PIERCE, DAVIS & PERRITANO, LLP WINTER 2010 NEWSLETTER

DEVELOPMENTS IN MUNICIPAL LAW

Case Comments

SJC Interpets Open Meeting Law Against Municipality: District Attorney v. School Committee Of Wayland, 455 Mass. 561 (2009)

The Supreme Judicial Court has rendered a key decision interpreting the provisions of the Massachusetts Open Meeting Law, M.G.L. c. 39, §§ 23A-24. In District Attorney for the Northern District v. School Committee of Wayland, the SJC overturned a Superior Court judge's allowance of the School Committee of Wayland's motion for summary judgment. The SJC transferred the District Attorney's appeal of the Superior Court decision to the Commonwealth's highest court on its own initiative, and ruled that the School Committee violated the Open Meeting Law when it deliberated about the professional competence of the Wayland Superintendent of Schools in two executive sessions. Furthermore, emails exchanged among Committee members before the first executive session were deliberations that also violated the Law.

In early June 2004, the Chairperson of the five-member School Committee emailed the other four Committee members, seeking input on the Superintendent's annual performance

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evaluation. Two Committee members responded by email to the Chairperson only; a third member sent an email response to the entire Committee. Based on the comments he received from the Committee members, the Chairperson prepared a draft evaluation of the Superintendent. Then, during two Committee meetings in June 2004, the Committee voted to adjourn to executive session expressly "for purposes of matters relating to Collective Bargaining as set forth in [G.L. c. 39, § 23B]." When in executive session, however, the Committee discussed the Superintendent's evaluation.

About a year later, a Wayland Town Crier reporter filed a complaint with the District Attorney, alleging that the process by which the School Committee evaluated the Superintendent, as well as the School Committee's refusal to release the evaluation of the Superintendent, violated the Open Meeting Law. This litigation ensued.

In the Wayland decision, authored by Justice Spina, the SJC found that both of the School Committee's executive sessions violated the Open Meeting Law. First, the stated reason for the executive sessions, collective bargaining, did not cover the Superintendent, a non-union employee. "Purpose 3" of M.G.L. c. 39, § 23B, one of the ten exceptions to the Open Meeting Law, allows a governmental body to convene a private executive session to, among other things, discuss collective bargaining strategy and strategize regarding negotiations with non-union personnel. The Court recognized that "Purpose 3" – had the Committee properly invoked it – would have permitted the Committee to adjourn to executive session during both meetings to discuss the Superintendent's contract renewal or salary. But, because the Open Meeting Law required the Committee to give a precise statement of the reason for convening an executive session, and the Committee did not indicate in either of its open sessions that it would discuss the Superintendent's contract renewal or salary, the Committee could not enjoy the protection afforded by "Purpose 3." Moreover, there was no evidence that the School Committee discussed the Superintendent's contract renewal or salary at either executive session. Instead, the Committee only discussed the Superintendent's professional competence. As "Purpose 1" of M.G.L. c. 39, § 23B specifically prohibits discussion in executive session of the professional competence of an individual (as opposed to an individual's reputation, character, physical condition or mental health), "Purpose 1" was also inapplicable.

The Court also held that the emails exchanged among the Committee members constituted deliberations and violated the letter and the spirit of the Open Meeting Law. Technically, the Open Meeting Law defines a "deliberation" as "a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction." M.G.L. c. 39B, § 23A. Even so, pointing to the importance of broad public access to the decision-making process employed by elected officials, the SJC ruled that governmental bodies may not circumvent the Open Meeting Law by conducting deliberations via private messages, in any form. The SJC did note, however, that the Public Records Act, M.G.L. c. 66, § 10, excludes public employee performance evaluations from disclosure. The proper procedure, therefore, would have been for the Committee to discuss the Superintendent's professional competence in an open meeting, and then move into executive session to discuss the draft evaluation.

This decision contains some important lessons for local governmental bodies. The formalities of the Open Meeting Law must be followed, including but not limited to a proper identification of the reasons for convening in executive session. Public bodies must also distinguish between negotiating non-union contracts and compensation (which can be done in executive session) and discussing non-union employees' professional competence (which cannot be done in executive session without notice to the employee and an opportunity to be heard). Further, public bodies must be cautious when communicating via email, and should avoid any discussions of public business. Although the sanctions in this case were limited to an adverse declaratory judgment and an order to disclose the Committee's emails to the public, governmental bodies communicating about public business via email do so at their peril.

First Circuit Protects Municipal Website Content As Government Speech: Sutliffe v. Epping School District, 584 F.3d 314 (1st Cir. 2009)

A citizens rights group, Epping Residents for Principled Government ("ERPG"), recently lost its First Amendment challenge of the Town of Epping, New Hampshire's refusal to link ERPG's website with the Town's website. ERPG, an advocacy group, promotes reduced governmental spending and views itself as "a perennial thorn in the Town's side." In Sutliffe v. Epping School District, the United States Court of Appeals for the First Circuit held that the Town's website was government speech and not a public forum. As such, the Court held that the municipal website was not subject to First Amendment scrutiny.

The dispute revolved around the choice by the Town's Board of Selectmen to place a hyperlink to a website operated by Speak Up, Epping! ("SUE") on the Town's website. At the time, SUE, part of a state-wide program facilitated by the University of New Hampshire Cooperative Extension, was preparing to sponsor a public discussion event in Epping. The purpose of the Town-endorsed event was to foster community spirit, civic discourse, and the organization of community projects and action groups. The Town intended for the hyperlink to help promote the upcoming SUE event.

In response to the Town's hyperlink to the SUE website, ERPG requested that its own website be similarly linked. The Town then requested information from ERPG, such as its mission statement and certain financial documents, with which to make a decision on ERPG's request. Instead of providing the requested information, ERPG filed a civil rights suit against the Town in the United States District Court for the District of New Hampshire.

During the course of litigation, the District Court dismissed many of ERPG's claims against the Town based on principles of standing and *res judicata*. The Town moved for summary judgment on ERPG's remaining claims, which alleged that the Town had violated ERPG's First Amendment right to free association by requesting information from ERPG before making a decision on whether to place a hyperlink to ERPG's website on the Town website. Such inquiry, ERPG alleged, was intended solely to harass and intimidate ERPG members. Further, ERPG alleged that its First Amendment right to free speech was violated when the Town refused ERPG's request for a hyperlink while maintaining the SUE hyperlink. Such conduct, alleged ERPG, constituted viewpoint discrimination with respect to a

designated public forum, i.e., the Town website. The District Court granted the Town's motion for summary judgment, and this appeal followed.

Upholding the District Court decision, the First Circuit (Lynch, J.) rejected ERPG's characterization of the Town's website as a "public forum." The Court held that the website, controlled by the Town without public input, was nothing more than government speech. Pursuant to the government speech doctrine, the Court held that the Town was free to fashion and communicate its message to the public unfettered by First Amendment scrutiny, even if it used a third-party entity to do so. See Pleasant Grove City v. Summum, 129 S.Ct. 1125 (2009). A government entity is entitled to speak for itself and to select the views that it wants to express, even when it receives assistance from private sources in exercising such rights. The Court concluded that the Town, by espousing and communicating certain viewpoints, was in fact exercising its rights to free speech, not infringing upon those of ERPG. Moreover, the Court disposed of ERPG's viewpoint discrimination claim with the simple observation that ERPG failed to introduce any evidence to support that SUE had expressed any particular viewpoint.

Interestingly, the First Circuit was careful to limit its holding to the facts of this case, leaving open the possibility that a municipality may run afoul of the First Amendment in the operation of a municipal website. Even more, the First Circuit hypothesized that a Town that opens its website to private speech in such a way that the Town loses control of the website's content may not enjoy protection under the government speech doctrine. So, municipal webmasters beware: while the Sutliffe decision stands for the proposition that municipalities may freely communicate and even promote governmental points of view through their websites, allowing such a website to become a forum for public discourse may implicate free speech principles under the First Amendment. Municipalities are advised to work with counsel to craft a formal policy with respect to website content and, if third-party viewpoints are to be included, viewpoint-neutral selection criteria.

"Shifting Reasons" For Employee's Termination May Lay Grounds For Discrimination Claim: Vélez v. Thermo King, 585 F.3d 441 (1st Cir. 2009)

In Vélez v. Thermo King, the United States Court of Appeals for the First Circuit reversed the United States District Court for the District of Puerto Rico's award of summary judgment against a plaintiff in an age discrimination lawsuit. The First Circuit found that an employer's "shifting explanations" for the plaintiff's termination, together with other evidence, was sufficient to raise a triable issue of fact on the grounds of pretext. Thermo King had fired the plaintiff after the company's private investigator alleged that he (plaintiff) had stolen company property and sold it. But because the company failed to articulate its reason for the firing at the outset and then offered "shifting

explanations" as the lawsuit advanced, a three-judge First Circuit panel ruled that there were triable issues on the question of pretext.

José Vélez had worked for Thermo King for 24 years when he was fired at the age of fifty-six. At the time of his discharge, Vélez worked as a Tool Crib Attendant for Thermo King, in charge of maintaining, dispatching, and safeguarding the company's tools and maintenance materials. In September 2002, Vélez reported that an expensive chipping hammer was missing. Thermo King hired private investigators to conduct an internal investigation into the disappearance of the chipping hammer and other irregularities with respect to its tools and materials. The investigation revealed that several employees had taken company tools and re-sold them for their personal gain. Vélez denied doing so, although he admitted to having received, and occasionally selling, small gifts from Thermo King's suppliers. Vélez was fired two weeks after his interview with Thermo King's human resources director. At the time, Thermo King did not give him a reason for his termination. After Vélez filed an administrative complaint, the company's human resources director responded with a claim that Vélez had been terminated because he had accepted small gifts from Thermo King suppliers.

When Vélez later filed suit in the District Court, Thermo King alleged that Vélez had received gifts, favors, services, gratuities, and products from Thermo King's suppliers and vendors without authorization, in violation of company policy. In addition, Thermo King asserted for the first time that Vélez was fired because he had sold Thermo King's property to other employees and admitted to Thermo King that he sold items received from suppliers and vendors. The District Court granted summary judgment for Thermo King in January 2008. Vélez appealed.

In awarding Thermo King summary judgment, the District Court judge had determined that Vélez could not raise a genuine issue of material fact as to whether Thermo King's stated reasons for firing him were a pretext for age discrimination. The First Circuit disagreed, finding that there were genuine issues of material fact relating to Thermo King's stated reason for firing Vélez. Judge Kermit V. Lipez wrote for the unanimous panel. "Thermo King did not initially provide Vélez with any reason for firing him," he wrote. "One month later, [Thermo King told] the [Equal Employment Opportunity Commission] that Vélez had been fired for violating the company's policy on receiving gifts from suppliers. It was not until over a year later that Thermo King, responding to this lawsuit, first said that Vélez had been fired for stealing and selling company property." "The fact that the employer gave different reasons at different times for its action surely supports a finding that the reason it ultimately settled on was fabricated," the First Circuit concluded. Moreover, those shifting explanations became more suspicious when considered along with Thermo King's ambiguous company policy about gifts from suppliers and the company's disparate response to similar conduct by employees other than Vélez. "[I]n light of the shifting explanations given for Vélez's dismissal, the inescapable ambiguity about whether the [company policy] even precludes Vélez's admitted behavior in accepting and selling the small value gifts adds to the suspicion that the company's reliance on the policy may be pretextual."

Judge Lipez also stressed that Vélez's evidence of disparate treatment was unusually strong. Vélez showed that at least three younger Thermo King employees were not fired despite their complicity in the theft and/or sale of company property. The First Circuit concluded that, based on the evidence in

this case, a jury could find that disparate treatment existed, exposing the pretextual nature of Thermo King's proffered explanation for firing Vélez and revealing that Thermo King's true motivation was age discrimination.

The Vélez ruling cautions that an employer must be complete and consistent in the reasons it gives to discharged employees, regulators, and in court filings.

Punitive Damage Award Upheld By SJC: Haddad v. Wal-Mart Stores, 455 Mass. 91 (2009)

In Haddad v. Wal-Mart Stores, the Supreme Judicial Court reinstated a one million dollar punitive damages award and established new standards for awarding punitive damages in discrimination cases brought under Massachusetts' Anti-Discrimination Law, M.G.L. c. 151B, §§ 1, et. seq. Cynthia Haddad, who was employed as a pharmacist manager at Wal-Mart, complained that her salary was lower than all of the male pharmacist managers. Soon after Haddad lodged internal complaints, district managers questioned Haddad about two allegedly fraudulent prescriptions that a pharmacy technician had filled at Haddad's store. Haddad denied having any knowledge about the prescriptions, but acknowledged that one of them might have been filled when she left the pharmacy briefly to purchase a soda, use the restroom, talk to customers, eat lunch or count narcotics. Wal-Mart terminated Haddad's employment immediately, citing her alleged failure to secure the pharmacy. This above-described incident, however, occurred eighteen months before Haddad was fired.

Haddad brought suit in the Berkshire Superior Court for gender discrimination under M.G.L. c. 151B, § 4(1), and presented evidence that other male pharmacists had been on duty when thefts of other controlled drugs had occurred. Those pharmacists had not been disciplined by the company. During the trial, a human resources expert who had studied Wal-Mart's Pharmacy Operations Manual testified that Wal-Mart had failed to equally enforce its policies and to update employees when policies had changed. Haddad also alleged that she was entitled to the same pay as other pharmacy managers even though she served as pharmacy manager on a temporary – rather than a permanent – basis for thirteen months. Since the "manager" title was not official, Wal-Mart contended that she was not entitled to the extra one dollar per hour that the other managers, all of whom were male, received.

After trial, a jury awarded Haddad compensatory damages, plus one million dollars in punitive damages. Wal-Mart filed a post-trial motion to vacate the punitive damages award, which the Superior Court granted. On appeal, the SJC (Cowin, J.) concluded that the Superior Court erred in vacating the punitive damages award, and articulated new requirements for such awards under Chapter 151B. More specifically: "An award of punitive damages requires a heightened finding beyond mere liability and also beyond a knowing violation of the statute. Punitive damages may be awarded only where the defendant's conduct is outrageous or egregious" and "where the conduct is so offensive that it justifies punishment and not merely compensation." Similarly, in making an award of punitive damages, the SJC held that a fact finder should determine that "the award is needed to deter such behavior toward the class of which plaintiff is a member, or that the defendant's behavior is so egregious that it warrants

public condemnation and punishment."

In determining whether a defendant's conduct rises to this level, the Court further stated that the fact-finder should consider all of the circumstances surrounding the wrongful conduct, including: (1) whether there was a conscious effort to demean; (2) whether the defendant was aware that its conduct would cause harm, or recklessly disregarded the likelihood of harm; (3) the actual harm to the plaintiff; (4) the defendant's actions after learning that the conduct would likely cause harm; (5) the duration of the wrongful conduct; and (6) whether the defendant made any attempt to conceal the conduct.

In the Haddad case, the SJC found sufficient evidence of misconduct to support an award of punitive damages, particularly because Wal-Mart paid Haddad less than her male counterparts and provided conflicting explanations regarding the reason for her termination. The SJC also found it compelling that Wal-Mart terminated Haddad for a single infraction, but did not investigate or discipline her male co-workers for similar or more serious infractions. This ruling provides employers with clearer guidance about the type of conduct that could warrant punitive damages in a discrimination case. Furthermore, it reminds all employers that the failure to prevent unlawful discrimination may result in substantial punitive damages awards.

Appeals Court Expands Recreational Use Defense: Dunn v. City of Boston, 75 Mass.App.Ct. 556 (2009) & Dami-Hearl v. City of North Adams, 75 Mass.App.Ct. 1113 (2009)

In Dunn v. City of Boston, plaintiff fell and suffered injuries while walking on the stairs located at Boston's City Hall Plaza. At the time, plaintiff was visiting the Plaza in preparation for an upcoming event sponsored by her employer, Gateway Christian Fellowship. Prior to the accident, the City of Boston had issued Gateway a one-time entertainment license for an event to be held at the Plaza. While the City did not charge a fee in exchange for the license, Gateway made a $10,000 donation to the Boston Neighborhood Fund in connection with the event. Gateway also reimbursed Boston for the security and janitorial services necessary for the event.

Plaintiff brought suit against the City of Boston in Suffolk Superior Court, claiming that the City was negligent in failing to repair the stairs upon which she fell. The City admitted that the stairs were crumbling and in need of repair, but argued that the Recreational Use Statute, M.G.L. c. 21, § 17C, barred plaintiff's lawsuit. The Superior Court allowed summary judgment in the City's favor, agreeing that the Recreational Use Statute applied because the City had opened the Plaza to the public for recreational purposes, free of charge. Plaintiff appealed the summary judgment decision to the Massachusetts Appeals Court, arguing that the Recreational Use Statute did not apply because: (1) she was not using the Plaza for a recreational purpose at the time of the accident; and (2) Gateway had, in fact, been charged a fee for the event. The Appeals Court (Lenk, J.) affirmed.

The Appeals Court rejected plaintiff's argument that, because she was visiting the Plaza as part of her job, she was a "business visitor" to whom the city owed a higher duty of care than it would to a

recreational user. Citing to Ali v. Boston, 441 Mass. 233 (2004), the Appeals Court held that the proper analysis under the Recreational Use Statute entails disregarding the user's subjective intent for visiting a public area. Instead, courts should decide whether the plaintiff was engaged in an objectively recreational activity at the time of an accident. Here, Gateway had permission from the City to use the Plaza free of charge. As part of that use, plaintiff entered the Plaza and walked there for the purpose of planning Gateway's event. Plaintiff had no special permission or authorization from the City to be on the Plaza that day. Instead, she was able to use the Plaza just as any attendee of a free event would be. Under such circumstances, the Appeals Court held that plaintiff was using the Plaza for the objectively recreational activity of planning the Gateway event. Thus, the Recreational Use Statute applied.

Plaintiff also argued that Gateway's donation and payment for security and janitorial services constituted a "fee" within the meaning of the Statute. Again, the Appeals Court disagreed, noting that there was no evidence that Gateway's donation was a condition of receiving the license. Second, Gateway reimbursed the City for services necessary to conduct the event. The reimbursement, held the Appeals Court, cannot be characterized as a fee within the meaning of the Recreational Use Statute.

On the same day as the Appeals Court issued its decision in Dunn, it also decided a similar matter in a Rule 1:28 decision, Dami-Hearl v. City of North Adams. This appeal concerned a plaintiff who fell into a pothole and injured herself while visiting gravesites at North Adams' historic Southview Cemetery. At the Superior Court level, a judge allowed North Adam's motion for summary judgment, based on the applicability of the Recreational Use Statute. Plaintiff appealed. Just as in its decision in Dunn, the Appeals Court refused to consider plaintiff's subjective belief as to why she was at the cemetery at the time of her accident. Instead, focusing on the objective circumstances surrounding her activities on the property, the Appeals Court held that, because there was no evidence that plaintiff was at the cemetery to conduct any type of business, she was lawfully in the cemetery as a recreational user.

The Dunn and Dami-Hearl decisions are indications that the Appeals Court intends to expand the scope of the Recreational Use Statute. In doing so, the Court is, among other things, giving credence to the Statute's laudable purpose, i.e., opening space to the public for recreational and other statutory uses. Both decisions should encourage practitioners to be more aggressive in raising defenses under the Recreational Use Statute.

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PD&P Decisions

City Held Immune For Misidentification Of Fire Victim By Police: Anderson v. City of Gloucester, 75 Mass.App.Ct. 429, rev. den., 455 Mass. 1105 (2009)

In a decision important to members of law enforcement, the Massachusetts Appeals Court recently reversed a denial of defendant's motion to dismiss plaintiff's lawsuit for negligence and ordered the Essex Superior Court to enter judgment in favor of the City of Gloucester. Pierce, Davis & Perritano, LLP represented the City. Suit arose from a tragic house fire that occurred at 163 Essex Avenue in Gloucester on December 22, 2003. Four occupants – two men and two women – were in the dwelling at the time of the fire. The men escaped the blaze relatively unharmed. The women were not so lucky. Upon arrival, Gloucester firefighters rescued the two women from the burning building, unconscious and covered in soot, and transported them by ambulance to Addison Gilbert Hospital. Shortly thereafter, doctors pronounced one woman dead; the other remained in serious condition.

Around this time, confusion arose concerning the identities of the two women. In an effort to resolve the confusion, hospital staff solicited the assistance of a Gloucester police officer who had transported one of the male occupants to the hospital in his cruiser. Although contested by the City, plaintiff alleged that the officer, as part of a police investigation into the fire, negligently misidentified the two women by means of hair color alone. The survivor, he said, was Ann Goyette, and the deceased was Susan Anderson. Families of the two female victims were promptly notified. Susan's former husband communicated the news of the death to their two minor children. Six days later, the misidentification was discovered when medical equipment was removed from the survivor's face. As it turns outs, it was Susan who survived the blaze and Ann who did not. Susan's former husband subsequently sued the City for the emotional distress suffered by the children.

The City moved to dismiss plaintiff's Complaint on immunity grounds, citing Sections 10(b), 10(h), and 10(j) of the Massachusetts Tort Claims Act. The Superior Court (Tuttman, J.) denied defendant's motion. On an appeal taken under the doctrine of present execution, the Appeals Court (McHugh, J.) reversed in reliance upon Section 10(j), which bars any claim against a public employer based on its failure to prevent the "harmful consequences of a condition or situation . . . not originally caused by the public employer . . .." M.G.L. c. 258, § 10(j). The sequence of events, explained the Appeals Court, was determinative. The fire, the removal of victims to the hospital, and the subsequent confusion surrounding their identities, all preceded the police officer's involvement in the alleged "harmful" condition or situation. "All of those conditions, and the uncertainties they produced, were a direct result of the fire, not of action or inaction by city employees." Thus, the officer's attempt to identify the victims was an act "intended to 'diminish the [fire's] harmful consequences,' namely the uncertainties about the identity of the victims." Such uncertainty was a "condition or situation" the City did not create, but which the officer's act was designed to cure.

The Anderson decision is significant for three reasons. First, the Appeals Court upheld the City's

immunity even though the police officer affirmatively *acted*. Many courts have suggested that Section 10(j) protection is available exclusively when the public employer is negligent by omission only, i.e., by its *failure to act*. Second, by focusing on the sequence of events that preceded the police officer's act (starting with the fire itself), the Court made clear that government involvement in a harmful condition or situation that already exists should not give rise to liability. Third, although it did not rely on Section 10(h) to support its decision, the Court discussed the purposes behind Sections 10(h) and 10(j) in language very protective of law enforcement. Section 10(h) protects municipalities from, *inter alia*, claims based upon inadequate police protection or the failure to investigate crimes. Citing the SJC's prior warning in Jean W. v. Commonwealth, 414 Mass. 496, 510 (1993), against excessive municipal exposure, the Appeals Court nonetheless acknowledged:

> Among other things, § 10(h) and (j) are based on a legislative recognition that public employees who respond to emergencies are called upon to act swiftly, often without the time for investigation and deliberate reflection available in other circumstances. As a consequence, the opportunity for mistakes is high, and municipal exposure to liability for those mistakes creates both an undesirable disincentive to action and the possibility of enormous claims on the public purse.

On December 3, 2009, the SJC denied plaintiff's application for further appellate review.

No Whistleblower Claim Where Town Officials Acted Promptly To Plaintiff's Clarion Call: Bruno v. Town of Framingham, 2009 WL 4062177 (D. Mass.)

Pierce, Davis & Perritano, LLP defended the Town of Framingham and several school officials in a civil rights action brought by Franco Bruno, the former girls varsity soccer coach at Framingham High School. Bruno claimed that he was suspended for going to the press with his concerns about having student-athletes carrying soccer goals to and from practice.

In the Fall of 2006, Bruno advised the school's Principal, Michael Welch, and Athletic Director, Gary Doherty, that older soccer goals have been known to tip over, causing severe head injuries to student-athletes, and that he would not allow "his girls" to carry them. The Department of Parks and Recreation maintains the athletic fields used by the school's soccer teams, and requires the teams to properly secure their soccer goals at the end of each practice. Far from taking any retaliatory action against Bruno, Welch directed Doherty to make sure that the girls soccer teams were not transporting soccer goals, and, moreover, authorized Doherty to purchase new, lighter weight goals with wheels. Welch also instructed Bruno to speak directly to Doherty about any future concerns with the Department of Parks and Recreation.

A year later, Bruno asked for and obtained approval from Welch to appear on Fox News, in connection with a story about soccer goal safety. Welch reminded Bruno that he should not publicly air his own personal grievances with the Department of Parks and Recreation's Director, Robert Merusi. When the Fox News story aired, it did not contain any reference to Merusi or the Department. Shortly

thereafter, however, Bruno gave another interview, without Welch's knowledge, to the MetroWest Daily News. In addition to discussing soccer goal safety, Bruno made a number of unfavorable comments about the Department of Parks and Recreation. Subsequently, Welch suspended Bruno for the first four games of the Fall 2008 soccer season. Believing that he had been constructively discharged by this suspension, Bruno resigned his position with the school. In January 2008, another person was hired for Bruno's former coaching position. Bruno subsequently filed suit in the United States District Court for the District of Massachusetts, claiming violations of, *inter alia*, his First Amendment rights and the Massachusetts Whistleblower's Statute, M.G.L. c. 149, § 185.

PD&P moved for summary judgment on all counts. The District Court (Sorokin, J.) dismissed each of Bruno's claims in a 29-page decision. With respect to Bruno's First Amendment claim, the District Court adopted the test established by the Supreme Court in Garcetti v. Ceballos, 547 U.S. 410 (2006), to determine the scope of First Amendment constitutional protections afforded to public employees. The Court then compared Bruno's First Amendment interest in airing his concerns about the Department of Parks and Recreation against the school officials' interest in the efficient operation of the Department's athletic programs. The District Court concluded that, given the interference to the soccer program caused by Bruno's continued disagreements with employees of the Department of Parks and Recreation, school officials' interest in maintaining the smooth and safe operation of the soccer program outweighed Bruno's interest in speaking out. The District Court also dismissed Bruno's claim under the Massachusetts Whistleblower's Statute and held that the school officials were entitled to qualified immunity.

The Bruno decision is a reminder to defense attorneys that, despite the stringent protections of the First Amendment, the importance of efficiently managing schools and other governmental entities is not to be underestimated.

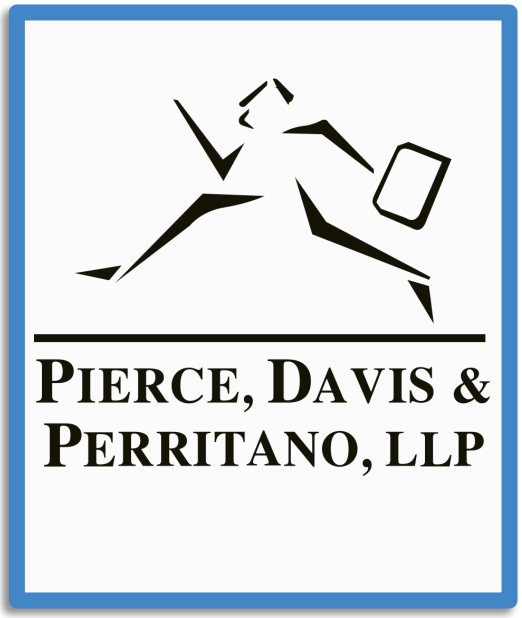
Town Held Not Liable For Parental Loss Of Consortium Claims: Spencer v. Town of Arlington, Middlesex Super. Ct., C.A. No. 09-00502 (September 3, 2009)

On September 3, 2009, the Middlesex Superior Court (Smith, J.) handed down the Commonwealth's first ruling that a parent cannot recover in tort against a municipality for loss of consortium. The case was successfully defended by Pierce, Davis & Perritano, LLP. Specifically, the Superior Court judge ruled that the statutory remedy for parental loss of consortium – M.G.L. c. 231, § 85X – does not allow for recovery against a city or town. Because the parents of minor plaintiffs often bring parental loss of consortium claims in conjunction with a minor's negligence claim, and because each parent is regarded as a separate plaintiff for purposes of applying the $100,000 statutory cap on liability, this decision may prove instrumental in limiting municipal exposure for injuries to minors.

In Spencer v. Town of Arlington, the minor plaintiff, Stephen J. Spencer, Jr., allegedly sustained serious injuries while ice skating at the Town of Arlington's Veterans' Memorial Skating Rink. Stephen alleged that the negligent supervision of the Town's rink staff caused his injuries. In addition to the

the minor's negligence claim, Stephen's parents each brought a claim of parental loss of consortium. PD&P filed a motion to dismiss all claims on the primary grounds that the Town was immune under M.G.L. c. 258, § 10(j). In opposition, plaintiffs conceded the application of Section 10(j), but nonetheless sought protection under the exception in Section 10(j)(1), claiming the rink staff made explicit and specific assurances of safety to them. Judge Smith disagreed and granted the Rule 12 motion. In a footnote to his written decision, Judge Smith also found that, to the extent Stephen's parents sought recovery from the Town under M.G.L. c. 231, § 85X, such claims likewise failed to state a claim upon which relief could be granted.

Parental loss of consortium claims did not exist under the common law. Norman v. Mass. Bay Transp. Auth., 403 Mass. 303, 305 (1988). Rather, they are wholly a creature of statute. In fact, the adoption of M.G.L. c. 231, § 85X in 1989 was a legislative reaction to the SJC's decision in Norman. In relevant part, Section 85X states: "[t]he parents of a minor child . . . shall have a cause of action for loss of consortium of the child who has been seriously injured against any *person* who is legally responsible for causing such injury." M.G.L. c. 231, § 85X (emphasis added). By its terms, Section 85X is only available against a "person." The definitions in M.G.L. c. 4, § 7 apply to all Massachusetts statutes "unless a contrary intention clearly applies." In Chapter 4, Section 7, "person" is defined to include only "corporations, societies, associations and partnerships." Nothing in Section 85X indicates that the Legislature intended the term "person" to apply to cities, towns or other governmental entities. Indeed, "person," as used in other remedies and statutes, has been held *not* to include municipalities. See, e.g., Howcroft v. City of Peabody, 51 Mass.App.Ct. 573, 591-592 (2001) (municipality held not a "person" subject to the Massachusetts Civil Rights Act). In the absence of any indication to the contrary, Judge Smith agreed that a municipality is not a "person" within the meaning of Section 85X.



In light of Judge Smith's willingness to exempt a municipality from the scope of the parental loss of consortium statute, municipalities should be careful to challenge such claims whenever they accompany the personal injury claim of a minor.