PIERCE, DAVIS & PERRITANO, LLP
SUMMER 2010 NEWSLETTER
DEVELOPMENTS IN MUNICIPAL LAW

Case Comments

First Circuit Restricts Public Employee's Free Speech Rights: Foley v. Town of Randolph, 598 F.3d 1 (1st Cir. 2010).

The First Circuit Court of Appeals recently addressed a municipality's ability to restrict the free speech rights of its public employees. In Foley v. Town of Randolph, the fire chief sued the Town of Randolph and its selectmen for civil rights violations under Section 1983 claiming that they retaliated against him in violation of his First Amendment rights to free speech. Relying on the Supreme Court's decision in Garcetti v. Ceballos, the United States District Court granted summary judgment in favor of the Town, which was recently upheld by the First Circuit Court of Appeals.

On May 17, 2007, a residential fire took the lives of two children. When the fire chief arrived at the scene, he took command and began to control operations. While he was in uniform and in the midst of fire suppression activities, he spoke to the press. He was critical about the fire details and commented on what he considered to be inadequate funding

About the Firm

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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and a lack of fire department staffing. The chief lamented that proposed overrides to Proposition 2½ were rejected by the voters. Shortly thereafter, disciplinary charges were brought against the chief. The Selectmen were of the view that his statements to the media "demonstrated a lack of sound judgment and of accuracy" and "were not conducive to the Town's mission of providing effective fire protection services." The Town suspended the chief for fifteen days.

The chief filed suit, arguing that his speech was protected by the First Amendment and that by disciplining him on account of that speech, the town violated his First Amendment rights. The First Circuit disagreed. The Court noted that although public employees do not forego all First Amendment protections by virtue their public employment, the Court must consider the interests of government employers in exercising some degree of control over their employees' words and actions in order to ensure the efficient provision of public services. Constitutional protection of a public employee's speech depends on whether he was both (1) speaking about a matter of public concern, and (2) speaking as a private citizen. If the answer to either question is "no," then the employee has no appreciable First Amendment claim.

The Foley Court held that the chief was "obviously" speaking about a matter of public concern. The budget and effectiveness of Randolph's fire department is of interest to the community. The chief's opinion on the effect of diminished resources on the department's ability to fight fires is an example of the "well-informed views" which the public has an interest in receiving. The Court, however, was not convinced that the chief was speaking as a private citizen. In analyzing whether the chief spoke as a citizen rather than as a Randolph employee, the Court first noted that it is not dispositive that the chief was not *required* to speak to the media. Notwithstanding that he was previously evaluated on how well he interacted with the media, the chief's job description was "neither necessary nor sufficient" to determine whether his speech at the press conference on the day of the fatal fire was pursuant to his official duties. More critical to the analysis was the context of the chief's speech. The chief was in uniform and on duty and spoke about issues related to budget and staffing. When choosing to speak to the press, the Court held, the chief was regarded as the public face of the fire department when speaking about department matters. Also, the chief addressed the media at a forum to which he had access because of his official position. Hence, because the chief was speaking on matters of public concern in his official capacity – not as a citizen – his speech was not protected under the First Amendment.

The Foley decision provides clearer guidance for determining when a public employee's speech is made in that employee's official capacity. Furthermore, Foley identifies circumstances when a municipality may discipline a public employee for official speech. In light of the First Circuit's ruling, municipal employees should take extra care when addressing the public on matters of importance to their municipality.

The Appeals Court Interprets Section 10(i) Narrowly Under the Tort Claims Act: McCarthy v. City of Waltham, 76 Mass. App. Ct. 554 (2010).

In a case of first impression, the Appeals Court examined the breadth of a public employer's immunity under Section 10(i) of the Massachusetts Tort Claims Act [MTCA] for wrongful release of a detainee. In McCarthy v. City of Waltham, the plaintiff's decedent, James McCarthy, was placed under protective custody by City police after McCarthy's father called to report that he was distraught, under the influence and possibly suicidal. Another relative then placed two telephone calls to the police department while McCarthy was in custody, expressing a desire to be present when McCarthy was released so that she could ensure that McCarthy did not harm himself. The dispatchers taking the calls variously indicated to the caller that an officer would call her or have McCarthy call her upon his release. The police, did neither, and shortly after his release, McCarthy committed suicide. McCarthy's estate sued the City for negligence under the MTCA for failing to notify the family of his release.

After a jury found for the estate, the City moved for a directed verdict on the grounds that Sections 10(i) and 10(j) of the MTCA entitled the City to immunity. The trial court denied the motion and subsequently entered judgment for the plaintiff on a $100,000 jury verdict. The City appealed and the Appeals Court reversed, agreeing with the City that Section 10(j) entitled it to immunity because McCarthy's self-destructive act was the "original cause" of the harm.

The McCarthy decision is also significant for its rejection, in dicta, of the City's claim to immunity under Section 10(i). Section 10(i) affords immunity for, "an[y] claim based upon the release…of… a… detainee…from the custody of a public employer…unless gross negligence is shown…." MASS. GEN. LAWS ch. 258, § 10(i). The City had argued that it was immune from suit pursuant to Section 10(i) because the plaintiff's claim was based upon the decedent's release from custody. Rejecting the City's position, the Appeals Court observed:

> Although it does not appear that any case has discussed whether [Section 10(i)] is applicable to a claim for injuries to the person released from custody, in addition to third parties who are injured by the person released, we conclude that the rulings of the motion and trial judges that excluded application of this form of immunity to the plaintiff's claim were not erroneous. In our view, the intent of the statute is to allow a form of remedy to those injured by the actions of the person released. This intention is inferred from the language…that creates an exception to immunity when "gross negligence is shown…."

Id. at 565.

The Court's narrow interpretation of Section 10(i) immunity (albeit in dicta) does not appear to be supported by the language of the statute. The Court is correct that Section 10(i) authorizes a cause of action for gross negligence to go forward. What is less clear is how the Court "infers" a limiting intent from that language, i.e., that Section 10(i) applies *only* to harm or injuries incurred by third parties. Indeed, the language used by the General Court is conspicuously broad, retaining immunity for "an[y] claim based upon" the release of a detainee. MASS. GEN. LAWS ch. 258, § 10(i).

Although statutes waiving sovereign immunity must be strictly construed and immunity waived only to the extent expressed by the Legislature, it is true that such statutes still must be interpreted reasonably and in a manner that does not frustrate the Legislature's intent. Todino v. Town of Wellfleet, 448 Mass. 234, 238 (2007). Even assuming, *arguendo*, that the Legislature drafted Section 10(i) with the intent of supplying a remedy for *gross* negligence to an innocent third party harmed by a detainee, it cannot be said that excusing the detainee from the preclusive effect of section 10(i) is necessary to further that intent. It must not be forgotten that, although McCarthy was a sympathetic case, Section 10(i) also applies to dangerous escapees and parolees. On the other hand, applying Section 10(i) to "any claim," third party or not, is true to the statutory language and achieves that same result, serving only to additionally deprive the actual detainee, parolee, escapee, etc., of a cause of action for ordinary negligence. Neither the statutory language nor public policy is offended by doing so.

Landowners' Duty of Care Held Not Negated By "Open and Obvious" Winter Hazards: Soederberg v. Concord Greene Condominium Assoc., 76 Mass. App. Ct. 333 (2010).

In Soederberg v. Concord Greene Condominium Association, the Appeals Court recently clarified that the "Open and Obvious Danger Rule" does not provide a defense to claims of negligent failure to remove unnatural accumulations of snow and ice, where those hazards lie in a known path of travel. Closing the door on any potential reversal of this holding, the Supreme Judicial Court denied the defendants' Application for Further Appellate Review on April 28, 2010. Municipalities should take note of this recent clarification because it effectively forecloses the use of an often relied upon defense to unnatural accumulation of snow and ice claims. The Appeals Court's message was clear – it is the property owner's responsibility to remove all potential hazards from "known paths of travel." A property owner cannot rely upon the "Open and Obvious Danger Rule" as a defense in these cases, regardless of how obvious the potential danger may be.

In October 2004, the plaintiff, a seventy-four-year-old retiree, moved into a condominium unit at the Concord Greene Condominium complex. The following January, the Concord area experienced significant snowfall, and it snowed again on February 3 and 4. On the morning of February 5, 2005, a Saturday, the plaintiff left her unit, and went down the walkway to the parking lot to her car. The walkway itself had been cleared of snow and ice, as had much of the parking lot. In the area where the walkway joined the parking lot, however, the plaintiff encountered frozen slush with deep footprints. The plaintiff testified that she recognized the danger and knew that she "had to be especially careful." Seeing that "it was just a few more steps" before she "got out of the danger zone," she concluded that she could navigate the patch safely if she used care. Despite these intentions, she fell and broke her hip. The plaintiff testified that there was no alternative route to her car. In response, the property owner suggested that the plaintiff could have returned to her unit and called the twenty-four-hour number listed in the tenant handbook.

The Appeals Court ruled that the property owner could not rely upon the open and obvious nature of the danger to negate its duty of care based on the long-held law in Massachusetts that a property owner owes a duty of reasonable care to all persons lawfully on his premises, including an obligation to maintain the property in a reasonably safe condition, in view of all the circumstances. The Court noted that this duty has long extended to remedying hazards caused by "unnatural" accumulations of snow or ice, despite the fact that unnatural snow or ice hazards are readily apparent. The Appeals Court found it "entirely foreseeable" that people will engage snow or ice hazards lying in well-traveled pathways, even if those hazards are open and obvious. Although the Court clarified that the "Open and Obvious Danger Rule" cannot be relied upon to preclude liability in unnatural accumulations of snow or ice cases, it is important to note that comparative negligence is still available as a defense to such claims. In that regard, the reasonableness of the plaintiff in encountering the hazard, despite its obviousness, may be considered in weighing any negligence on the part of the plaintiff to diminish liability.

First Circuit Rules Public Notice Not Required When Employers Adopt Longer 'Work Periods': Calvao v. Town of Framingham, 599 F.3d 10 (1st Cir. 2010).

In Calvao v. Town of Framingham, the First Circuit Court of Appeals found that neither the Fair Labor Standards Act ("FLSA"), its legislative history nor its implementing regulations require a municipal employer to give notice to its public safety officers before invoking the statutory exemption for such officials from the usual overtime requirements. Section 207(k) of the law allows employers of public safety officers to adopt "work periods" of as long as 28 days as an alternative to the act's standard 40-hour workweek.

29 U.S.C. §207(k) permits state and local governments to work law enforcement and fire protection employees more than 40 hours in a workweek without paying them overtime. Instead, overtime pay for those workers is calculated on the basis of a "work period." A work period is any established and regularly recurring period of work that is not less than seven consecutive days nor more than 28 consecutive days (29 C.F.R. §553.224(a)). Under the Section 207(k) exemption, overtime compensation is due after an employee works more than a certain number of hours, depending on the length of the work period. For example, for a 28-day work period, law enforcement employees are due overtime for each hour worked over 171, and for a seven-day work

period, they are due overtime for each hour worked over 43. For police and firefighters to qualify for the Section 207(k) exemption, their employer must "establish" a work period for them. *See* 29 C.F.R. §553.224(a). In most state and local governments, establishing the work period is an administrative declaration. Within these limitations, the work period may be of any length and need not coincide with the workweek, the pay period or with a particular day of the week or hour of the day.

The Calvao plaintiffs claimed their employer never "established" a work period because it never provided them with advance notice of the work period designation. As a result, they claimed they were owed back overtime. In deciding whether the employer properly "established" a work period, the First Circuit considered three things: the text of the statute, its legislative history and its implementing regulations. The text of Section 207(k) "does not specify that a public employer is required to establish a work period or identify how an employer might do so," the Court held. "Further, the text contains no requirement of notice to affected employee." Section 207(k)'s legislative history also supports an interpretation that public notice is not required, the First Circuit held, noting that Congress "explicitly rejected" a proposal requiring that employers obtain employee agreement before establishing a work period.

The First Circuit concluded that, although "Section 553.224's reference to an 'established' work period is the foundation of plaintiffs' claim," the rule in fact "includes no procedural steps of any kind, let alone a notice requirement." The Court rejected the plaintiffs' claim and found the employer free from liability for back overtime.

PD&P Decisions & Jury Verdicts

School Held Immune for Classroom Sexual Assault: Doe v. City of Fitchburg, 76 Mass. App. Ct. 1106 (2010).

On January 7, 2010, the Appeals Court reversed the denial of a Rule 12(b)(6) motion and ordered the Superior Court to enter a judgment of dismissal in favor of the City of Fitchburg and two Fitchburg school officials. Suit arose out of the sexual assault of a disabled wheelchair-bound student of FLLAC Educational Collaborative, a separate legal entity formed by area communities pursuant to G.L. c. 40, § 4E to provide educational services to children of special needs. During the 2003-2004 school year, FLLAC occupied a classroom in Academy Middle School, a public school building in Fitchburg, pursuant to a written lease. On May 17, 2004, a wheelchair repairman gained access to the school, entered the FLLAC classroom and groped the minor plaintiff while purporting to service her wheelchair. The repairman subsequently pleaded guilty to charges of sexual assault and was sentenced to state prison.

The minor and her family brought suit against the city, the Fitchburg School Superintendent and the Principal of Academy Middle School on theories of negligent security and negligent supervision. PD&P represented the Fitchburg defendants. The city moved to dismiss under G.L. c. 258, § 10(j), citing its immunity from claims based on the harmful consequences of a condition or situation it did not originally cause, "including the violent or tortious conduct of a third person" – here, the wheelchair repairman. Simultaneously, the Superintendent and Principal moved to dismiss on the grounds that their personal immunity was guaranteed under G.L. c. 258, § 2. The Superior Court denied defendants'

motion, stating only that plaintiffs' complaint was "sufficiently pled so as to survive a [Rule] 12(b)(6) motion." The city and school officials immediately appealed pursuant to the doctrine of present execution. The Fitchburg defendants also moved to stay the Superior Court proceedings pending the outcome of their appeal; this motion was also denied.

In a Rule 1:28 decision, the Appeals Court reversed and ruled in favor of the Fitchburg defendants. Citing Brum v. Town of Dartmouth, 428 Mass. 684 (1999), the Appeals Court stated that "straightforward application" of Section 10(j) prevented plaintiffs' formation of a recognized cause of action; thus, dismissal of their claims as against the city was required. The repairman's "predatory molestation" of the minor plaintiff was a violent or tortious act of a third person not originally caused by the city or any city officials or employees. As such, plaintiffs' allegations fell squarely within the rule of Brum. With respect to the Superintendent and Principal, plaintiffs' claims confronted the prohibition of the "clear language" in Section 2 which holds that no public employee shall be liable "for any injury . . . caused by his negligent or wrongful act or omission while acting within the scope of his office or employment . . .." Thus, the Superintendent and Principal, like their employer, were also entitled to dismissal.

The Doe v. Fitchburg decision is neither extraordinary nor unique. Yet it illustrates that, in practice, the doctrine of sovereign immunity does not always shield cities and towns from vexatious litigation. From start to finish, the Fitchburg defendants were active parties in this suit for over two and one-half years. Quite simply, some judges still remain hesitant to dismiss sympathetic cases against municipal defendants, despite the "straightforward" and "clear" language of the Massachusetts Tort Claims Act.

School Held Immune for Failure to Drop Off First Grade Student at Designated Bus Stop: Surgens v. Attleboro Public Schools, 27 Mass.L.Rptr. 7, 2010 WL 1266724 (Mass. Super. Ct., March 31, 2010).

In Surgens v. Attleboro Public Schools, a first grade student and her mother brought suit against the City and the local bus company, which contracted with the City to provide bus transportation for the its public school students, after the student suffered life-threatening injuries when she was struck by a motor vehicle while attempting to cross the street after being dropped off by the bus at a location that was not her designated bus stop. Although the school had no policy requiring students, above the level of kindergarten, to be met at their bus stop by a parent or guardian, the plaintiff would not get off her bus unless her mother or sister were present to meet her. On the day of her accident, plaintiff's older sister was late to meet the bus; instead, she ran down and across the street to flag down the bus. When the bus driver recognized the plaintiff's sister, she dropped off the plaintiff at the different location into the care and custody of her sister. Several minutes later after walking toward their home, and despite warnings from her older sister to hold her hand, the plaintiff attempted to run across the street to their home and was struck by an on-coming vehicle.

The Superior Court allowed the City's Motion for Summary Judgment against the plaintiffs, finding that the immunity preserved in Section 10(j) of the Massachusetts Tort Claims Act protected the City from liability for the plaintiffs' negligence-based claims. Section 10(j) retains sovereign immunity for "any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer ..." G.L. c. 258 § 10(j). Plaintiffs argued that the City "originally caused" the "situation or condition" leading to the minor's injuries because the school principal allegedly directed the bus company to drop the child off at a different location after no one met her at the designated bus stop. The Court, however, declined to confine its analysis to the limited facts plaintiffs suggested. Instead, upon considering all the circumstances that preceded the accident, the Court held that the failure of someone to pick the plaintiff up at her designated bus stop was the "situation or condition" that originally caused the child's injuries. In addressing the principal's alleged decision to have the plaintiff dropped off at a different location, the Court explained that the City was still afforded immunity under Section 10(j) because the principal's response in such an emergency situation was designed to cure and address the situation created by the plaintiffs' family in failing to pick her up at her designated bus stop. Failure to cure a harmful condition or situation not created by the municipality cannot give rise to liability.

Legislative Advisory

The Massachusetts Anti-Bullying Statute and Public School Liability

On May 3, 2010, Governor Deval Patrick signed into law the Massachusetts Anti-Bullying Statute. The bulk of this law's provisions have been codified in G.L. c. 71 §§ 37H & 37O. This highly publicized legislation, under consideration in various forms for quite some time, was passed in the aftermath of recent suicides of students in South Hadley and Springfield who were alleged victims of school bullying. Massachusetts is now one of 43 states with some form of anti-bullying legislation. The law imposes various administrative requirements which, in turn, raise concerns about potential claims against public school officials. Prior to exploring this impact, it is helpful to briefly describe the content of the legislation.

Under the law, two types of conduct are prohibited in public schools: Bullying or retaliation against a person reporting bullying or assisting bullying investigations In addition to these prohibitions, the Anti-Bullying statute also amended several criminal laws, such as the crimes of stalking (G.L. c. 265 § 43), criminal harassment (G.L. c. 265 § 43A); intimidation of witnesses (G.L. c. 268 § 13B); and annoying telephone calls (G.L. c. 269 § 14A) to encompass conduct falling within the definition of "bullying," and its subcategory of "cyber-bullying." School officials should also be aware that a separate law passed in February 2010 authorizes State courts to issue "harassment prevention orders" in the form of civil restraining orders upon a showing of "harassment" consisting of "3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property." See G.L. c. 258E. There are criminal penalties for violating such orders. Unlike the more familiar Chapter 209A restraining orders, "harassment prevention orders" are not restricted to family members or household members.

The new statute broadly defines bullying as:

- the repeated use by students of a written, verbal or electronic expression *or* a physical act or gesture *or* any combination thereof, directed at a victim that
- causes physical or emotional harm or property damage; *or*
- places the victim in reasonable fear of harm or damage to his property; *or*
- creates a "hostile environment" for the victim; *or*
- infringes on the rights of the victim at school; *or*
- materially and substantially disrupts the education process or orderly operation of the School.

The Statute includes cyber-bullying within this definition, which in turn is defined as: "bullying through the use of technology or any electronic communication." The law then provides a non-exhaustive list of examples of such communications:

- any transfer of signs, signals, writing, images, … including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications;
- the creation of a web page or blog in which the creator assumes the identity of another person;
- the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions proscribed in the definition of bullying;
- the distribution of electronic communications to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions proscribed in the definition of bullying.

The law then prohibits bullying both inside and outside of school property. The prohibition thus applies to conduct:

- on school grounds; *or*
- property immediately adjacent to school grounds; *or*
- at a school-sponsored or school-related activity, function or program at any location; *or*
- at a school bus stop; *or*
- on a school bus or other vehicle owned, leased or used by a school; *or*
- through the use of technology or device owned, leased or used by a school; *or*
- at any other location or using non-school owned technology if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school.

School administrators should consult with their legal counsel in order to ensure compliance with the new law. Briefly stated, the Act imposes a number of affirmative obligations upon public schools to prevent bullying, which must be in place by December 31, 2010, as follows:

- Anti-Bullying Plan: each school shall develop, adhere to and update a plan to address bullying prevention and intervention.
- Professional Development: All school employees, from custodians to administrators, must participate in a program of professional development to build the skills necessary to prevent, identify and respond to bullying,
- Reporting: All school employees must report bullying or retaliation.
- Investigating and Discipline: The Principal or designee shall promptly conduct an investigation of reported bullying and take appropriate disciplinary action.
- Notifications: A school must notify the parents and guardians of both the perpetrator and victim of bullying (to the extent permitted by law governing confidentiality of student records); notify local law enforcement of any potential criminal conduct; notify other school administrators if other schools are involved; annually notify staff of the bullying prevention plan.
- Promulgate policies: Internet Safety policy is required.
- Special Education: If an IEP team determines a student is vulnerable to bullying, the IEP must address skills and proficiencies to avoid and respond to bullying.

IMPACT ON PUBLIC SCHOOL LIABILITY:

The key provision in the law for purposes of school liability is contained in the following passage, G.L. c. 71 § 37O(i):

> "Nothing in this section shall supersede or replace existing rights or remedies under any other general or special law*, nor shall this section create a private right of action*."

Thus, there is no new civil cause of action is created solely for violating any obligation under the Anti-Bullying Statute. Nonetheless, despite this provision, the new duties imposed on school officials may be looked at by potential litigants as a basis for claims under pre-existing common law legal theories such as negligent supervision, negligent hiring or retention, or other alternative theories.

The scope of a public school's anti-bullying duties may be broad, but they are not without limit. Although the law prohibits activity which may take place outside of the school property or school activities, the law does not create an affirmative obligations to police the entire universe of student conduct: "Nothing contained herein shall require schools to staff any non-school related activities, functions, or programs." See G.L. c. 71 § 37O(b). Despite these new obligations to prevent bullying, schools arguably retain their immunities from liability found under the Massachusetts Tort Claims Act, G.L. c. 258, §§ 1, *et seq*.

Firm Announcements

PD&P is pleased to announce that Adam Simms and David C. Hunter, III, were elected partners of the firm on May 1, 2010.

PD&P also recently hired a new associate, Roger R. Allcroft. Mr. Allcroft came to PD&P from another Boston firm where he concentrated on medical malpractice, environmental and construction cases. He earned his juris doctor from Suffolk University Law School in 2005 (*cum laude*). He graduated from the University of Rhode Island in 1996 with a degree in Political Science. Before attending law school, he was a teacher and football coach in Port St. Lucie, Florida. At PD&P, Mr. Allcroft's practice will focus on municipal liability and employment law.

You can learn more about Attorneys Simms, Hunter, and Allcroft at http://www.piercedavis.com/.