers, Inc., HAC No. 2008-11

Chapter 40B of the Massachusetts General Laws allows developers to seek comprehensive permits from local zoning boards for housing projects that include affordable housing. To ease municipal concerns that Chapter 40B unfairly limits local control over development decisions, the Department of Housing and Community Development ("DHCD") issued regulations in 2003 that create certain "safe harbors" which allow municipalities to deny or place conditions on comprehensive permits without the threat of appeal.

In 2008, the DHCD further expanded these safe harbors. Specifically, under the new regulations, a municipality may qualify for a "planned production" safe harbor if the DHCD approves its Housing Production Plan and the city or town then approves new affordable housing units equal to 0.5% of its existing housing stock. Once a municipality approves a project that it believes qualifies for the planned production safe harbor, it must then apply to the DHCD for certification of compliance with its Housing Production Plan. Under the expanded regulations, a municipality that qualifies for this safe harbor is free to deny any Chapter 40B applications for the next 12 months. However, until a recent decision by the Housing Appeals Committee ("HAC") in a matter involving the Town of Bourne, the DHCD's regulations were unclear as to when the one-year safe harbor protection began to run – upon the municipality's approval of the new housing project, or upon the DHCD's certification that the municipality had approved sufficient affordable housing entitling it to protection?

Under the 2008 DHCD regulations, local zoning boards intending to claim a safe harbor are required to do so within 15 days of opening a public hearing on a comprehensive permit application. This gives the prospective developer an opportunity to appeal to the DHCD early in the permitting process for a determination of whether a municipality qualifies for a safe harbor. Either the developer or the municipality may then file an expedited interlocutory appeal of the DHCD's decision to the HAC. The Bourne case was the first such appeal decided by the HAC.

When Chase Developers applied for a comprehensive permit on June 3, 2008, the Town of Bourne claimed protection under the planned production safe harbor because it had recently approved (on April 28, 2008) another development project that would create affordable housing sufficient to meet

the 0.5% threshold. However, by the time Chase filed its application, the Town had not yet applied to the DHCD for certification of compliance with its previously-approved Housing Production Plan. Chase quickly invoked the new procedure to request a ruling from the DHCD that the Town was not entitled to the safe harbor protection. The DHCD agreed with the developer, and the Town appealed to the HAC. The HAC overturned the DHCD's decision and ruled in favor of the Town. Bourne's approval of the previous project, stated the HAC, effectively triggered the one-year protection. Thus, the Town could rely on the safe harbor provision to delay Chase Developers' proposed Chapter 40B project, despite the fact that the Town had not yet asked the DHCD to certify compliance with its Housing Production Plan.

In rendering its decision, the HAC explained that the 12-month safe harbor protection becomes effective on the date a municipality achieves its numerical target. The HAC expressed little concern for a developer who might not know about a potential, yet unclaimed, planned production safe harbor when applying for its permit. Instead, the HAC reasoned that the developer would learn of the Town's reliance on a safe harbor provision before extensive proceedings were conducted. The HAC also rejected the developer's argument that the approved units that allowed the Town to meet its 0.5% threshold would not be developed within the year, noting that whether the units might lose their eligibility in 12 months had no bearing on their eligibility during that one-year period.

As a result of the HAC's decision in the Town of Bourne matter, municipalities need not await DHCD certification in order to enjoy the protection of the planned production safe harbor. Meanwhile, developers seeking to learn whether a municipality is protected under a planned production safe harbor can no longer safely rely on the DHCD's published list of towns certified as having sufficient units under an approved Housing Production Plan. Instead, as part of their due diligence, they must also inquire whether a municipality has recently granted a comprehensive permit to a developer of affordable housing, but has not yet sought certification from the DHCD.

PD&P Decisions & Jury Verdicts

Defense Verdict: Kennie v. Town of Dennis

On August 7, 2009, a Barnstable Superior Court jury returned a verdict in favor of the defendant, Dennis Shellfish Constable Alan Marcy, following a one-week trial. The case, captioned Kennie v. Town of Dennis, C.A. No. BACV2002-00293, was successfully defended by Attorney John J. Davis. Suit arose out of plaintiffs' application to the Dennis Conservation Commission for a permit to construct a private dock from their property into Bass River. The Shellfish Constable, plaintiffs alleged, was so opposed to the dock proposal that he threatened to do "whatever it takes" to defeat plaintiffs' application, even going so far as to "salt" the proposed site by distributing quahogs into the waters of Bass River, thereby tainting the results of a shellfish survey later conducted by the Massachusetts Division of Marine Fisheries ("DMF"). After the DMF confirmed that plaintiffs' "preferred" dock location was a viable shellfish habitat, plaintiffs claimed they were forced to abandon the site and select another, resulting in additional delay and expense. Several months later, the Conservation Commission eventually approved plaintiffs' revised application and the Kennies got their dock.

Prior to the public hearing on their revised application, plaintiffs filed suit against the Shellfish Constable under M.G.L. c. 12, §§ 11H & 11I, the Massachusetts Civil Rights Act ("MCRA"), alleging the Shellfish Constable interfered or attempted to interfere with their constitutional and statutory rights to develop their property through "threats, intimidation or coercion." Dismissing the "quahog-planting" allegations as absurd, the Town and Mr. Marcy believed plaintiffs' real purpose in bringing the suit was to pressure the Conservation Commission into granting the dock permit. The Superior Court subsequently dismissed plaintiffs' claims on a motion for summary judgment (Kane, J.), and the Appeals Court affirmed. Kennie v. Natural Resource Dep't of Dennis, 69 Mass.App.Ct. 158 (2007). In its ruling, the Appeals Court concluded that no reasonable person would have felt threatened, intimidated or coerced in the context of plaintiffs' dock permitting process. Id., 69 Mass.App.Ct. at 163. On further appellate review, however, the Massachusetts Supreme Judicial Court reversed, ruling that the summary judgment record raised questions of material fact as to whether the Shellfish Constable's words and conduct interfered with plaintiffs' constitutional or statutory rights by means of "threats, intimidation or coercion." Kennie v. Natural Resource Dep't of Dennis, 451 Mass. 754, 755 (2008).

At trial, plaintiffs offered expert testimony that the results of the DMF shellfish survey could not be squared scientifically with those of a similar survey conducted six months earlier by plaintiffs' own surveyor. Plaintiffs also called to the stand an eyewitness who testified that, several days before the DMF survey, he saw the Shellfish Constable "doing something" in the waters off of plaintiffs' property. Defendant's expert rebutted plaintiffs' scientific evidence, testifying that, based on the methodology employed by plaintiffs' surveyor, the results of the earlier survey most likely under-reported the number of shellfish present at the site at that time. And, during Mr. Marcy's testimony, the Shellfish Constable admitted he was present at the site several days before the DMF survey for the purpose of surveying the number of soft shell clams in the intertidal zone.

The jury deliberated for one hour and twenty minutes before returning its verdict. In response to special questions, the jury found that, in applying for a dock permit, plaintiffs were exercising a right protected under Massachusetts law. Nevertheless, Mr. Marcy did not interfere or attempt to interfere with that right. Ironically, the jury never reached the issue of whether plaintiffs were the victims of "threats, intimidation or coercion," the issue expressly preserved by the SJC one year earlier. The plaintiffs did not pursue another appeal.

Plaintiff Held To Be "Original Cause" Of Alleged Harmful Condition Or Situation: Jones v. Maloney, 74 Mass.App.Ct. 745 (2009)

In January 2003, the plaintiff, an eighteen-year old senior at Groton Dunstable Regional High School, sexually assaulted a female student by grabbing and squeezing her breasts during "A" period manufacturing technology class. The young woman reported the incident to her guidance counselor who, in turn, informed the assistant principal, Cathy Jo Maloney. Maloney immediately investigated the incident by interviewing the victim, two witnesses and, finally, the alleged assailant, Cyle Jones. Due to the serious nature of the allegations, Maloney also reported the incident to the school resource officer, a member of the Groton Police Department. Maloney initially suspended the plaintiff for five days for two violations of the school's anti-harassment policy. The principal later suspended Cyle indefinitely.

Following its investigation, the Groton Police Department charged Cyle with three counts of indecent assault and battery. In May 2003, a jury convicted Cyle on one count of indecent assault and battery for touching the female student's breasts.

In June 2005, Cyle Jones and his mother filed suit against the School District and Maloney alleging negligence and intentional infliction of emotional distress. In substance, the plaintiffs complained that the School District, through the omissions of Maloney, mishandled the initial investigation and violated school policies by failing to advise Cyle's mother that her son was being interrogated by police, and by failing to remain in the room with Cyle to act *in loco parentis* during the police interview. On August 17, 2007, the Middlesex Superior Court (McEvoy, J.) granted summary judgment in favor of both the School District and Maloney. Cyle and his mother appealed.

On August 3, 2009, the Massachusetts Appeals Court (Kafker, J.) affirmed the decision below. At the outset, the Appeals Court rejected plaintiffs' argument that Cyle was convicted for an accidental or "unintentional" touching. An indecent assault and battery is an "intentional, unprivileged and indecent touching of the victim." Commonwealth v. Mosby, 30 Mass.App.Ct. 181, 184 (1991). Therefore, Cyle could not contest the validity of the criminal conviction in the context of his civil suit. In light of that conviction, the School District was entitled to immunity under M.G.L. c. 258, § 10(j). Maloney's alleged omissions were not affirmative acts sufficient to qualify as the "original cause" of the harmful condition or situation – i.e., Cyle's exposure to criminal prosecution and eventual conviction. "[R]ather Cyle's groping of his classmate is the original cause." Nor could plaintiffs successfully invoke the exception to immunity that eliminates "any claim based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention . . .." M.G.L. c. 258, § 10(j)(2). "The cause of Cyle's injury is Cyle's own proven criminal conduct, not any 'intervention' by the assistant principal."

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Summary judgment, ruled the Appeals Court, was also properly entered on plaintiffs' claim for intentional infliction of emotional distress against Maloney. Focusing, in particular, on the second element of proof – that defendant's conduct was extreme and outrageous – the Court found nothing extreme and outrageous about Maloney's investigation, which involved interviews of both the victim and perpetrator, as well as witnesses. "If [the investigation] was in any way incomplete or precipitous, it was at most negligent."

The Jones decision is significant for two reasons. First, the Appeals Court ruled that the plaintiff himself, rather than only the defendant or a third party, can be the "original cause" of a harmful condition or situation. This ruling broadens the potential application of Section 10(j) immunity in future cases. Second, the Court narrowly interpreted the immunity exception in Section 10(j)(2) by limiting

"interventions" to affirmative acts (similar to the "original cause" restriction), and by recognizing that the "victim" protected by Section 10(j)(2) can be someone other than the plaintiff. As the Jones Court explained, "Cyle is not a 'victim' here." The female student was his "victim." Clearly, expansive use of Section 10(j)(2) to avoid immunity will not be tolerated by Massachusetts courts. The School District and Maloney were successfully defended in this action by PD&P.

School Officials Held Not Responsible For Sexual Assault By Former Teacher: Bethoney v. Town of Middleborough, United States District Court for the District of Massachusetts, C.A. No. 06-12224-RWZ

PD&P defended the Town of Middleborough, Middleborough High School, and several school officials in an action brought by a former student and his parents arising out of a sexual assault committed by a former teacher, Gregory Pathiakis, on December 23, 2003. Pathiakis sexually assaulted the student-plaintiff during his junior year, three weeks after Pathiakis resigned from Middleborough High School. The plaintiffs also claimed, that after the assault, Middleborough took insufficient measures to protect the student-plaintiff from his classmates' abuse and ridicule. The plaintiffs brought tort and civil rights claims attacking Middleborough's hiring, review, and resignation process. They also argued that Middleborough was directly responsible for the assault.

Pathiakis hand-delivered his resume and letters of recommendation to Middleborough school officials during the Fall of 2002. Unknown to Middleborough, several weeks earlier, Pathiakis was forced to resign from his teaching position at a parochial school because his personal website (to which he directed students) arguably contained racist material. After reviewing his resume, the Middleborough High School Principal, a department head, and the Superintendent of Schools interviewed Pathiakis and, after conducting a successful CORI check, hired him as a math teacher. No one from the administration contacted Pathiakis' references. During Pathiakis' first year, the department head observed him in the classroom. She concluded that he was focused, comfortable, and ran a well-organized class. Before the school year ended, the Principal met with Pathiakis to discuss his teaching experience over the previous months.

The following year, Pathiakis was the student-plaintiff's geometry teacher. The student-plaintiff never complained to the administration about Pathiakis. On December 3, 2003, school officials received a report that Pathiakis had telephoned a student seeking marijuana and had also entertained another student at his home and given the student rides to school. Upon learning this, the Assistant Principal met with the two involved students, who confirmed the allegations. The Assistant Principal reported his findings to the Principal who, within hours, secured Pathiakis' resignation. School officials received no information of alleged sexual misconduct on the part of Pathiakis.

Three weeks later, on December 23, 2003, Pathiakis and the student-plaintiff began instant messaging. Eventually, the two agreed to meet at a local restaurant. According to the student-plaintiff, Pathiakis then lured him to his apartment where he forced him into oral sex. The student-plaintiff told his parents about the assault a week later. The parents, in turn, reported it to the Brockton Police Department.

Upon the student-plaintiff's return to school, the Principal made counseling available to him and advised his teachers to keep a close eye on him. The student-plaintiff testified that the teachers "were all very supportive and, like, don't worry about it, we'll work to get you caught up. Just take it easy." His classmates, however, allegedly harassed him. The student-plaintiff never reported the harassment to the administration.

PD&P moved for summary judgment on all counts. The United States District Court for the District of Massachusetts (Zobel, J.) dismissed each of plaintiffs' claims in a 28-page decision. The Court held that the Principal and Superintendent could not be held liable as supervisors because their alleged actions or inactions were not "affirmatively linked" to the sexual assault that occurred three weeks after Pathiakis' resignation. Further, the Court was not convinced that, as of the date of Pathiakis' resignation, the Principal and Superintendent had adequate control over Pathiakis to prevent the assault. More importantly, the Court found that neither the Principal nor the Superintendent had notice of any behavior that was likely to result in a violation of the student-plaintiff's constitutional rights. Nor did the Town of Middleborough, the Court concluded, deprive the student-plaintiff of his civil rights by failing to check Pathiakis' references. "Had Middleborough contacted Pathiakis' references, it might have discovered that he had been discharged for potentially exposing his previous students to racist material. That is not enough to conclude that the plainly obvious consequences of hiring him would be a student's rape." The Court used the same rationale to refuse recovery based on Middleborough's alleged negligent supervision. Upon the student-plaintiff's return to school, the Principal advised his teachers to report any students who talked about the assault. Even if his peers subjected the student-plaintiff to ridicule and harassment, the Court held there was insufficient evidence to support the claim that Middleborough was deliberately indifferent to such harassment.

Tort Suit Dismissed For Failure To Make Adequate Presentment: Kelly v. Wareham, Plymouth Superior Court, C.A. No. 08-00917-B

PD&P successfully moved to dismiss a personal injury case based on inadequate presentment under M.G.L. c. 258, § 4. The litigation stemmed from a low speed collision that occurred in August 2006 in Wareham, Massachusetts. The plaintiff claimed that he sustained back injuries when a vehicle owned by the Town of Wareham and operated by a Town employee backed up and struck the vehicle in which the plaintiff was sitting.

Plaintiff brought suit against the Town alleging that the driver of the Town vehicle was negligent. Prior to bringing suit, plaintiff's counsel submitted two letters to the Town, both purporting to satisfy the written presentment requirements of M.G.L. c. 258, § 4. The first letter was addressed simply "Dear Sir or Madam." The second letter, which plaintiff sent several days after the first, was directed to the Town's Purchasing Agent. On behalf of the Town, PD&P moved to dismiss plaintiff's Complaint on the grounds that the letters did not satisfy the presentment requirement because they were not addressed to an "executive officer" of the Town. Specifically, Section 4 requires that presentment be made to one of the following executive officers: "mayor, city manager, town manager, corporation counsel, city solicitor, town counsel, city clerk, town clerk, chairman of the board of selectmen, or executive secretary of the board of selectmen."

In opposition to the motion to dismiss, plaintiff argued that the Town's Purchasing Agent shared the same physical office space as the Town Administrator and, therefore, despite the technical deficiencies in the presentment letters, the Town had actual notice of plaintiff's claim. Further, plaintiff's counsel deposed the Purchasing Agent, who testified that she had forwarded the claim to the Town's insurance carrier and that it was her normal practice to inform Town Counsel of all new claims upon receipt (although she could not recall whether she had followed that practice with respect to Kelly's claim).

After oral argument, the Plymouth Superior Court (Connon, J.) granted the Town's motion to dismiss. In a brief written opinion, the Court noted that plaintiff's presentment letters were deficient and that plaintiff failed to establish that the Town had actual notice of his claim, despite the fact that the Purchasing Agent worked in close confines with the Town Administrator. This decision illustrates the continued viability of the presentment defense under the Massachusetts Tort Claims Act. Future claimants and their counsel should take all precautions to ensure that the requirements of M.G.L. c. 258, § 4 are scrupulously met.

Advisory

Governmental Employee Email As Public Records

Recent publicity scrutinizing a city official's habit of deleting emails, which precluded the city from promptly responding to a newspaper's public records request, offers a lesson to public officials in Massachusetts. Many public employees are unaware of the obligations and risks when using electronic mail to communicate. This article briefly describes the status of governmental employee email as a public record in Massachusetts, and the duties incumbent upon employees to safeguard and preserve such public records.

The Massachusetts Public Records Act, M.G.L. c. 66, §§ 1, et. seq., broadly defines "public records" to include "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee" of any Massachusetts governmental entity. M.G.L. c. 66, § 10(a). There is a presumption that all governmental records are public records. M.G.L. 66, § 10(c); 950 C.M.R. 32.08(4). There are 18 strictly and narrowly construed exemptions to this broad definition of public records. See M.G.L. c. 4, §§ 7(26)(a-s); see also Attorney General v. Assistant Comm'r, 380 Mass. 623, 625 (1980) (stating statutory exemptions are to be strictly and narrowly construed). Of course, the "primary purpose of [the public records law] is to give the public broad access to governmental records." Worcester Telegram & Gazette Corp. v. Chief of Police, 436 Mass. 378, 382-383 (2002). The statute expresses the Legislature's considered judgment that "[t]he public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner." Attorney General v. Collector of Lynn, 377 Mass. 151, 158 (1979). "Greater access to information about the actions of public officers and institutions is increasingly . . . an essential ingredient of public confidence in government." New Bedford Standard-Times Publ. Co. v. Clerk of Court, 377 Mass. 404,

417 (1979).

With this background, one should expect that emails of public officials and employees are considered public records under the Public Records Act. Lest there be any doubt, the Massachusetts Secretary of State's Public Records Division has issued guidelines expressly stating that "[a]ll email created or received by an employee of a government unit is a public record." See www.sec.state.ma.us/arc/arcrmu/rmubul/bul199.htm. The guidelines explain that email is subject to the same records management principles as all other public records. Government offices are required to establish and implement records management procedures to ensure public records are preserved for the proscribed period. Every governmental department is required to have a "records custodian" having routine access to, or control of, public records. 950 C.M.R. 32.03. Further guidance regarding public records retention and management from the Public Records Division and the Supervisor of Records can be found at the following websites:

1. www.sec.state.ma.us/arc/arcrmu/rmindex.htm; and

2. www.sec.state.ma.us/pre/preerecords/erecords.pdf.

For example, the Supervisor of Records suggests that, while an email scheduling a meeting can be disposed of after use, an email relating to a contract should be retained for six years after final payment.

It is apparent that the content of each email must be screened and evaluated to determine the need for, and duration of, retention. As for the form of the retention, the Public Records Division recommends that the user print out the email message and file it in accordance with the entity's paper-filing system, unless it cannot be printed accurately or is too voluminous, in which case it should be stored electronically. Given the volume of email correspondence today, and the potential relevance of electronic metadata discussed below, it is advisable that governmental entities establish electronic record-keeping systems in lieu of the burden of printing physical copies.

Public employees should be aware that some of the exceptions contained in the Public Records Act may apply to the content of emails, and the emails may be subject to other state statutory or common law privileges from disclosure. Thus, legal counsel should be consulted prior to producing emails in response to a public records request. Furthermore, the burdens of producing email as part of a lawsuit may be equally onerous. The obligation of a governmental entity to respond to discovery requests in the context of litigation is beyond the scope of this article. Governmental officials should be aware, however, that courts routinely allow electronic discovery, including production of electronic data. Court cases and rules recognize that electronic documents contain metadata, hidden contextual data that may reveal the author of electronic documents, the date of creation, and any alterations to the documents. Metadata may be relevant and discoverable. If a governmental department is involved in litigation, counsel or the court may seek a "litigation hold" requiring the department to preserve intact all electronic data as of a certain date, effectively overriding other applicable retention policies. Although these record-keeping obligations may seem burdensome, numerous resources now exist for email storage and searching. Prudent governmental departments should consult with information technology specialists to determine the necessary electronic archiving solutions to meet their obligations with respect to governmental employee email.