MASSACHUSETTS MUNICIPAL ASSOCIATION

LABOR LAW UPDATE

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Boston, Massachusetts

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UPDATE ON LABOR CASES[3]

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3 Remarks and handouts are for informational and training purposes only and do not constitute legal advice. You should contact Labor Counsel concerning any specific legal questions you may have.

TABLE OF CONTENTS

4. **Former fire captain who alleged discrimination, retaliation and tortious interference with contractual relations failed to rebut plaintiff's legitimate, non-discriminatory reasons for the actions taken against him.**

Pierce v. Cotuit Fire Dist., 741 F.3d 295 (1st Cir. 2014).

5. **Teacher did not forfeit pension because crime for which he was convicted was not applicable to his position.**

Garney v. Massachusetts Teachers' Retirement System, 469 Mass. 384 (2014).

6. **An employee of a Housing Authority was not required to exhaust administrative remedies with the Civil Service Commission before filing claim in Superior Court.**

Fernandes v. Attleboro Housing Authority, 470 Mass. 117 (2014).

7. **Employee entitled to appeal termination to Civil Service Commission despite the fact he was terminated from a position to which he was provisionally appointed.**

City of Springfield v. Civil Service Commission, 469 Mass. 370 (2014).

8. **Special act concerning City finances does not absolve the City of Wage Act obligations.**

Ronald Plourde v. Police Department of Lawrence, 85 Mass. App. Ct. 178 (2014).

9. **Teacher retains rights under the collective bargaining agreement, notwithstanding the expiration of his professional license.**

School Committee of Marshfield v. Marshfield Education Association, 84 Mass. App. Ct. 743 (2014).

10. **Pension forfeited as a matter of law as a result of criminal convictions.**

Somerville Retirement Board v. Buonomo, 467 Mass. 662 (2014).

I. LEGISLATION

1. **Minimum Fair Wage** – On January 1, 2015, the Massachusetts minimum wage increased from $8.00 per hour to $9.00 per hour. On January 1, 2016, the minimum wage will increase $1.00, from $9.00 per hour to $10.00 per hour. On January 1, 2017, the minimum wage will, again, increase $1.00, from $10.00 per hour to $11.00 per hour. However, these state minimum wage increases and the Minimum Fair Wage law itself have been interpreted **not** to apply to public employees. Grenier v. Town of Hubbardston, 7 Mass. App. Ct. 911 (1979). Municipalities **must still** pay employees at least the federal minimum wage which is currently $7.25.

2. **An Act Relative to Compensated Absences in Cities and Towns** – On April 4, 2012, Governor Patrick signed a bill amending Ch. 40 § 13D of the General Laws. The bill authorizes a city or town to establish, appropriate or transfer money to a reserve fund for the future payment of accrued liabilities for compensated absences due to any employee or full-time officer of the town upon the termination of their employment.

   The bill also gives the treasurer the authority to invest the monies in the reserve fund in a manner authorized by M.G.L. Ch. 44 § 54, and any interest earned will become part of the fund. The city or town should designate a municipal official to authorize payments from the fund. In the absence of such a designation, the chief executive officer of the city or town will be responsible for authorizing payments. With respect to school districts, funds may be added to the reserve fund only by appropriation in the annual budget.

3. **Earned Sick Leave** – On November 4, 2014, voters passed the Earned Sick Leave ballot measure which entitles Massachusetts employees to earn and use up to forty hours of paid sick time. Under the law, employees earn one hour of sick time for every thirty hours worked, up to a maximum of forty hours earned. Employees begin accruing sick hours on either (a) the date of hire; or (b) July 1, 2015, whichever is later. Employees are entitled to use earned sick time and miss work in order to:

   - Care for a physical or mental illness, injury, or medical condition affecting the employee or the employee's child, spouse, parent, or parent of a spouse;
   - Attend routine medical appointments of the employee or the employee's child, spouse, parent, or parent of a spouse; or
   - Address the effects of domestic violence on the employee or the employee's dependent child.

   In certain circumstances, employers may require employees to provide certification of the need for sick time. It is important to note that this law is **not automatically applicable to cities and towns.** In order for the law to apply to cities and towns, it must be accepted by a local vote or by appropriation of sufficient funds to pay for the benefit.

4. **An Act Relative to Domestic Violence** – On August 8, 2014, Governor Patrick signed into law a bill mandating that all public and private employers with fifty (50) or more employees grant up to fifteen (15) days of leave during any twelve (12) month period to any employee affected by domestic violence. An employer has discretion to decide whether the leave is paid or unpaid. An employee will be eligible for domestic violence leave if: (1) the employee, or a family member of the employee, is a victim of domestic violence, sexual assault, stalking or kidnapping; and (2) the employee uses the leave to "obtain medical attention, counseling, victim services or legal assistance; secure housing; obtain a protective order from a court; appear in court or before a grand jury; meet with a district attorney or other law enforcement official; or attend child custody proceedings or address other issues directly related to the abusive behavior against the employee or family member of the employee."

   Additionally, employers are required to notify employees of their rights under the law and, in the event an employee takes leave pursuant to the Act, the employer must ensure that it protects the employee's confidentiality. In light of this law, employers should ensure that their leave policies provide for domestic violence leave.

5. **Military Leave Law** – This past year, Massachusetts amended its military leave law, M.G.L. Ch. 33 § 59, applicable to those serving in the National Guard and the Reserve forces of the United States, by expanding the financial obligations of those employers that have previously accepted § 59. Under the revised § 59, public employees must be paid for the first thirty (30) days of active duty service in the National Guard for state emergencies and riots in addition to the previously existing benefit of pay during annual training. After thirty (30) days, the salary paid by the public employer will be reduced by the pay received from the National Guard.

   Additionally, if members of the National Guard or Reserves are called to active duty by the United States, they will receive their base pay, subject to offset of their military pay. The law also protects employees from any loss in seniority or accrued benefits during any period of active duty to the Commonwealth or the United States.

6. **An Act Relative to Parent (Maternity) Leave** – Recently, on January 7, 2015, former Governor Patrick, in one of his last acts in office, enacted "An Act Relative to Parent Leave" which amended G.L. Ch. 149 §105D and which becomes effective April 7, 2015. The Act entitles either a male or female employee, who has completed an initial probationary period not to exceed three months, to eight weeks of parental leave. The Act is significant because such leave had previously only been available to female employees. As amended, however, §105D provides that both male and female employees may take leave for the purpose of:

   - Giving birth;
   - Adopting a child under the age of 18;
   - Adopting a child under the age of 23, if the child is mentally or physically disabled; and/or
   - The placement of a child with an employee pursuant to a court order.

The leave authorized pursuant to §105D may be paid or unpaid at the discretion of the employer. Upon return from leave, an employer must reinstate the employee to his or her prior position or a similar position, unless other employees of equal length of service credit and status were laid off due to economic conditions during the employee's parental leave. Further, if an employee is allowed to more than eight weeks of parental leave provided under §105D, an employer is required to provide written notice to the employee if the employee will not be reinstated or afforded other rights under §105D because they took more than eight weeks of leave. Lastly, the Act clarifies that any two employees of the same employer are limited to a total of eight weeks of leave for the birth or adoption of the same child.

7. **OPEB Reform Act** – Two years ago, on February 12, 2013, Governor Patrick filed legislation to reform health insurance benefits for retirees that he contended would save $20 billion dollars for the Commonwealth and municipalities over the next thirty (30) years. Ultimately, the new legislation was not adopted. The current law, M.G.L. Ch. 32B § 20, provides that a city or town may establish an Other Post-Employment Benefits Liability Trust Fund, and may appropriate amounts to be credited to the fund. Any interest or other income generated by the fund shall be added to and become part of the fund.

II. SECURITIES AND EXCHANGE COMMISSION GUIDANCE

Municipalities' Financial Disclosure Obligations[1]

Over the past few years, the Securities and Exchange Commission ("SEC") has made a point of actively going after government officials for their failure to properly disclose financial information on a timely basis and for misleading investors.

For example, the SEC charged the State of Illinois with securities fraud for "misleading investors about serious problems with the state's pension fund." Additionally, the SEC charged the city of Miami and its former budget director with securities fraud. The charges against the city and the individual revolved around allegations that the former budget director sought to deceive investors and bond-rating agencies "regarding the city's financial health by transferring funds from other city accounts to hide deficits in the city's general fund."

Investors are attracted to municipalities because of the perceived strength of the municipal bond market, which was "seen as [a] relatively safe [investment] and in some cases had tax benefits." This all changed, however, when the financial crisis hit in 2008. The Great Recession had a "devastating effect on the financial positions of states and municipalities" and "greatly increased the risk of harm to investors in municipal bonds." As a result, the SEC has turned its focus toward the municipal bond market and on government officials.

To ensure compliance with SEC rules and regulations, state and local government officials must be continually aware of their disclosure obligations in a bond prospectus and "should have complete and updated securities disclosure policies in place, and they should regularly train relevant employees on the policies and related requirements under the federal securities laws." Further, all "disclosure obligations must be filed on a timely basis." The failure to comply with federal securities law could potentially result in *personal liability* for state and local government leaders.

To avoid personal liability, state and local government officials must ensure full disclosure under federal securities laws of relevant financial information.

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[1] The information from this summary was collected from an article by Ivan B. Knauer and John Snodgrass entitled, "United States: Public Officials, Financial Disclosure and a New Era of Liability." The article is available at: http://www.mondaq.com/unitedstates/x/282270/Fiscal+Monetary+Policy/Public+Officials+Financial+Disclosure+and+a+New+Era+of+Liability.

III. CASE LAW

1. **Employer liable to employee for sexual harassment for negligently allowing a co-worker to continue to sexually harass the employee through the termination of the employee.**

Velazquez-Perez v. Developers Diversified Realty Corp., 753 F.3d 265 (1st Cir. 2014).

The First Circuit held that an employer may be liable for quid pro quo sexual harassment when the employer acted negligently in allowing a co-worker's harassment to have its desired effect – the termination of the employee to whom the harassment was directed.

In Velazquez, the plaintiff, Velazquez, a male, was an operations manager who often worked closely with a female, non-managerial human resources representative of the defendant. Velazquez and the representative communicated frequently by telephone and email and, during the first ten months of Velazquez's employment, had a good working relationship. However, their relationship turned sour rather quickly after Velazquez rebuffed the representative's repeated romantic advances. Taking Velazquez's rejection to heart, the representative began sending messages to him that were perceived by Velazquez as threatening to have him fired for rejecting her.

Velazquez ultimately complained to his supervisor about her, and the supervisor orally advised him to "[s]end [her] a conciliatory email" because, according to the supervisor, if he did not, "[s]he's going to get you terminated." Despite Velazquez's complaints, she did not relent and she eventually began criticizing the plaintiff's job performance to his supervisors, including recommending his termination. When the supervisors disagreed with her recommendation, she went over their heads and spoke with more senior managers at the company's headquarters in Ohio. Several days later, Velazquez's employment was terminated.

Velazquez filed suit alleging claims of sexual harassment, among others. The employer prevailed in the U.S. District Court, but the First Circuit reversed that decision on appeal. Noting the case was one of first impression, the Court held an employee may be liable for quid pro quo harassment where: "the plaintiff's co-worker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff's firing; the co-worker's discriminatory acts proximately cause the plaintiff to be fired; and the employer acts negligently by allowing the co-worker's acts to achieve their desired effect though it knows (or reasonably should know) of the [co-worker's] discriminatory motivation."

This decision is particularly significant because it serves to expand employer liability in the area of sexual harassment. Prior to this decision, an employee suing under a quid pro quo sexual harassment theory needed to prove that a *supervisor* either conditioned the granting of a job benefit upon the receipt of sexual favors from a subordinate or punished a subordinate for refusing to comply with a request for sexual favors. An employee may now, however, bring a quid pro quo sexual harassment theory against an employer if it *negligently allows a co-worker* to harm a fellow co-worker.

2. **Municipality qualified for overtime exemption despite the fact it did not expressly adopt the exemption.**

Rosano v. Township of Teaneck, 754 F.3d 177 (3rd Cir. 2014).

The Third Circuit held that a New Jersey municipality qualified for the Fair Labor Standards Act ("FLSA") Sec. 207(k) overtime exemption, which allows public employers to establish a "work period" ranging from seven to 28 days for its law enforcement personnel.

In Rosano, 88 current and former officers of the Township of Teaneck ("Teaneck") filed suit against the town to recover unpaid compensation for: 1) overtime; 2) time spent during muster time; and 3) time spent donning and doffing uniforms and equipment each day.

The collective bargaining agreement ("CBA") provided that police officers work established and regularly recurring work periods of either seven or nine days. In total, the police officers would work, on average, 39.25 hours per week during a calendar year. If an officer worked in excess of his or her normal hours, such work was compensated at a rate of time and one-half. An officer's overtime would accrue in blocks based on the amount of work performed in excess of the regular day's work. For example, "if an officer works less than 31 minutes past his scheduled tour, he receives no overtime; if the officer works between 31 minutes and 44 minutes past his scheduled tour, he receives 30 minutes of overtime."

The CBA also provided for inspection and roll call, or "muster time." This muster time would take place 10 minutes prior to the start of an officer's shift and 10 minutes at the end of the shift. Accordingly, muster time would result in the officers working for 8 hours and 20 minutes. If muster time took less than 20 minutes, the officers would still receive credit for the full 8 hours and 20 minutes.

The CBA, however, was silent as to whether Teaneck officers were entitled to compensation for their time spent donning and doffing, which, on average, amounted to 15 minutes per day for non-uniformed officers, and 30 minutes per day for uniformed officers. Teaneck did not have any requirement that the donning and doffing take place at a specific location, but, rather, officers were allowed to don and doff where they wanted.

As to whether Teaneck qualified for the Sec. 207(k) exemption, the Court concluded that, even though Teaneck failed to expressly adopt the 207(k) exemption, the exemption was still applicable because Teaneck met the factual criteria set forth in the exemption which require the employees at issue to "be engaged in fire protection or law enforcement" and the employer to have "established a qualifying work period." The Court first noted that there was no dispute that the police officers qualified as law enforcement for the purposes of the FLSA. Second, the court reasoned that because Teaneck officers work and are paid in accordance with "established and regularly recurring work periods" of either seven or nine days, as noted above, Teaneck established a "qualifying work period."

Additionally, the Court rejected the officer's argument that they were not compensated for the 20 minutes of muster time, and, instead, found that the muster time was built into the salaries of the officers such that the officer's daily work schedule is 8 hours and 20 minutes. The Court noted that "[s]uch a reading would therefore encompass the tour of duty, the assignment, and pre- and post-tour muster time."

Lastly, the Court concluded that the officers' donning and doffing time was not compensable under the FLSA. The Court also placed significant weight on the fact that the CBA did not address such donning and doffing and, also, that the union never addressed the issue during contract negotiations when it stated, "[t]hose facts certainly establish a longstanding acquiescence on the part of the officers and the unions to a 'custom or practice' of non-compensability of change time."

3. **The phrase "under God" in the "Pledge of Allegiance" does not violate the equal rights amendment of the Massachusetts Constitution.**

Jane Doe v. Acton-Boxborough Regional School District, 468 Mass. 64 (2014).

The Massachusetts Supreme Judicial Court held that the phrase "under God" in the Pledge of Allegiance does not violate the equal rights amendment of the Massachusetts Constitution nor does it violate G.L. Ch. 76 § 5 which prohibits discrimination in Massachusetts public school education.

In this case, the Plaintiff, Jane Doe, had three children, ages fourteen, twelve, and ten years old, who attended the Acton-Boxborough Regional Schools. Ms. Doe and her children are atheists and humanists, and, thus, do not believe in the existence of any type of God or gods. Ms. Doe and her children alleged that the Pledge of Allegiance (the "Pledge"), which was recited each morning in the public schools of the town of Acton and the Acton-Boxborough regional school district, violated their Massachusetts constitutional and statutory rights because it includes the words "under God." The Court disagreed.

In its analysis, the Court noted that the Pledge is a fundamentally patriotic exercise, not a religious one. The Court delved into the history of the Pledge concluding that a "reasonable observer...aware of the history and origins of the words in the Pledge would view the Pledge as a product of this nation's history and political philosophy." The Court also distinguished the Pledge from prayer finding the Pledge is "not a religious exercise or activity, but a patriotic one" and stating, the "inclusion of words 'under God,' despite their religious significance, 'does not alter the *nature* of the Pledge as a patriotic activity."

Additionally, and of particular importance to the Court's decision, was the fact that, "[f]or both students and teachers, participation in the Pledge of Allegiance [was] totally voluntary," and, "[a]ny teacher or student [could] abstain themselves from participation in the Pledge of Allegiance for any or no reason, without explanation and without any form of recrimination or sanction." Thus, Ms. Doe's children were afforded the clear opportunity to abstain from saying the Pledge. Their argument that they felt "stigmatized," "marginalized," and "excluded," because they did not state the Pledge like everyone else, was not a cognizable harm under the Massachusetts Constitution. Further, the factual record of the case was devoid of any evidence of the children being treated differently by school personnel or fellow children.

The Plaintiffs' equal protection claims brought pursuant to the Massachusetts equal rights amendment were also quickly squashed by the Court. In order to establish an equal protection claim, a party must demonstrate that there has been some type of classification made by the law. In this particular case, however, there was "no classification...created by the practice of reciting the pledge in the manner it is presently recited, voluntary." To the contrary, all students were treated alike, each student was free to recite the pledge or to abstain, and, "significantly, no student who abstains from reciting the Pledge, or any part of it, [was] required to articulate a reason for his or her choice to do so."

4. **Former fire captain who alleged discrimination, retaliation and tortious interference with contractual relations failed to rebut plaintiff's legitimate, non-discriminatory reasons for the actions taken against him.**

Pierce v. Cotuit Fire Dist., 741 F.3d 295 (1st Cir. 2014).

The First Circuit held that a former fire captain was not discriminated against in violation of the First Amendment, was not retaliated against in violation of the Massachusetts Whistleblower Act, and did not suffer tortious interference with contractual relations.

David Pierce was a Captain in the Cotuit Fire Department, who served directly over his wife, Jayne, also a firefighter, during the majority of their relationship.[2] Pierce was advised by the Massachusetts State Ethics Commission ("Ethics Commission") that the state ethics law, M.G.L. Ch. 268A, § 19, prohibited him from participating in his wife's supervision, performance evaluations, promotions, or in setting her compensation. Additionally, Pierce was further advised to obtain a formal exemption from the Board of Fire Commissioners (the "Board") but chose not to do so. Despite this advice, Pierce was directly involved in his wife's employment on three occasions, including making certain recommendations to the Fire Chief that would directly benefit her, and also being involved in a disciplinary investigation against her. The Ethics Commission ultimately found Pierce to be in violation of the ethics law. Pierce was suspended and terminated for this violation, though he was ultimately reinstated.

During his time as Captain, Pierce was also involved in an election involving an opening on the Board. Pierce was concerned that the individual running for re-election, Donald Campbell, was an active union firefighter which created a possible conflict of interest. Accordingly, he encouraged William Wool to run. Pierce, however, was instructed not to campaign for Wool while on duty or to use Department resources with his campaigning. Pierce complied with both requests and actively and appropriately campaigned for Wool.

Despite Pierce's efforts, Campbell ultimately won re-election. According to Pierce, after the election, Pierce's supervisor, Olsen, expressed that he was not happy about campaigning for Wool, stating he was disappointed and frustrated regarding Pierce's support for Wool. Pierce claimed that Olsen had retaliated against him by reneging on a promise to make Pierce "Deputy Chief," by taking away his Department-issued cell phone, for calling Pierce and his wife greedy for volunteering for overtime, and for lashing out at Pierce for failing to prepare for a memorial ceremony. Pierce eventually sent a letter to the Board objecting to this "harassment."

In its analysis, the Court first held that Pierce was not discriminated against in violation of the First Amendment for campaigning for Wool. The Court reasoned that Pierce could offer no evidence that any of the actions taken against him were based on his campaigning for Wool. Rather, all actions taken against Pierce were supported by legitimate, non-discriminatory justifications: Olsen took Pierce's cell phone because it was more efficient to make the phone

[2] This inter-departmental relationship was only one, among many, that existed in the decades leading up to the fall of 2009.

available to all on-duty officers; the position of "Deputy Chief" did not exist; and Olsen reprimanded Pierce, along with other firefighters, because they were unprepared for an official duty.

Next, the Court held that the Board did not retaliate against Pierce when it conducted an ethics investigation against him and terminated him. The Court reasoned that the investigation of the Board was in response to genuine and timely concerns about Pierce's professional conduct as Captain, which he, himself, was aware of when the Ethics Commissions originally instructed him that he was likely in violation of the Massachusetts ethics laws when he was supervising Jayne.

Lastly, the Court held that Olsen and the Board did not tortiously interfere with his employment contract with the Cotuit Fire Department. The Court noted that a claim for tortious interference cannot be maintained by one party to a contract against another, meaning that an employee cannot bring such a claim against his own employer. An employee can, however, bring a claim against a supervisor if the supervisor acted "out of malevolence, that is, with actual malice." The Court reasoned there was no actual malice because its decision to suspend and terminate Pierce was based on Pierce's violation of the Massachusetts ethics laws.

5. **Teacher did not forfeit pension because crime for which he was convicted was not applicable to his position.**

Garney v. Massachusetts Teachers' Retirement System, 469 Mass. 384 (2014).

The Massachusetts Supreme Judicial Court held that a former public school teacher who was convicted of possessing child pornography did not forfeit his pension pursuant to G.L. Ch. 32 § 15(4) because the convictions were not, as required by the statute, applicable to his position as a public school teacher.

Ronald Garney was a ninth grade science teacher who, in 2006, was arrested for purchasing and possessing child pornography. Shortly after his arrest, Garney was informed that he would be dismissed from his job for conduct unbecoming of a teacher. Before his dismissal, Garvey resigned. In August 2007, Garney reached retirement age and submitted an application with the Massachusetts Teachers' Retirement System ("MTRS"). In December 2007, Garney pleaded guilty to eleven counts of purchasing and possessing child pornography.

Garney received his retirement benefits until 2009, when, at that time, the MTRS Board issued a decision concluding Garney forfeited his pension when he was convicted of possessing child pornography. The MTRS Board cited G.L. Ch. 32 § 15(4) which requires the automatic forfeiture of pension benefits "after final conviction of a criminal offense involving violation of the laws applicable to [the employee's] office or position." The Board found that there was a "direct link between Mr. Garney's employment and his possession of child pornography...." As support for its findings, the Board cited the fact that Garney used the email address provided by the Department of Elementary and Secondary Education. Garney appealed the Board's decision to the District Court which affirmed it. The case then went to the Superior Court, which reversed the District Court's decision and vacated the Board's finding.

After taking the case directly from the Superior Court, the Supreme Judicial Court affirmed the Superior Court's reversal. Specifically, it noted that G.L. Ch. 32 § 15(4) "clearly requires a direct link between the criminal offense and the violation of the laws applicable to the office." Accordingly, the Supreme Court held that, despite the fact Garney's conduct was both despicable and deserving of prosecution and dismissal from his teaching position, his conduct "fail[ed] to reach the inside of the school doors." The Supreme Judicial Court reasoned that Garney's crimes did not reference his public employment nor was there any direct factual link to his teaching position. Rather, his crimes occurred "outside of school, without using school resources or otherwise using his position to facilitate his crime, and without involving students in his illicit activities."

6. **An employee of a Housing Authority was not required to exhaust administrative remedies with the Civil Service Commission before filing claim in Superior Court.**

Fernandes v. Attleboro Housing Authority, 470 Mass. 117 (2014).

The Supreme Judicial Court held that the Civil Service Commission does not have exclusive authority over a Wage Act claim filed by a housing authority employee. Additionally, it held that reinstatement of employment is not an available remedy under the Wage Act.

David Fernandes was hired by the Attleboro Housing Authority ("AHA") in 2001 and, upon his hire, was classified as a Maintenance Mechanic II. Maintenance Mechanic II was an entry-level position essentially constituting an apprenticeship to a higher position. After working at the AHA for two years, Fernandes was assigned additional responsibilities and was required to perform more diversified work that he believed was more in line with the Maintenance Mechanic I position. The Maintenance Mechanic I position required a greater skill level than the Maintenance Mechanic II position, and, accordingly, commanded a higher salary.

Despite repeated complaints to management that he should be classified as a Maintenance Mechanic I based on the type of work he was performing, Fernandes was paid as a Maintenance Mechanic II. In response, Fernandes filed a complaint with the Attorney General's office. A month later, management held a meeting with Fernandes and informed him that he was being laid off due to budgetary constraints. Fernandes then filed suit in the Superior Court alleging violations of the Wage Act for unpaid wages and retaliation for filing a complaint with the Attorney General's office.

The AHA first defended on the grounds that the Superior Court did not have jurisdiction over the case, arguing that a housing authority employee, under the doctrine of primary jurisdiction, is only entitled to seek redress for an adverse employment action through administrative proceedings under the Civil Service law. The Supreme Judicial Court disagreed. After conducting a review of the relevant provisions of the Civil Service law, the Court noted that, while the Civil Service law clearly afforded housing authority employees, like Fernandes, the protections of the Civil Service law, nothing in the law dictated that it was the only avenue for an employee to seek redress of his claims.

To the contrary, the fact that the Civil Service law states that an employee "may" file a complaint with the Civil Service Commission "strongly suggests that the Legislature has not granted exclusive authority over all challenged employment actions to the commissions." Further, nothing in the Civil Service law precluded Fernandes from bringing his Wage Act claims in Superior Court nor did the Wage Act itself exclude a housing authority employee "from its protections or require that such employee pursue relief from alleged wrongful conduct under the civil service system." As such, it was proper for Fernandes to bring suit in Superior Court.

In his Complaint, Fernandes sought reinstatement to the position of Maintenance Mechanic I, with full seniority, arguing that such reinstatement qualified as an injunctive relief permitted by the Wage Act. The Court disagreed holding that reinstatement to employment is *not* an available remedy for Wage Act violations. The Court reasoned that, because the Legislature has "plainly articulated the availability of reinstatement" as a remedy for other statutes, including the Anti-Discrimination Statute, the False Claims Act, and the Whistleblower Statute, and, because reinstatement was not specifically articulated as a remedy in the Wage Act, it was not available to Fernandes as a remedy. The Court does not "read into [a] statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose."

7. **Employee entitled to appeal his termination to the Civil Service Commission despite the fact he was terminated from a position to which he was provisionally appointed.**

City of Springfield v. Civil Service Commission, 469 Mass. 370 (2014)

The Massachusetts Supreme Judicial Court held that a tenured civil service employee who had *provisional promotion* status was entitled to appeal his termination to the Civil Service Commission (the "Commission") pursuant to G.L. c. 31 §§ 41-45.

McDowell was originally hired as a skilled laborer for the City. In 1989, he was promoted to carpenter. He achieved permanent tenured status for the position of carpenter in 1993. That same year, he was provisionally promoted to Assistant Deputy of Maintenance. A year later, he was, again, provisionally promoted to Deputy Director of Maintenance. McDowell served in this position until 2005. In January 2005, he was suspended for inappropriate use of City property and conducting private business during working hours. In April 2005, after a two- day disciplinary hearing, McDowell was terminated.

McDowell appealed his termination to the Commission, but the City argued that McDowell was not entitled to such an appeal.[3] It reasoned that only tenured employees were permitted to appeal their terminations, and McDowell was not tenured but, rather, was serving in a temporary position to which he was provisionally appointed. The Supreme Judicial Court disagreed and held that McDowell was, in fact, a tenured employee, a status he achieved in 1993. The Court, in deferring to the Commission's interpretation of "tenured employee" in G.L. c. 31 § 1, reasoned that the statutory definition of "tenured employee" did not differentiate between employees who held permanent tenured positions and employees who held permanent tenured positions but were appointed to provisional positions. Accordingly, because McDowell was tenured, albeit for a different position, he was entitled to appeal his termination to the Commission.

Another issue in this case revolved around the fact that, during McDowell's appeal of his termination to the Commission, McDowell was indicted and pled guilty to filing false tax returns in 2007. The City argued that, had McDowell been working for the City at this point, such an indictment and guilty plea would have been grounds for his suspension and termination, respectively under Chapter 268A. The Court disagreed with both the City and the Commission, who had originally ruled in the City's favor. The Court noted that G.L. c. 268A, § 25 gives a public employer the authority to suspend an employee who is under indictment for "misconduct in such office or employment." There must, however, be a direct relationship between the employee's misconduct and the office held.

[3] The Commission, in 2010, ultimately determined McDowell's actions of inappropriately using City property and conducting private business on non-working time, warranted only a six month suspension. Additionally, it found that no just cause existed for the termination. The suspension would have resulted in McDowell losing his job as the provisional Deputy Director of Maintenance and returning to his position as a carpenter.

When the indictment against McDowell was issued in April 2007, had he been working for the City, he would have been employed in his original tenured position as carpenter. The Court reasoned that falsifying tax returns is not related to the position of carpenter nor does the position encompass any public trust which would be violated upon the commission of such a crime. Accordingly, the City would not have been able to suspend McDowell without pay from his position as carpenter under Chapter 268A, because the crime was not directly related to the position.

8. **Special act concerning City finances does not absolve the City of Wage Act obligations.**

Ronald Plourde v. Police Department of Lawrence, 85 Mass. App. Ct. 178 (2014).

The Massachusetts Appeals Court held that the Police Department of Lawrence was liable for unpaid compensatory time under G.L. c. 149, Sections 148 and 151, the Massachusetts Wage Act, notwithstanding a special act, which set forth a procedure requiring the Police Department to work within its budgeted allocation, and to provide notice to the municipality of certain expenses exceeding that allocation.

The plaintiff was employed by the Police Department of Lawrence from 1985 through 2010. During the course of his employment and under the terms of the collective bargaining agreement between the Police Department of Lawrence and his Union, the plaintiff was permitted and elected to work additional shifts. The Department's policies and practices governed by the Fair Labor Standards Act permitted officers to elect compensatory time in lieu of wages for overtime hours. Throughout his employment, the plaintiff elected to take compensatory time for many of his overtime shifts. At the time of the plaintiff's retirement, the plaintiff was paid accumulated sick leave under the parties' collective bargaining agreement, but the Department refused to pay the plaintiff his accrued compensatory time, which at the time totaled 261 ½ hours.

The plaintiff filed suit for unpaid wages in the form of compensatory time under the Massachusetts Wage Act. The Superior Court dismissed the plaintiff's claim reasoning that it was precluded under the Lawrence Act – a special act that was designed to ensure the fiscal stability of Lawrence. The Lawrence Act provides that no personnel expenses earned or accrued within any department, board, commission, agency or other unit, shall be charged to or paid from any allotment without the written approval of the Mayor. The Superior Court determined that this provision created a "use it or lose it" policy where Lawrence employees had to obtain Mayoral approval to carry over accrued compensatory time from previous periods. Consequently, the Superior Court determined that the Wage Act claim was barred by the Lawrence Act because the plaintiff has never received Mayoral approval to carry over the compensatory time from previous periods.

The Appeals Court reversed finding that the Superior Court's interpretation was in error. The Appeals Court reasoned that the Lawrence Act was enacted in 1990, subsequent to the Wage Act. Without some expression by legislature of its intention that the special act overrode the provisions of the Wage Act, Lawrence's reliance upon a statutory construction that gives the Lawrence Act priority over the Wage Act could not apply. Further, if Lawrence's interpretation of the Act was correct, employees would be forced to use all earned vacation, sick, and compensatory time before the end of each two or three month allotment periods if the department heads and Mayor refused to allow them to be carried over. On a practical level, it strains credulity to suggest that a special act designed to ensure Lawrence's fiscal health would mandate bureaucratic inefficiency forcing each of Lawrence's numerous department heads or their employees to obtain the Mayor's signature every two or three months for all Lawrence employees to keep their accrued

sick, vacation and compensatory time. Further, the defendant paid the plaintiff's accrued sick time upon his retirement even though the time had been accrued over the course of several fiscal periods.

Accordingly, it appeared that the defendant was relying on one interpretation of Mayoral authorization to pay the plaintiff's accrued sick time while at the same time relying on an altogether different interpretation to bar the payment of the plaintiff's compensatory time. The Court found that the defendant cannot arbitrarily invoke the Lawrence Act as a shield to avoid a statutory obligation to pay the plaintiff's compensatory time.

9. **Teacher retains rights under the collective bargaining agreement, notwithstanding the expiration of his professional license.**

School Committee of Marshfield v. Marshfield Education Association, 84 Mass. App. Ct. 743 (2014).

The Massachusetts Appeals Court held that an arbitrator did not exceed her authority in determining that a teacher was entitled to a one-year, unpaid leave of absence under the collective bargaining agreement between his employer and his union, and was not terminated as a matter of law upon the expiration of his license under G.L. c. 71, § 38(g).

The plaintiff school teacher was employed as a teacher by the Marshfield Public School District for almost eight years before being terminated in 2008. The School Committee determined that the teacher's employment automatically ended by operation of law when his teaching license was not renewed by the Commissioner of Education and the Commissioner denied the District Superintendent's request for a waiver of the license requirement. The School Committee took no steps to terminate the plaintiff in accordance with the terms of his contract and the collective bargaining agreement between the union and the School Committee. The School Committee also did not follow the teacher termination process set out in G.L. c. 71, § 42. The School Committee claimed that the teacher ceased to be employed as a matter of law and as a result was not entitled to any rights afforded a professional teacher under Section 42 or with the Collective Bargaining Agreement.

The union grieved the teacher's termination and filed a demand for arbitration. At arbitration, the arbitrator determined that the teacher's employment did not cease as a matter of law, despite the lack of a license or waiver, and that he was still an employee entitled to contractual rights, including a one-year, unpaid leave of absence that he had requested in order to work towards obtaining his license.

The Court affirmed the award. The Court reasoned that the statute governing teacher licensure, G.L. c. 71, § 38(g) must be read in harmony with G.L. c. 71, § 42 and the collective bargaining agreement. Section 38(g) provides, "no person shall be eligible for employment as a teacher... unless he has been granted by the Commissioner a provisional or standard certificate with respect to the type of position for which he seeks employment." Section 42 addresses the termination process for professional teachers, which includes in pertinent part, "a teacher... shall not be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards...." The collective bargaining agreement provided that the Superintendent may suspend a teacher or terminate his employment for cause as provided in G.L. c. 71, § 42. The collective bargaining agreement also provided that a teacher with six or more continuous years of service may be granted an extended leave of absence of up to two years without pay for personal reasons.

In construing the statutes and the collective bargaining agreement, the Court found that, although Section 38(g) defines eligibility requirements for employment as a teacher in public schools, it does not in any way define the requirements for termination of employment and the associated rights of employment for those who have been previously licensed and achieved professional teacher status. Those requirements are addressed in Section 42 and in the collective bargaining agreement. Thus, the Court found that Section 38(g) can and should be read in harmony with the procedural termination provision set out in Section 42 and the collective bargaining rights of affected employees.

Accordingly, where there were no termination proceedings, under G.L. c. 71, § 42, the employment relationship between the district continued, even though the teacher no longer held a teaching license. The continuing employment relationship afforded the teacher standing to grieve his claims and rights to an unpaid leave of absence under the relevant provision of the Collective Bargaining Agreement. As such, the arbitrator did not exceed her authority in vacating the teacher's termination and granting the one-year, unpaid leave of absence under the Collective Bargaining Agreement.

10. **Pension forfeited as a matter of law as a result of criminal convictions.**

Somerville Retirement Board v. Buonomo, 467 Mass. 662 (2014).

The Massachusetts Supreme Judicial Court held that a public employee forfeited his pension from his position as former member of the board of aldermen when he, in his capacity as register of probate for Middlesex County, was convicted of stealing monies from coin depositories in the registry of deeds section of a building in Cambridge.

In Buonomo, the defendant, Buonomo, first held a position as a Somerville alderman, a position which he held until January 2000 when he retired. At this time, Buonomo began receiving pension benefits from the State Board of Retirement (the "Board"). In November 2000, Buonomo was elected as register of probate for Middlesex County. After his election, Buonomo became eligible to enroll in the State employees' retirement system, but, instead, chose to continue receiving his retirement allowance from the Board.

In August 2008, a criminal complaint was issued against Buonomo charging him with eighteen counts of breaking into a depository, eight counts of larceny under $250, and eight counts of embezzlement by a public officer. These charges were the result of a two month investigation into Buonomo that unmistakably revealed Buonomo had been unlocking machines in the above-described locations with "a key, opening them, removing money, closing the machines, and then leaving the area." As a result of his actions, the Board notified Buonomo that it was revoking his pension pursuant to G.L. ch. 32 § 15(3)-(4). §15(4) provides "[i]n no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance...."

Buonomo appealed his decision to the District Court which ultimately reinstated the pension. After some procedural maneuvering, the case made its way to the Supreme Judicial Court where the District Court's decision was vacated and Buonomo was stripped of his pension.

In its analysis of G.L. ch. 32 §15(3)-(4), the Supreme Judicial Court first held that Buonomo violated laws applicable to his office or position. Pursuant to the Code of Professional Responsibility for Clerks of the Court (the "Code"), the register [of probate] "shall comply with the laws of the Commonwealth." The Supreme Judicial Court reasoned that, when Buonomo pled guilty to theft, he violated the Code, and, in doing so, violated the laws applicable to his office.

Despite the fact that Buonomo violated laws applicable to his position, he argued that he was still entitled to his retirement allowance because his conviction was not related to the same office from which he was receiving the allowance. The Supreme Judicial Court rejected this argument, however, explicitly stating that "the statute does not say that the office or position whose laws were violated be the same as the one from which the member is receiving a retirement allowance." Buonomo's attempt to read in such a requirement stands in direct contrast to the language of the statute itself. As such, when Buonomo pled guilty to theft, he violated the laws applicable to his position, and forfeited his entitlement to *any* retirement allowance, including that which he was receiving from his prior position as alderman.

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D. is a senior partner in the firm's Labor, Employment and Employee Benefits Group. He has extensive experience in labor and employment law. He has frequently represented management in labor and employment cases before government agencies, including the National Labor Relations Board, the Department of Labor and the Massachusetts Commission Against Discrimination. He has personally conducted more than 600 labor negotiations, including numerous negotiations involving teachers, factory workers, hospital employees, and public employees. D. also practices education law and represents public and private schools in Massachusetts. Presently, D. is labor counsel for various private and public employers in Massachusetts and regularly advises employers on labor and employment law issues.

He drafted a portion of the Massachusetts Labor Statute and is a founder and former management chair of the State Joint Labor Management Committee (Dunlop Commission) and the Worcester County Bar Association Labor and Employment Law Committee.

In 2013, D. received the 2013 Cushing-Gavin Labor-Management Counsel Award. Also in 2013, D. was awarded a rare honorary membership in the International City Management Association (ICMA). Honorary membership in ICMA is awarded to an individual outside of the profession of local government management because of his or her distinguished public service and contributions to the improvement and strengthening of local government.

Human Resource Executive Magazine and *Lawdragon* have recognized D. as being one of the "Top 100 Corporate Employment Attorneys in the United States" in 2010, 2011, 2012, 2013 and in 2014 elected him to the Human Resources Hall of Fame. D. was selected by his peers for inclusion in *The Best Lawyers in America* ©2014 in the field of Employment Law – Management (Copyright 2014 by Woodward/White, Inc., of Aiken, SC). D. was also named Best Lawyers' 2013 and 2014 Worcester Employment Law – Management "Lawyer of the Year." In 2007, the Massachusetts Municipal Personnel Association selected him as the recipient of its annual Emil S. Skop Award for outstanding contributions to human resources management. D. has been named one of Massachusetts "Super Lawyers" by *Boston* magazine and *Law & Politics* every year since 2006. D. has received an AV® Preeminent Peer Review Rating by *Martindale-Hubbell*, the highest rating available for legal ability and professional ethics.

He is a fellow of the College of Labor and Employment Lawyers which includes the leading labor lawyers in the U.S.

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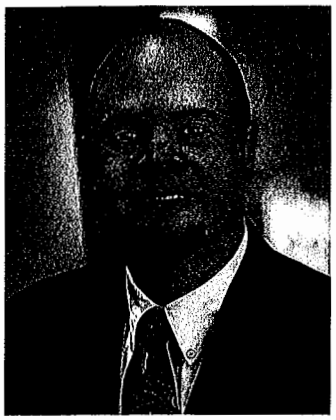
ATTORNEY BIOGRAPHY – DEMITRIOS M. MOSCHOS

Publications (Partial Listing)

- "Workplace Emergencies," HRMA Perspectives (October 2013)
- "How to Conduct an Employment Investigation," HRMA Perspectives (October 2012)
- "Federal Court Upholds NLRB's Notice-Posting Rule, but Invalidates Enforcement Penalties Contained in Final Rule, (April 2012)
- "Summary of Seminar on Lobbying Law," WCBA, Legal Lines (May 2011)
- "2010 Amendments to the Massachusetts Personnel Records Law," HRMA Perspectives (October 2010)
- "New Wage Law Prompts Review of Pay Practices," *HRMA Perspectives* (September 2008)
- "Identity Theft," *HRMA Perspectives* (February 2007, updated April 2008)
- "U.S. Department of Labor Proposes to Review Overtime Regulations," *HRMA Perspectives* (May 2003)
- "Change in Employer and Individual Liability Under Harassment Law," *MBA Journal*, Section Report (Spring 2001)
- "Employers Can Be Held Liable for Sexual Harassment that Takes Place Without Their Knowledge," *Boston Business Journals,* June 20-July 6, 2000



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Nick is a member of the firm's Labor, Employment and Employee Benefits Group and Higher Education Group. His practice includes traditional private- and public-sector labor law, litigation of employment disputes, and counseling on labor, employment and human resource matters. While maintaining a diverse practice, he has developed a significant emphasis on labor relations. Nick regularly counsels clients on traditional labor issues, including union avoidance, election campaigns, collective bargaining and complex contract formation disputes, grievance adjustment and arbitration, unfair labor charges, strikes, picketing, and other work stoppage issues and reduction-in-force planning. Nick regularly counsels colleges, universities and community colleges on a wide range of legal issues. He has appeared before numerous state and federal agencies including the National Labor Relations Board, the Massachusetts Division of Labor Relations, the Equal Employment Opportunity Commission, and the Massachusetts Commission Against Discrimination.

Boston magazine and *Law & Politics* have recognized Nick as one of the 2014 Massachusetts "Super Lawyers" and a Massachusetts "Rising Star" from 2006 to 2010. He was also selected by the *Worcester Business Journal* as one of "40 Under Forty" young professionals honored for their professional achievements and community service. In September 2010, Nick was appointed by Governor Patrick to the Division of Labor Relations Advisory Council.

Representative Matters

- Successfully represented City in obtaining permanent stay of arbitration based upon unenforceable "Evergreen" clause
- Successfully negotiated sweeping municipality-wide (including School Unions) plan design changes through informal coalition bargaining
- Advised and represented client through NLRB decertification proceeding, which resulted in employee votes to remove incumbent Union as exclusive bargaining representative
- Developed strategies for a health care provider during picketing and work stoppage
- Successfully guided a service-industry client during union organizing, including defending related unfair labor charges, and card-check election
- Represented an employer in union duty of fair representation litigation in federal court
- Represented a municipality in a $4 million arbitration related to health insurance premium contribution for unionized employees

ATTORNEY BIOGRAPHY – NICHOLAS ANASTASOPOULOS

Representative Matters (Continued)

- Represented a higher education institution in a complex union recognition dispute
- Defended an unfair labor charge related to a municipality's decision to lay off police officers and allegations of direct dealing with employees

Publications/Presentations

- "MOOCs: When Opening Doors to Education, Institutions Must Ensure that People with Disabilities Have Equal Access," *The New England Journal of Higher Education*, August 2013 (co-author)
- "Yeshiva Redux: Religiously Affiliated Institutions and the Right to Unionize," National Center for the Study of Collective Bargaining in Higher Education and the Professions, April 2013
- "What the Presidential Election Means for Non-Unionized Workplaces," Mirick O'Connell Labor, Employment and Employee Benefits Seminar, March 2013
- "Laboratory Safety (and Liability) in the Research Environment," NACUA, Fall 2012 CLE Workshop, November 2012
- "OSHA and Criminal Prosecution of UCLA," College of Worcester Consortium, November 2012
- "OSHA Announces Extended Compliance Date for New Residential Construction – Fall Protection Directive," ABC, Inc./Gould Construction Institute, June 2011
- "The Future Employee Voice in the Workplace—Union and Non-Union," 32nd Annual Labor and Employment Law Spring Conference, Massachusetts Bar Association, June 2011
- NLRB Labor Law Update, in-house client presentation, June 2011
- Public Sector Labor Law Update, Massachusetts Municipal Management Association, June 2011
- "Labor Law Update," Massachusetts Municipal Management Association, June 2011
- "EFCA" Seminar, in-house client presentation, June 2011
- Records Management and Documentation, Massachusetts Municipal Personnel Association, May 2011
- "Collective Bargaining in the Brave New World: Exploring the Impact of Electronic Media on Negotiations, Protected Activity and Privacy in the Modern Workplace," 38th National Conference, National Center for the Study of Collective Bargaining in Higher Education and the Professions, April 2011
- "What Every Non-Unionized Employer Needs to Know About the New National Labor Relations Board (NLRB)," Mirick O'Connell Labor, Employment and Employee Benefits Seminar, March 2011
- "Employee Documentation," in-house client presentation, March 2011
- "CORI and Personnel Records," in-house client presentation, March 2011
- "Organizing Activity in a Non-Union Workplace," Healthcare Program, January 2011
- "The Ins and Outs of OSHA – Preparing for an Audit," Gould Construction Institute, May 2010
- "Workplace Investigations: An Overview of When, Why, and How to Conduct a Workplace Investigation," April 2010
- "College Campuses and Labor Law," Colleges of Worcester Consortium, April 2010
- "OSHA: Preparing for an Audit and Legislative Update," Mirick O'Connell Labor and Employment Law Update Seminar, March 2010
- "Union Avoidance in the EFCA ERA," Mirick O'Connell Seminar, February 2009
- "President Starts Making Good on Campaign Promises to Unions" *HRMA Perspectives*, February 2009
- "The New Family and Medical Leave Act" HRMA Seminar, January 2009
- "NLRB Addresses Two Significant Issues: Voluntary Recognition and Unfair Labor Practice Charge Involving Union Salts," *HRMA Perspectives*, December 2007
- "Balancing Employee Privacy Rights with an Employer's Need to Know," Mirick O'Connell Labor and Employment Law Update Seminar, November 2007
- "Collective Bargaining and the GIC; What Are Your Options?" Association of Town Finance Committees Annual Meeting, November 2007
- "Basic Legal Aspects of Collective Bargaining," lecture, UMass/McCormack Graduate School, Topics in Municipal Governance, Fall 2006-present
- "Communicating across Generational and Gender Gaps in the Workplace," Mirick O'Connell Labor and Employment Law Update Seminar, November 2006
- "NLRB Strengthens Employers' Ability to Maintain Harassment-Free Workplace," *HRMA Perspectives*