PIERCE, DAVIS & PERRITANO, LLP SUMMER 2009 NEWSLETTER

DEVELOPMENTS IN MUNICIPAL LAW

Case Comments

Class-Of-One Equal Protection Claim Not Actionable Against Public Employer: Engquist v. Oregon Department of Agriculture, 128 S.Ct. 2146 (2008)

In a recent 6-3 opinion written by Chief Justice Roberts, the Supreme Court refused to recognize the validity of a so-called "class-of-one" equal protection claim in a public employment setting. A class-of-one equal protection claim arises where an employee claims she was treated differently from other similarly situated employees, *without* basing the alleged different treatment on the employee's membership in a protected class.

Deborah Engquist was hired as an international food standard specialist with the Oregon Department of Agriculture. She encountered multiple problems with a fellow employee whom she complained made false statements about her and made her life difficult. An assistant director at the Department of Agriculture advised a client that he found it difficult to "control" Engquist and that she "would be gotten rid of." When a managerial position became available within the Department, Engquist applied for it. Although Engquist had more experience,

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PIERCE, DAVIS & PERRITANO, LLP
90 Canal Street
Boston, MA 02114
(617) 350-0950
www.piercedavis.com

the position was given instead to the co-worker who allegedly made false statements about Engquist. Later that year, Engquist was informed that, due to reorganization, her position would be eliminated. Engquist could either move to another position at her level or accept a demotion. Because Engquist was found unqualified for the one position available at her level, and refused to be demoted, she was laid off.

Engquist filed suit in the United States District Court for the District of Oregon asserting, among other claims, that the Department violated her Fourteenth Amendment rights to equal protection. The Engquist v. Oregon Department of Agriculture decision is significant for its discussion of Engquist's efforts to pursue a class-of-one equal protection claim. More specifically, Engquist claimed she was terminated *not* because she belonged to a protected class, but for "arbitrary, vindictive, and malicious reasons." The District Court allowed the class-of-one equal protection claim to proceed, and a jury found in plaintiff's favor. The Ninth Circuit Court of Appeals reversed, holding that a class-of-one equal protection claim in the context of public employment interfered with the state's employment practices and distorted the notion of at-will employment in the public sector.

The Supreme Court affirmed the Ninth Circuit decision, holding that a class-of-one equal protection claim is not permitted in the public employment sector. While the Equal Protection Clause of the Fourteenth Amendment protects individuals from the conduct of government and public officials, the Court noted that a distinction exists between government serving in its legislative capacity, and government operating as an employer managing its internal operations. The Court posited that the "government as employer indeed has far broader powers than does the government as sovereign." At the heart of the Engquist decision is the notion that the government's need to operate in an effective and efficient manner must be balanced against the rights of the individual. Allowing class-of-one equal protection claims would effectively subject government employers to judicial review on numerous routine employment decisions, ultimately making virtually every employment decision a potential constitutional question and "constitutionaliz[ing] the employee grievance." Thus, Engquist's class-of-one equal protection claim was rejected.

Supreme Court Retreats From Mandatory Qualified Immunity Sequence: Pearson v. Callahan, 129 S.Ct. 808 (2009)

Qualified immunity shields government officials from suit and liability unless the official's conduct violated a clearly established constitutional right. In Saucier v. Katz, 533 U.S. 194 (2001), the Supreme Court mandated a two-step approach for resolving government officials' qualified immunity claims. First, a court must determine whether the facts alleged make out a violation of a constitutional right. If the first step is satisfied, a court must next decide whether the constitutional right was clearly established at the time of the defendant's alleged misconduct. In a unanimous opinion written by Justice Alito, the Supreme Court recently rejected the mandatory sequence of the two-step approach in the case of Pearson v. Callahan, allowing lower courts some discretion in deciding qualified immunity claims.

In the eight years between the Saucier and Pearson decisions, federal Courts of Appeal, District Courts, and the Supreme Court itself frequently criticized the rigidity of the mandatory two-step approach. For example, in many instances the required procedure resulted in the needless expenditure of

substantial judicial resources. Critics of Saucier noted that, where the facts of a particular case show that no constitutional right was clearly established, it is merely an academic exercise to determine whether such facts describe the violation of a constitutional right. While the first-step Saucier mandate was designed, in part, to further the development of constitutional precedent, in practice the fact intensive nature of determining each plaintiff's constitutional claim did not often provide guidance for future cases.

Armed with "a considerable body of new experience of requiring adherence to [Saucier's] inflexible approach," the Supreme Court held that the two-step process should not be rigidly followed. While the well-established sequence is often appropriate, courts should be free to conduct their qualified immunity analysis in whatever sequence they deem fit. The Pearson decision recognizes that judges "are in the best position to determine the order of decisionmaking" and aims to increase the efficiency of the judicial process.

Prior to the Pearson decision, the First Circuit Court of Appeals separated the second step of the qualified immunity analysis into two sub-parts, thus analyzing qualified immunity under a three-step test. The first sub-part focused on the clarity of the law at the time of the alleged civil rights violation while the second sub-part focused on whether, based on the facts of the particular case, a reasonable defendant would have understood that his conduct violated the plaintiff's civil rights. In the wake of the Pearson decision, the First Circuit abandoned its three-step test, deferring to the two-step inquiry articulated by the Supreme Court. Maldonado v. Fontanes, 568 F.3d 263, 268-269 (1st Cir. 2009).

Although considered seismic when first announced, the practical result of the Pearson decision will likely be more limited. The Supreme Court re-emphasized that qualified immunity is an immunity from suit and liability, and the purpose of that immunity will be lost if public officials are forced to engage in costly and time-consuming litigation. The reiteration and recognition of this principle should assist municipal defendants in continuing to press qualified immunity claims.

Circuit Split Resolved – Supreme Court Allows Concurrent Title IX And Section 1983 Claims: Fitzgerald v. Barnstable School Committee, 129 S.Ct. 788 (2009)

In a recent decision involving the judicial remedies available to victims of student-to-student sexual harassment, the Supreme Court expanded the rights of sex discrimination plaintiffs to proceed under multiple federal statutes. In the case of Fitzgerald v. Barnstable School Committee, an elementary school student and her parents filed suit against a school superintendent and the school committee based on defendants' allegedly inadequate response to plaintiffs' claims of sexual harassment. Plaintiffs further alleged that defendants' failure to respond appropriately to their initial complaints of sexual harassment caused the minor plaintiff to suffer additional (and foreseeable) harassment. Plaintiffs sought recovery under 42 U.S.C. § 1983 for violation of their equal protection rights, and also claimed relief under Title IX (20 U.S.C. § 1681(a)). The United States District Court for the District of Massachusetts dismissed the Section 1983 claims on the grounds they were precluded by the comprehensive remedial scheme of Title IX. Later, following the completion of discovery, the District Court also granted defendants'

motion for summary judgment on plaintiffs' Title IX claim. The defendants could not, the District Court ruled as a matter of law, be found deliberately indifferent absent evidence of severe, pervasive, and objectively offensive harassment that took place after defendants first learned of the offending conduct. The Court of Appeals for the First Circuit affirmed. But in a unanimous opinion written by Justice Alito, the Supreme Court reversed, putting to rest an issue that had split the Circuits for years: whether Title IX precludes a gender discrimination action under Section 1983.

The critical inquiry, the Supreme Court noted, was whether Congress intended the judicial remedy authorized by Title IX to coexist with the alternative civil rights remedy available under Section 1983. Typically, statutes with comprehensive remedial schemes evidence Congressional intent to preclude suits under other more generic statutes. Accordingly, the Supreme Court looked to the nature and extent of Title IX's remedial scheme, noting first that Title IX does not have an administrative exhaustion requirement. Further, the only remedies available under Title IX are the withdrawal of federal funding from institutions that violate Title IX, and an implied private right of action. Title IX's remedial scheme, reasoned the Supreme Court, stands in "stark contrast" to the more elaborate enforcement schemes found in other federal statutes.

In addition, the Supreme Court explained the differences between the rights and protections guaranteed under Title IX and those guaranteed under the Equal Protection Clause of the Fourteenth Amendment. For example, a plaintiff can only recover under Title IX against an institution or program that receives federal funding; Title IX suits against school officials, teachers, and other officials are prohibited. Further, elementary and secondary schools are not subject to Title IX's prohibition against discrimination in admissions. Finally, military service schools and traditional single-sex public colleges are exempt from *all* provisions of Title IX. Yet plaintiffs may bring viable equal protection claims against such persons and entities for some of the activities exempted by Title IX.

Based on the absence of a comprehensive enforcement scheme, as well as the divergent coverage between Title IX and the Equal Protection Clause, the Supreme Court concluded that the provisions of Title IX did not preclude the pursuit of concurrent Section 1983 claims. (Plaintiffs did not appeal the issue of deliberate indifference). The holding in the Fitzgerald decision means that school districts must now be prepared to defend gender discrimination claims on more federal fronts. More significantly, school officials – teachers, principals, and other administrators – may now be held individually liable under the provisions of Section 1983 for their failure to protect students from peer-to-peer sexual harassment. This remedy may loom large in the future.

Supreme Court Rules on School Strip Search Case: Safford Unified School District No. 1 v. Redding, 129 S.Ct. 2633 (2009)

On June 25, 2009, the Supreme Court (Souter, J.) issued a decision in the matter of Safford Unified School Dist. No. 1 v. Redding, a case that required the Court to consider how much leeway to allow school officials in enforcing zero-tolerance drug and violence policies. In reaching its ruling, the Supreme Court provided some much-needed guidance to schools and administrators around the nation struggling to determine what measures they may lawfully employ when they suspect a student is in possession of drugs or alcohol. The issue before the Supreme Court was whether a thirteen-year old student's Fourth Amendment rights were violated when she was subjected to a search of her bra and underpants by school officials acting on a reasonable suspicion that the student had brought prescription and over-the-counter drugs to school.

The incident arose when a Safford Middle School student was found to be carrying several ibuprofen pills that she claimed belonged one of her classmates, the plaintiff, Savana Redding. School policy prohibited student possession of any medication on school property – whether prescription or over-the-counter – without prior approval. Savana denied the pills were hers but, nonetheless, allowed the assistant principal to search her belongings. The assistant principal (a male) found no pills in a search of Savana's backpack. Still unsatisfied, the assistant principal instructed the school nurse and an administrative assistant (both females) to conduct a strip search of Savana in the nurse's office. During this search, Savana was instructed to strip to her underwear, pull her bra out to the side and shake it, and pull her underpants down at the crotch and shake them. Savana breasts and pelvic area were exposed. She felt embarrassed, scared, and humiliated by the ordeal. No pills were found during the search.

The Reddings brought suit in the United States District Court for the District of Arizona against the Safford school district, as well as the assistant principal, the school nurse, and the administrative assistant involved in the strip search. The individual defendants moved for summary judgment on the grounds of qualified immunity. The District Court examined one element of qualified immunity, e.g., whether the facts alleged by the plaintiff made out a constitutional violation, and found that they did not. Accordingly, the District Court granted summary judgment to the individual defendants.

A divided panel of the Ninth Circuit Court of Appeals agreed that defendants' search did not violate Savana's Fourth Amendment rights and affirmed the District Court decision. Redding v. Safford Unified School Dist. No. 1, 504 F.3d 828 (9th Cir. 2007). A Ninth Circuit panel then reconsidered the matter *en banc* and, in a split decision (6-5), affirmed in part and reversed in part. Redding v. Safford Unified School Dist. No. 1, 531 F.3d 1071 (9th Cir. 2008). The majority held that Savana did have a constitutional right under the Fourth Amendment to be free from strip searches by school officials. The Ninth Circuit noted that "[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity." Id., 531 F.3d at 1088.

The Supreme Court affirmed the Ninth Circuit's 2008 decision, albeit on different grounds. Noting

that a school official must have reasonable suspicion – but not probable cause – to conduct a search of a student, the Court held that the defendants' search of Savana was unreasonable and violated the Fourth Amendment. The Court's decision was based on two keys factors. First, there was no indication that the type, quantity or potency of the suspected drugs posed any threat to students. Second, the defendants had no reason to suspect that Savana was carrying pills in her underwear. The Court went on to decide, under another element of qualified immunity, e.g., whether the constitutional right was clearly established at the time of the defendants' alleged misconduct, that the defendants could not be found liable to the plaintiff. Based on numerous inconsistent cases regarding school strip searches, the Court held that the Fourth Amendment standard for strip searches in schools was not sufficiently clear to advise the defendants of the illegality of their conduct. The defendants were thus entitled to qualified immunity. The Court remanded plaintiff's claim against the Safford school district, the only remaining claim, to the District Court for further proceedings.

The Supreme Court's decision cautions school officials that they must have sufficient knowledge of a student's wrongdoing before conducting a search of the student's belongings and/or person. Further, school officials should only search the portion of a student's belongings and/or person where the suspected contraband may reasonably be found. The Court's decision also, however, affirms the well-established principle that school officials are entitled to immunity from suit where disuniform law results in uncertainty as to the scope of a particular legal principle.

Second Circuit Affirms School Administrators Can Prohibit Disruptive Speech: Doninger v. Niehoff, 527 F.3d 41 (2nd Cir. 2008)

The Second Circuit Court of Appeals (Livingston, J.) recently issued a decision limiting the First Amendment right of Connecticut high school student Avery Doninger to express her opinion because the expression could interfere with the operation of her school. Avery's mother, Lauren Doninger, brought suit after the high school punished Avery for expressing an opinion on an upcoming school-sponsored music festival on a personal blog. Avery's mother also requested preliminary injunctive relief against the high school to repeal her daughter's punishment. The request for injunctive relief was denied by the United States District Court for the District of Connecticut and a unanimous panel of the Second Circuit affirmed.

Avery Doninger was a high school junior in Burlington, Connecticut during the 2006-2007 academic school year. As junior class secretary, she was involved in organizing a yearly student concert known as Jamfest. School administrators had delayed the event on two separate occasions and, in April of 2007, Avery and her fellow students learned that administrators were contemplating a third delay. In response, Avery and three other students sent a mass email, encouraging students to contact school administrators to express concern about the potential third postponement of Jamfest. School administrators were then subjected to a deluge of telephone calls and emails. School principal Karissa Niehoff met with Avery and expressed her disappointment that Avery had sent out the email. Niehoff told Avery that class officers are charged with working cooperatively with school administrators and should always demonstrate qualities of good citizenship.

That evening, Avery made a critical posting on her personal blog in which she referred to school administrators as "douchebags" and encouraged readers to keep calling and emailing principal Niehoff and school district superintendent Paula Schwartz "to piss [them] off more." Several of Avery's classmates responded to the posting with messages that included vulgar language. When principal Niehoff discovered the blog posting, she prohibited Avery from running for senior class secretary. Principal Niehoff's reasons for such discipline were three-fold. First, Avery disregarded Niehoff's advice that class officers should work with school administrators to resolve the Jamfest dispute. Second, the blog posting was inaccurate and included vulgar language. Third, the portion of Avery's blog posting that encouraged other students to try to further "piss off" school administrators was inappropriate for a class officer. Despite the fact that Avery was not allowed to appear on the ballot, she ultimately received the plurality of votes as a write-in candidate. The school, however, did not permit her to take office, and the second-place candidate became senior class secretary.

Avery's mother filed suit against principal Niehoff and superintendent Schwartz, alleging, among other claims, that the defendants violated Avery's First Amendment right to freedom of speech and expression. Avery's mother also sought a preliminary order to void the senior class secretary election and hold a new election in which Avery would be allowed to participate. Alternatively, Avery's mother requested that the court order the school to bestow on Avery the same title, honors, and obligations as the student elected to the senior class secretary position, including the privilege of speaking at graduation. The District Court denied the request for preliminary relief.

Avery's mother appealed the District Court ruling, which the Second Circuit affirmed. In rendering its decision, the Second Circuit recited the well-established Supreme Court precedent that students do not "shed their constitutional rights to freedom of speech or expression at the school house gates." Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969). That right, however, does not come without limitation. In the Tinker decision, the Supreme Court recognized that student expression may be prohibited when it will "materially and substantially disrupt the work and discipline of the school." Id., 393 U.S. at 513.

In affirming the District Court ruling, the Second Circuit held that plaintiff had not shown that she was likely to succeed on the merits of her claim, a prerequisite to the issuance of preliminary injunctive relief. This was so because Avery's blog posting created a foreseeable risk of substantial disruption within the school environment. Evidence of such a risk included a threatened student sit-in protest. Further, Avery and other students involved in the Jamfest dispute were called away from their classes at times to manage the dispute. Niehoff and Schwartz were forced to miss several school-related activities because of the large volume of calls and emails they received about student reaction to the posting. Thus, the Second Circuit concluded that the risk of substantial disruption at Avery's school precluded Avery's mother from showing a reasonable likelihood of success on the merits of her case, and affirmed the denial of plaintiff's request for injunctive relief.

Swimming Against The Current – Student Has No Constitutionally Protected Property Interest In Extracurricular Activities: Mancuso v. Massachusetts Interscholastic Athletic Association, 453 Mass. 116 (2009)

In a case of first impression, the Massachusetts Supreme Judicial Court recently rejected a high school student-athlete's claim that she held a constitutionally protected property interest to participate on her high school swim team.

Regarded as one of the fastest swimmers in the Commonwealth, Elizabeth Mancuso completed the ninth grade at Austin Preparatory School during the 1999-2000 academic school year. Plaintiff chose not to swim for Austin Prep. that year despite her eligibility to do so under the rules of the governing body for high school athletics, the Massachusetts Interscholastic Athletic Association ("MIAA"). In 2000, plaintiff transferred to Andover High School and repeated her freshman year. She swam competitively for Andover throughout her freshman, sophomore, and junior years.

Towards the end of her junior year, MIAA officials notified plaintiff that she was ineligible to compete during her senior year pursuant to MIAA's "fifth year student rule," which limited high school student-athletes to four consecutive years of eligibility. Because plaintiff was eligible to swim while at Austin Prep., the plaintiff's fourth year of eligibility expired after her junior year at Andover. The plaintiff's request for a waiver of the eligibility rule was denied, as were her administrative appeals with MIAA.

Plaintiff filed suit against MIAA, in part claiming that MIAA infringed upon her constitutionally protected property interest to participate in interscholastic athletics without due process of law. Such a right, plaintiff theorized, was encompassed within her constitutionally protected property interest in a public education. Plaintiff also argued that a property right was implied from MIAA's eligibility rules because she reasonably expected to receive benefits, i.e., continued eligibility, under the rules. After a plaintiff's verdict on the due process portion of her claim, the trial court granted MIAA's motion for judgment notwithstanding the verdict, on the grounds that no constitutionally protected property interest was at stake. Plaintiff appealed and the SJC granted direct appellate review on its own initiative.

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In its opinion, written by Justice Cowin, the SJC focused upon the threshold due process question of whether a constitutionally protected property right was at stake. The SJC first observed that while students have a constitutionally protected right to a public education, that right had always been defined in terms of a "total exclusion" of a student from the

educational process. Goss v. Lopez, 419 U.S. 565, 573-574 (1975). The SJC rejected plaintiff's claim that a property right to participate in extracurricular activities is implied from the broader right to an education, declining to dissect the "myriad [of] activities which combine to form the educational process" into hundreds of actionable property rights, "each cognizable under the Constitution." The SJC concluded that the Fourteenth Amendment does not require extending due process rights to every student denied access to a particular class, sports team, club or extracurricular activity.

Plaintiff fared no better under her secondary argument that MIAA's eligibility rules and her longstanding enjoyment of eligibility under those rules gave rise to a property right. The SJC held that even assuming, *arguendo*, that MIAA's rules could *ever* give rise to a property right, the parameters of such a right would be defined by MIAA's rules. Because those rules clearly provided for only four years of eligibility, which plaintiff did not dispute she had received, the SJC reasoned that plaintiff had no "legitimate claim of entitlement to further participation."

The reach of the Mancuso v. MIAA decision is broader than extracurricular sports. The SJC specifically rejected the notion that participation in clubs or a "particular class" triggers due process rights. It would seem that nothing short of a total exclusion from the educational process will offend the Constitution. On the other hand, the SJC passed on the specific question of whether MIAA's eligibility rules can *ever* give rise to a property interest, assuming as much for the sake of analysis. It remains to be seen whether due process rights will be required where the applicable eligibility rules provide better support for a claim of reasonable entitlement.

P D&P Decisions

First Circuit Court Of Appeals Interprets Rule 68 In Favor Of PD&P Clients: King v. Rivas, 555 F.3d 14 (1st Cir. 2009)

In an appeal successfully handled by PD&P, the First Circuit Court of Appeals (Boudin, J.) recently reversed a ruling of the United States District Court for the District of New Hampshire and, in so doing, interpreted Rule 68 of the Federal Rules of Civil Procedure in a manner favorable to civil rights defendants. The King v. Rivas appeal raised the issue of whether multiple defendants who extend a joint offer of judgment must apportion that offer among them so as to inform the plaintiff precisely how much of the total offer applies to the case against each individual defendant. The District Court held that such apportionment was required, otherwise a joint offer is "ambiguous" and "unenforceable." King v. Rivas, 2008 WL 822236, *6 (D. N.H.).

In the circumstances presented, seven defendants (officials and employees of the Hillsborough County House of Correction) made a joint unapportioned Rule 68 offer of $10,000 to the plaintiff (a former inmate seeking recovery under 42 U.S.C. § 1983) at an early stage of the litigation. Three years later, concluding it was "very difficult," if not "impossible," to compare the judgment finally obtained by the plaintiff against only one of the seven defendants – $5,500 – with the amount of the offer – $10,000 – without knowing how much the liable defendant contributed toward the total, the District Court refused

to enforce the offer and the cost-shifting provisions of Rule 68. According to the District Court, without such apportionment, an accurate comparison cannot be made between the final judgment and the individual defendant's offer. The effect of the District Court decision, of course, was to deny the liable defendant recovery of his post-offer costs and, instead, subject him to plaintiff's post-offer attorney's fees.

On appeal, the First Circuit ruled that the District Court erred in refusing to enforce the joint offer of judgment. The joint offer (which the First Circuit labeled a "package offer") "was hardly 'ambiguous': by its terms it was an offer to settle the whole case, and only the whole case, for $10,000 – plus costs and attorney's fees to date." Thus, the District Court should have followed the "straightforward" language of Rule 68 and applied the cost-shifting provisions in favor of the sole remaining defendant. Citing the "grim and unsanitary" conditions of plaintiff's confinement in the Hillsborough County House of Correction, the First Circuit admitted its decision was "not entirely welcome." Nonetheless, the phrasing of the cost-shifting provision was "mandatory": "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer." The First Circuit therefore reversed and remanded the case to the District Court for further proceedings consistent with its decision.

The King decision is significant, in part because the First Circuit reached a result previously rejected by both the Fifth and Seventh Circuit Courts of Appeals. More importantly, however, the King decision breathes new life into the Rule 68 mechanism. A Rule 68 offer of judgment can be a useful tool for resolving civil rights actions early, preferably before both sides begin to incur substantial attorney's fees. The First Circuit's recognition and specific endorsement of "package offers" made by multiple defendants effectively warns future plaintiffs to weigh offers of judgment with great care. If a civil rights plaintiff should reject an offer of judgment, but eventually recover less than the amount offered against any or all defendants, he will not be entitled to recover any post-offer attorney's fees, and will also be on the hook for the defendant's post-offer costs.

Court Upholds Constitutionality Of M.G.L. c. 266, § 120: Wholey v. Tyrell, 567 F.Supp.2d 279 (D. Mass. 2008)

The United States District Court for the District of Massachusetts (Tauro, J.) recently upheld the constitutionality of M.G.L. c. 266, § 120, which allows public officials to issue a "No Trespass" order without court approval or review. Plaintiff claimed the "No Trespass" statute violated his due process rights and his "right" to enter onto school property to see his nephew play high school basketball. Plaintiff was issued a "No Trespass" letter by the Town of Hull's superintendent of schools after he verbally threatened both the high school athletic director and principal. The District Court found that the "No Trespass" order did

not violate plaintiff's due process rights or his "right" to view his nephew play basketball on school property. A "No Trespass" letter such as the one issued in this matter allows public officials to take immediate action to address concerns of public safety without having to first obtain a court order. It is an important device and, while challenged on occasion, the "No Trespass" statute has been repeatedly upheld by both federal and state courts in the Commonwealth. PD&P attorneys represented the defendants.

Summer Program Participant's Injury Claim Barred By Consent And Release Form: Moose v. Tewksbury, Middlesex Super. Ct., C.A. No. 06-04590 (March 23, 2009)

PD&P recently obtained summary judgment in favor of the Town of Tewksbury in a suit brought by a middle school student claiming injury while attending an extracurricular summer program operated by the Town. The parents of the student, a minor, signed a "Consent & Release" form to allow their son to attend the program. The Release stated that it precluded "any and all claims" for injuries arising "directly or indirectly" out of the student's "participation in the Program."

On the date of the injury, plaintiff had just finished flying a model airplane in a contest held in the school's gymnasium. Plaintiff was sitting on nearby bleachers with a fellow student while the remaining participants flew their airplanes. When plaintiff playfully inserted his pinky finger into a hole in an adjustable railing on the bleachers, his friend turned the railing, thus creating a "scissoring" effect between the moving and stationary parts that severed plaintiff's finger just below the nail bed.

Plaintiff did not contest that the Release was enforceable under Sharon v. City of Newton, 437 Mass. 99 (2002) (enforcing a minor's release, signed by a parent, so that the minor could participate in extracurricular activities). Instead, plaintiff posited that an issue of material fact existed as to the parties' intent and the meaning and applicability of the Release. Specifically, plaintiff argued that a jury could find that the Release did not apply because his injury arose out of a property defect and *not* out of his active participation in the program. The Release was silent regarding property defects.

The Middlesex Superior Court (Walker, J.) agreed with PD&P's position that the conspicuously broad "any and all" language of the Release, particularly when read in the context of the even more expansive "directly or indirectly" language, rendered plaintiff's narrow reading of the Release implausible. Finding no genuine issue of material fact, Judge Walker awarded summary judgment and costs to the Town.

Legislative Update

New Law Urges Drivers To "Move Over" For Emergency Vehicles

The Massachusetts Legislature recently enacted a new law in an effort to provide a safer work environment for professionals whose jobs require roadside emergency and/or maintenance stops. The so called "Move Over" Law (Chapter 418 of the Acts of 2008) requires any driver approaching a stopped emergency or maintenance vehicle with flashing lights to move to the next available lane if it is safe to do so, and, barring that, to reduce his speed. The new law, codified in M.G.L. c. 89, § 7C, took effect on March 22, 2009. Violators are subject to a maximum fine of $100. The Commonwealth has undertaken efforts through radio and billboard advertising to raise awareness of the new law.

This legislation is designed to make highways and public ways safer for roadside emergency and maintenance professionals, including police, firefighters, paramedics, and other municipal employees. From a municipal perspective, the benefits of this new legislation are twofold. First, the law should help reduce the number of accidents between motorists and municipal vehicles, thereby resulting in fewer injuries and lawsuits. Second, the law should be useful in defending those cases where a passing driver fails to act in accordance with the provisions of the new law and an accident unfortunately occurs. Under Massachusetts law, the violation of a statute, ordinance or regulation is admissible as evidence of negligence on the part of the violator of all consequences that the statute, ordinance or regulation was intended to prevent. Perry v. Medeiros, 369 Mass. 836, 841 (1976). The "Move Over" Law was intended to prevent personal injuries to municipal employees.