MASSACHUSETTS MUNICIPAL ASSOCIATION

ANNUAL LABOR LAW UPDATE*

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PRESENTED BY

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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.
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TABLE OF CONTENTS

I. LEGISLATION

II. CASE LAW

4. **The Appeals Court held that a former MBTA employee who was allegedly laid off after he conducted a number of investigations relating to fraud and abuse at the MBTA could move forward with his claim that the MBTA violated the Massachusetts public employee whistleblower statute.**

Stephen Trychon v. Massachusetts Bay Transportation Authority, 15-P-1316 (September 15, 2016).

5. **The Supreme Judicial Court held that (i) a municipal retirement board does not possess absolute discretion to terminate a part-time employee's membership in a retirement system to which the board had granted the employee membership, and (ii) that a part-time employee is not considered to have separated from service when the part-time employee ceases working one of her two jobs with the municipal employer.**

Retirement Board of Stoneham v. Contributory Retirement Appeal Board, SJC-12098, (December 22, 2016).

6. **The Supreme Judicial Court held that neither M.G.L. c. 150E – governing labor relations of public employees – nor Massachusetts common law recognizes a privilege in civil cases protecting as confidential the communications between union members and union representatives.**

Chadwick v. Duxbury Public Schools, No. SJC-12054 (Oct. 4, 2016).

7. **The Supreme Judicial Court held, in part, that an employee's acts of self-help discovery to aid her claims under G.L. c. 151B § 4 may constitute protected activity, but only if the employee's actions are reasonable under the totality of the circumstances.**

Verdrager v. Mintz Levin, P.C., SJC-11901 (May 31, 2016).

8. **The Superior Court held that a former Commissioner of the Department of Corrections who voluntarily resigned under threat of termination was not entitled to be restored to his prior civil service position as Correction Officer.**

Luis S. Spencer v. Civil Service Commission, CV 15-03723 (Mass. Super. Ct. August 25, 2016).

9. **The Supreme Judicial Court held that, under the doctrine of sovereign immunity, a public employer is not liable for post-judgment interest accruing on a judgment under G.L. c. 151B § 9.**

Helen Brown v. Office of the Commissioner of Probation, SCJ-11987 (October 11, 2016).

10. **The Supreme Judicial Court held that there was sufficient evidence for a jury to find that a hemodialysis nurse at Massachusetts General Hospital was subjected to retaliation by her supervisor for exercising her right to take leave under the Family Medical Leave Act.**

Esler v. Sylvia-Reardon, 473 Mass. 775 (2016).

I. LEGISLATION

1. **A. Veterans Act** – This past July, Chapter 149 of the Massachusetts General Laws, the Veterans Leave Statute, was amended to require public and private employers to provide leave of sufficient duration for veterans "to participate in a Veterans Day or a Memorial Day exercise, parade or service . . . in their community of residence . . . ." The statute requires employers with 50 or more employees to provide such leave with pay on Veterans Day, but not Memorial Day. Generally, under the statute, a veteran is defined as any person with an honorable discharge who served in any branch of the U.S. military or who served full-time in the National Guard under certain conditions for a minimum of 90 days' active service, at least one day of which was for wartime service. The law, however, permits employers to deny such time off for those "employees whose services are essential and critical to the public health or safety and determined to be essential to the safety and security of each such employer or property thereof." Prior to this amendment, no employers were required to provide paid leave, only unpaid leave, for participation in Veterans Day and Memorial Day events.

B. Veterans Status – In addition, the Massachusetts Fair Employment Practices Act, G.L. c. 151B, was amended to provide that employees' "veteran status" is now a protected class under the statute. As such, discrimination against employees on the basis of veteran status is prohibited.

2. **Pay Equity Act** – This past August, Governor Baker signed into law the Pay Equity (the "Act"), which goes into effect on July 1, 2018. The Act strengthens the current Massachusetts statutory prohibition on discrimination in wages based on gender to ensure that all Massachusetts employees receive equal wages for comparable work. The Act defines wages broadly as "all forms of remuneration for employment," which includes hourly wages, salaries, bonuses, commissions, expense accounts, health insurance and other fringe benefits. To achieve its goal, the Act prohibits Massachusetts employers from discriminating against employees "on the basis of gender in the payment of wages" or from "pay[ing] any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work...." The Act defines comparable work as work that is "substantially similar" in that the work must involve "substantially similar skill, effort and responsibility" and be "performed under similar working conditions." An employee's job title and/or position description are not dispositive in determining whether two employees are performing comparable work.

Despite the Act's equal pay mandate, employers are permitted, in certain circumstances, to establish variations in the payment of wages among employees. Any such variation must, however, be based upon seniority[1], merit, a system that "measures earnings by quantity or quality of production, sales, or revenue" (e.g., commission payments), the geographic location where a job is performed, education, training, or experience if such factors are reasonably related to the particular job,

[1] Protected leaves of absence, including leaves due to a pregnancy-related condition and parental, family, and medical leave, may not be used to reduce an employee's seniority.

and/or travel (if the travel is a regular and necessary condition of the job). The Act also prohibits employers from (i) screening applicants based on wage or salary history, (ii) seeking the salary history of an applicant (unless the employer has made an offer and the applicant consents), and (iii) prohibiting employees from discussing their compensation with co-workers or colleagues. The Act creates an affirmative defense for an employer if the employer has completed a good faith self-evaluation of its pay practice within the previous three years and can demonstrate reasonable progress to eliminate pay differential based on gender.

3. **Minimum Fair Wage** – On January 1, 2017, the Massachusetts minimum wage increased from $10.00 per hour to $11.00 per hour. However, 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.

4. **Amendments to the Massachusetts Public Records Law, G.L. c. 66** – On June 3, 2016, Governor Baker signed a major overhaul to the state's Public Records Law (the "Amended PRL"), which took effect on January 1, 2017. In addition to amending the public records request process, the Amended PRL authorizes new penalties for violations of the law, and requires that municipalities appoint a "Records Access Officer" and make certain records available for free online.

   Under the Amended PRL:

   - Municipalities must respond to public records requests within 10 business days (as opposed to 10 calendar days). If a request is unduly burdensome, municipalities may extend the time to produce records to 25 business days. The Supervisor of Public Records may grant a one-time additional extension of 30 business days for municipalities;

   - Records must be provided by electronic means unless the record is not available in electronic form or the requestor does not have the ability to receive electronic records. To the extent feasible, records must be provided in a searchable, machine readable format, unless the requestor prefers a different format.

   - Each municipality must appoint a Records Access Officer to track and coordinate timely responses to public records requests. The Records Access Officer must produce guidelines to assist persons making public records requests; and

   - To the extent feasible, municipalities must post online certain commonly available records, including budgets, annual reports, minutes of open meetings, hearing notices, final decisions from agency proceedings and winning bids for public contracts.

5. **Marijuana Act** – On November 8, 2016, Massachusetts voters approved a ballot question legalizing marijuana for recreational and commercial use. The Marijuana Act (the "Act") provides that – as of December 15, 2016 – persons at least 21 years of age may possess, use, purchase, process, and/or manufacture 1 ounce or less of marijuana outside their residence and up to 10 ounces of marijuana within their residence. The Act also comprehends the establishment of retailer, cultivator, testing facilities, and product manufacturers.

With respect to a municipality's function as an employer, the Act provides that property owners may prohibit or otherwise regulate the consumption, display, production, processing, manufacturing or sale of marijuana and marijuana accessories on or in their property. Importantly, the Act does not require employers to permit or otherwise accommodate conduct allowed by the Act in the workplace and does not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.[2] See § 5 of Chapter 334 of the Acts of 2016.

With respect to a municipality's function as a local planner, the Act permits cities and towns to enact bylaws and ordinances to impose "reasonable safeguards" on marijuana establishments, provided that the local laws are not "unreasonably impracticable" to operating a marijuana establishment. Such bylaws and ordinances may: govern the time, place, and manner of marijuana establishment operations; limit the number of types of marijuana establishments, regulate the licensed cultivation that poses a public nuisance, impose reasonable regulations on public signs for marijuana establishments; and establish civil penalties for violations. Further, municipalities may adopt a local sales tax of up to 2% on marijuana sales.

Although the Act, as passed by the voters, called for the sale of marijuana to begin on January 1, 2018, Governor Baker recently signed a bill to extend the sale date until July 1, 2018.

6. **OPEB Reform Act** – Four years ago, on February 12, 2013, then-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 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.

7. **Changes to Fair Labor Standards Act Overtime Exemptions** – On May 18, 2016, the United States Department of Labor ("DOL") issued rules setting forth a new

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[2] Federal law prohibits marijuana users from shipping, transporting, receiving or possessing firearms or ammunition. 18 U.S.C. § 922(g)(3). See also Open Letter to All Federal Firearm Licensees from the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, September 21, 2011, available at https://www.atf.gov/file/60211/download. Therefore, police officers, and those public safety employees who use firearms and ammunition as part of their jobs are prohibited from using marijuana.

salary threshold for exempt employees under the Fair Labor Standards Act ("FLSA"). The new salary threshold increased from $455 per week, or $23,660 annually, to approximately $913 per week, or $47,476 annually, representing a substantial increase from the amount previously proposed by the DOL in 2014. In addition, the DOL rule raised the salary threshold for so-called "highly compensated" employees from an annual salary of $100,000 to $134,000.

Under the rule, the salary test is tied to the salary at the 40th percentile of weekly earnings for full-time salaried employees, as determined by the United States Bureau of Labor Statistics for the lowest paid census region (South). Similarly, the highly compensated employee threshold is tied to the 90th percentile of weekly earnings for full-time salaried employees. By basing these salary tests on the weekly earnings calculated by the Bureau of Labor Statistics, the salary tests would be automatically adjusted every three years to reflect inflation and wage adjustments.

The regulations were set to take effect on December 1, 2016. On November 22, 2016, however, Judge Mazzant of the United States District Court for the Eastern District of Texas ruled that the DOL exceeded its authority and ignored Congressional intent when it published its Final Rule raising the minimum salary level from $23,660 annually to $47,476 annually. In addition, the Court ruled that the DOL lacked authority to impose the automatic salary increase provision found in the Final Rule, which would first take effect in January 2020. Thus, at this point, the amended regulations are currently frozen, meaning that the current salary threshold of $455 per week (or $23,660 annually) remains in effect for white collar exempt employees under the FLSA.

8. **Cadillac Tax** – The Cadillac Tax (the "Tax") is a 40% excise tax on high end health insurance plans, passed by Congress as part of "ObamaCare." More specifically, the Tax only applies to health insurance plans that have premiums in excess of $10,200.00 for individuals, and $27,500.00 for families. Therefore, every dollar spent in excess of $10,200.00 for individuals, and $27,500.00 for families, will be taxed at a rate of 40% (i.e., if an individual's premium costs $10,500.00, only $300.00 will be taxed at a rate of 40%). Notably, individual beneficiaries are not responsible for paying the Tax; rather, the Tax is paid by health insurance issuers and sponsors of self-funded group health plans. It is, however, expected that a portion of this tax will be passed on to the consumer by the health insurer.

On December 18, 2015, the President signed the "Consolidated Appropriations Act, 2016," a provision of which delayed the implementation of the Tax from 2018 until 2020.

At this point, it is unclear how the GIC will deal with the Tax if, and when, it becomes effective, particularly in light of ObamaCare's uncertain fate under the new presidential administration.[3] For example, questions remain regarding how the Tax will impact a municipality's existing health insurance plans, and whether the Group

[3] Indeed, President Trump is proposing to repeal ObamaCare and it is assumed that the Tax will be included in any such repeal.

Insurance Plan, itself, will pay the tax, or whether it will pass the Tax's costs on to municipalities.

II. CASE LAW

1. Arbitrator's award reinstating terminated employee without loss of pay or other rights was upheld by the Appeals Court despite the arbitrator's finding that the employee had, in fact, engaged in conduct amounting to sexual harassment.

City of Springfield v. United Public Service Employees Union, 89 Mass. App. Ct. 255 (2016).

The Massachusetts Appeals Court held that an arbitrator did not exceed her authority when she ordered a terminated employee reinstated without loss of pay or other rights, even though she found the employee to have engaged in conduct amounting to sexual harassment.

The City of Springfield ("City") terminated a male employee after he engaged in sexually inappropriate conduct. The Union grieved the employee's termination and the case was submitted to an arbitrator to determine whether "the termination of Grievant... [was] supported by just cause? If not, what shall be the remedy?"[4]

As an employee with the City, the grievant worked as a messenger, answering telephones, and making deliveries. The City terminated the grievant for an incident occurring at work on December 12, 2012. Specifically, the grievant was working at the main desk and received a telephone call that made him upset. The grievant then went into a female employee's office with whom the grievant regularly interacted.[5]

The arbitrator found that, after entering the female employee's office, the grievant:

> "[T]old [the female employee] that 'the [expletive] p***y called again,' asked [the female employee] about the meaning of the word p***y [after she had previously told him not to use such language]; referenced 'not getting any,' grabbed his crotch on the outside of his pants, put his hand inside his pants, started to unbuckle his belt, and said 'sorry babe' as [the female employee] exited the room."

Despite the grievant's explicit and inappropriate behavior, the arbitrator found that his conduct "was a single, short-lived episode of anti-social behavior by an employee who posed no reasonable threat to others." The arbitrator concluded that the grievant's termination "was an excessive reaction in light of [his] long and problem-free work history and his developmental delays."[6]

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4 At the arbitration, the arbitrator found that the grievant had significant physical and mental health problems, and that he suffered from cerebral palsy, epilepsy, and depression, and had an overall IQ of 74. The arbitrator also noted that, prior to his termination, the grievant had no disciplinary history.

5 The grievant's interactions with the female employee consisted of bringing her food and gifts and following her around the office. The grievant was also described to have had a "crush" on the female employee.

6 The arbitrator also found that the grievant was subjected to disparate treatment in that the City had declined to terminate another employee who had "engaged in a six-month course of sexual harassment directed at a co-worker" and received only a reprimand.

The City appealed the arbitrator's decision claiming that the arbitrator violated public policy when she reinstated the grievant in light of her finding that he had engaged in conduct amounting to sexual harassment, and that such reinstatement precluded the City from taking action required by state and federal law regarding sexual harassment. The Court rejected both arguments.

First, the Appeals Court noted that it was within the arbitrator's "ample authority to conclude that," in light of the grievant's "significant mental and physical limitations, his pliant demeanor, and his twenty-two year problem-free work history, [his] misconduct, despite its severity, did not require termination." Second, the Court held that the arbitration award did not preclude the City from fulfilling its state and federal statutory mandates to take remedial action to prevent and correct sexually harassing behavior. The Court reasoned that, while the employee was reinstated without loss of pay or other rights, the City could, nonetheless, provide the grievant with counseling and training regarding his sexual harassment. Such actions would allow the City to satisfy its statutory obligation to address and prevent sexual harassment.

2. The Supreme Judicial Court held that a private citizen did not criminally harass an elected official when he sent anonymous letters to the elected official sharply criticizing his job performance and seeking his resignation, but further held that the private citizen may have criminally harassed the elected official's wife when he sent three vulgar letters to her.

Commonwealth v. Harvey J. Bigelow, SCJ-11974 (September 27, 2016).

Harvey Bigelow was convicted of two counts of criminal harassment under G.L. c. 265 § 43A for sending five letters he allegedly wrote to Michael Costello and his wife, Susan Costello, after Michael Costello was elected selectmen in the town of Rehoboth. Between May 9 and July 23, 2011, Bigelow sent five anonymous, typed-written letters to the Costello's.

The first letter Bigelow wrote began: "Michael Costello – The biggest f*cking loser I have ever met. You should be utterly ashamed of yourself for even suggesting that anyone take you seriously as 'chairman of the board of selectm[e]n.' It won't be long before you crash and burn big time." The second letter Bigelow sent referred, in part, to Michael Costello's 'criminal mess[,]' that Costello was being investigated by several governmental agencies, and that he was guilty of fraud.

The third and fourth letters Bigelow sent were addressed to Susan Costello. The third letter stated, in part, that: "I am sure you are not surprised to receive another letter regarding the disgusting cheat you are married to... [W]hat were you thinking getting tied up with such a scum bag." The letter concluded: "Have you selected a new place to live? Maybe now would be a good time to preplan your future... If I were you, I'd spend less time defending this worthless human being and more time worrying about yourself." In his fourth letter, also addressed to Susan Costello, Bigelow enclosed a letter to the editor of a local newspaper that was critical of her husband, with the handwritten note.[7] Bigelow's fifth letter was addressed to "Susan 'The Maid' Costello" on July 23, 2011 and contained allegations that her husband was having an affair with certain female town employees.

Bigelow was ultimately charged and convicted of criminal harassment for sending the aforementioned letters. Bigelow appealed his convictions to the Supreme Judicial Court, claiming that his letters constituted protected, political speech.

The Supreme Judicial Court held that Bigelow's letters to Michael Costello constituted protected political speech. In so holding, the Supreme Judicial Court reasoned that the letters constituted protected political speech because their "central thrust [wa]s criticism of [Costello] as a selectman in the town; the personal insults and allegations concerning Michael's alleged criminal past and sexual improprieties appear to be intended to persuade him to resign from his elected position." In addition, the Court further held that Bigelow's conduct in writing and mailing the anonymous letters to Michael Costello was not, by itself, a criminal act.

The Court had a different opinion of the letters Bigelow sent to Susan Costello – who was not a selectman and did not hold political office – holding that the letters' content may have

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[7] Bigelow's handwritten note read: "[t]he authorities will continue to hound [Michael] until you and he can't stand it anymore. Maybe you will have to live like Whitey Bulger frequenting plastic surgeons to have any hope of a peaceful lifestyle. The only difference is that Whitey had unlimited funds and you don't."

constituted true threats – conduct that is proscribed by § 43A. Indeed, the three letters to Susan Costello "contained vulgar and hateful insults and comments that in their choice of language and their repetitive nature were disturbing...." In addition, certain of the comments, "such as Susan's possible future need to have plastic surgery to change her appearance as a self-protective measure, [and] her current need to move out of their home... could be found to qualify as expressing a danger to Susan's personal safety, especially in her home."

3. The Supreme Judicial Court established a new, two-part inquiry to determine whether a plaintiff is entitled to "punitive damages from his or her employer on the basis of being exposed to a sexual hostile or offensive work environment created by one of its employees...."

Emma Gyulakian v. Lexus of Watertown, Inc., SJC-11959 (August 24, 2016).

In December 2014, a jury rendered a verdict in favor of the plaintiff, Emma Gyulakian, after finding that she was subjected to a sexually hostile or offensive work environment during her employment with the Defendant, Lexus of Watertown, Inc. Among the evidence presented at trial was testimony from the Plaintiff that her supervisor (i) inappropriately made comments about her physical anatomy, (ii) asked her whether she would have sexual intercourse with him, (iii) touched her buttocks, and (iv) would try to throw coins down her blouse.

The Plaintiff testified that she first reported the foregoing conduct to Lexus' general manager and human resources on the day her employment was terminated. The Plaintiff further testified, however, that before she reported this conduct to the general manager and human resources, she had previously informed an assistant sales manager multiple times during the previous eighteen (18) months of the sexually offensive incidents.

After finding in favor of the Plaintiff, the jury awarded her $40,000.00 in compensatory damages for emotional distress, and $500,000.00 in punitive damages after finding that Lexus acted "intentionally or with reckless disregard for [Plaintiff's] rights under the discrimination laws."

After Lexus filed a motion requesting that the judge set aside or decrease the damage awards, the judge set aside the $500,000.00 punitive damages award. The judge reasoned that an employer "'may not be vicariously liable for punitive damages' under G.L. c. 151B based purely on the actions of its supervisory personnel." The judge's decision to abrogate the punitive damage award was appealed and ultimately went to the Supreme Judicial Court.

On appeal, the Supreme Judicial Court established a two-part inquiry to determine whether a plaintiff is entitled to "punitive damages from his or her employer on the basis of being exposed to a sexual hostile or offensive work environment created by one of its employees...." The first part of the inquiry asks if the employer was on notice of the harassment and, if so, whether it failed to take steps to investigate and remedy the situation. If the answer to that inquiry is yes, then the court needs to analyze whether an employer's failure to investigate was outrageous or egregious conduct.[8]

As applied to this case, the Court held that Lexus "acted intentionally or with reckless disregard for Gyulakian's rights under the discrimination laws, and that its actions were outrageous or egregious." The Court first reasoned that Lexus was aware, through its assistant sales manager, that the Plaintiff had made multiple complaints about her supervisor's sexual harassment, and that he failed to undertake any remedial action to remedy the discrimination as required by Lexus's

[8] To determine whether an employer's failure to investigate was outrageous or egregious, the court will consider "whether there was a conscious and purposeful effort to demean or diminish the class of which the plaintiff is a part (or the plaintiff because he or she is a member of the class); whether the defendant was aware that the discriminatory conduct would likely cause serious harm or recklessly disregarded the likelihood that serious harm would arise; the actual harm to the plaintiff; the defendant's conduct after learning that the initial conduct would likely cause harm; and the wrongful conduct's duration and if the defendant tried to conceal it."

sexual harassment policy. In addition, the evidence tended to show that, after informing Lexus' general manager and human resources of the harassment on the day she was terminated, these individuals conducted an inadequate investigation because they failed to interview the Plaintiff and other relevant witnesses, and because the investigation lacked neutrality, as the general manager admitted to harboring a bias against the Plaintiff.

The Court likewise found the above evidence sufficient to support a finding that Lexus's failure to investigate was outrageous or egregious. As a result, the Supreme Judicial Court reinstated the $500,000.00 punitive damages award to the Plaintiff.

4. The Appeals Court held that a former MBTA employee who was allegedly laid off after he conducted a number of investigations relating to fraud and abuse at the MBTA could move forward with his claim that the MBTA violated the Massachusetts public employee whistleblower statute.

Stephen Trychon v. Massachusetts Bay Transportation Authority, 15-P-1316 (September 15, 2016).[9]

Plaintiff was an employee of the MBTA between March 30, 2009, and April 10, 2013, during which time he was promoted twice and received excellent performance reviews. As part of his job, Plaintiff made it his mission to eliminate the MBTA's $180 million debt. In line with his mission, Plaintiff conducted investigations into:

- Contract fraud, including illegal extensions of expired contracts and the practice of "dividing large contracts and purchases into smaller ones to avoid the necessity of management approval" in violation of the public bidding law;
- The significant number of eye injuries sustained by MBTA employees, which prompted the Plaintiff to draft a mandatory eye-wear policy;
- Suspected time fraud, where certain individuals who were friends of MBTA upper management allegedly did not "punch in for work by hand scanner as required by MBTA policy, but were still being paid..."; and
- Unsafe rail track conditions and "alarming safety conditions needing correction."

On April 9, 2013, the Plaintiff received an unsigned card that stated, "Good luck.' 'Enjoy your layoff!' and 'F*ck off.'" The next day, the Plaintiff was laid off.

The Plaintiff later brought suit against the MBTA under the Massachusetts Whistleblower statute which protects "public employees from retaliation by their employers for disclosing to a supervisor or public body workplace activities, policies, or practices that the employee reasonably believes violate the law, or pose a risk to public health, safety, or the environment." To prove a claim under the Whistleblower statute, the Plaintiff must demonstrate that (1) he engaged in a protected activity; (2) participation in that activity played a substantial or motivating part in the retaliatory action; and (3) damages resulted.

As to prong 1 of the above test, the evidence demonstrates that plaintiff engaged in a protected activity when he reported the contract fraud he discovered that he reasonably believed violated the public bidding law. The Plaintiff similarly engaged in a protected activity when he reported the alarming MBTA track conditions, which he reasonably believed was a risk to public safety.

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[9] This case was heard as a motion to dismiss, which means that the MBTA attempted to get the case dismissed at a very early stage in the litigation. When ruling on a motion to dismiss, the court accepts as true all of the plaintiff's allegations in his complaint. As set forth below, the court ultimately ruled that the Plaintiff's allegations were sufficient to withstand a motion to dismiss, meaning that the case will proceed to discovery and, if necessary, a trial.

With respect to prong 2, the evidence demonstrated that there was a causal connection between the aforementioned protected activities and the Plaintiff's layoff, given the fact that the Plaintiff had "proven himself to be an effective and dedicated public employee, saving taxpayers millions of dollars, identifying fraudulent contract, and exposing alarming track conditions that posed a risk to public safety." In addition, there was also evidence to suggest that there was a "continuing pattern of opposition and hostility to [the Plaintiff]..." which apparently extended to the MBTA's upper management. Indeed, MBTA's upper management appeared to be responsible for ending the Plaintiff's investigation into the contract fraud, and also supported employees who were insubordinate and hostile to the Plaintiff.

Given the foregoing, the Appeals Court held that the Plaintiff's allegations were sufficient to withstand the MBTA's motion to dismiss, meaning that the case is free to move forward.

5. **The Supreme Judicial Court held that (i) a municipal retirement board does not possess absolute discretion to terminate a part-time employee's membership in a retirement system to which the board had granted the employee membership, and (ii) that a part-time employee is not considered to have separated from service when the part-time employee ceases working one of her two jobs with the municipal employer.**

Retirement Board of Stoneham v. Contributory Retirement Appeal Board, SJC-12098, (December 22, 2016).

Christine DeFelice started working for the Stoneham school department in November, 2000. In April, 2001, she took a second job working for the school department filling a temporary vacancy. As a result of taking the second, temporary job, her weekly hours worked increased from nineteen and one-half hours per week to over thirty hours per week for the nine-weeks she worked the temporary job. In 2009, DeFelice sought to retroactively become a member of the Stoneham retirement system as an employee of the school department as a result of the time she spent working the two jobs in the spring of 2001. In 2001, to be eligible for membership in the retirement system, employees had to be scheduled to work more than thirty hours per week for a period of seven days.

The retirement board initially denied DeFelice's application because she was only temporarily scheduled – for nine weeks – to work more than thirty hours in a seven day period in 2001. However, the retirement board later reconsidered its decision and granted DeFelice retroactive membership in the Stoneham retirement system, but only for the nine-week period in the spring of 2001; the retirement board denied DeFelice membership for the remaining time she was a part-time employee of the school department. Thereafter, DeFelice appealed the retirement board's decision regarding her ineligibility for membership and the case eventually made its way to the Supreme Judicial Court.

After reviewing the above facts, the Supreme Judicial Court held that (i) the Stoneham retirement board did not possess absolute discretion to terminate DeFelice's membership in its retirement system after it had granted her membership as a result of her service in the spring of 2001, and (ii) that DeFelice is not considered to have separated from service when she stopped working her temporary job with the school department, because she continued working her part-time, nineteen and a half hour position until 2009.

In so holding, the Court reasoned that the retirement board had set a low bar for becoming a member in its retirement system, and decided that – by working over thirty hours for nine weeks in 2001 – DeFelice had satisfied that criteria. Once she had achieved such "member-in-service" status, she was permitted to continue in the retirement system "until her death or a separation from service," which, as noted above, never came about. Accordingly, DeFelice remained eligible for membership in the retirement system.

6. The Supreme Judicial Court held that neither M.G.L. c. 150E – governing labor relations of public employees – nor Massachusetts common law recognizes a privilege in civil cases protecting as confidential the communications between union members and union representatives.

Chadwick v. Duxbury Public Schools, No. SJC-12054 (Oct. 4, 2016).

The Supreme Judicial Court held that there is no "union member - union privilege" under G.L. c. 150E or the common law that protects as confidential the communications between a union member and his/her union representative in a *civil lawsuit.*[10]

The Plaintiff, Nancy Chadwick, was an English teacher at Duxbury High School between 2006 until her retirement in 2015, and served as president of the Duxbury Teachers Association between 2010 and 2015. Plaintiff alleged that in December 2013 and between March and May 2014, she and Defendant, Duxbury Public Schools, engaged in a series of interactions that were discriminatory and retaliatory. Plaintiff later commenced a lawsuit in December 2014 against the school seeking monetary damages.

As part of the lawsuit, Defendant served document requests and interrogatories on Plaintiff. Plaintiff, however, objected to certain of the discovery requests claiming a union member-union privilege. Accordingly, Defendant requested, and Plaintiff produced, a privilege log identifying ninety-two email messages Plaintiff withheld from disclosure pursuant to the union member-union privilege. Defendant ultimately filed a motion seeking to compel Plaintiff to produce the communications. The Superior Court granted Defendant's motion and ordered Plaintiff to produce all requested discovery, noting that Massachusetts law – both statutory and common – recognizes no such privilege. Plaintiff appealed the Superior Court's decision and the case ultimately made its way to the Supreme Judicial Court.

The Supreme Judicial Court first looked at whether there was a legislative intent to create a union-member privilege for civil cases under G.L. c. 150E –namely, § 10(a)(1) – which, in relevant part, prohibits employers from interfering, retraining or coercing any employee in the exercise of any right guaranteed *under this chapter*. The Court held that, by restricting § 10(a)(1)'s application to the bargaining unit process, the legislature did not contemplate or intend to protect the confidentiality of union member - union communications in a private lawsuit. In support of its holding, the court cited to decisions from the Department of Labor Relations interpreting § 10(a)(1) as only protecting the confidentiality of union member –union communications during a labor dispute. The Court held, "[c]ivil lawsuits are beyond the zone of protection for union rights contemplated in G.L. c. 150E."

The Court likewise held that Massachusetts common law did not recognize a union member-union privilege for private civil actions and refused to create such a privilege. Instead, the Court chose to leave the task of creating such a privilege to the legislature which, the Court wrote, was the "more appropriate body to weigh policy considerations and the contours of any such privilege...."

[10] Notably, the union member – union privilege does protect as confidential communications made within the scope of G.L. c. 150E.

7. **The Supreme Judicial Court held, in part, that an employee's acts of self-help discovery to aid her claims under G.L. c. 151B § 4 may constitute protected activity, but only if the employee's actions are reasonable under the totality of the circumstances.**

Verdrager v. Mintz Levin, P.C., SJC-11901 (May 31, 2016).

The Plaintiff, Kamee Verdrager, was an associate at the Boston law firm Mintz Levin. Between the start of her employment in June, 2004, and November, 2008, the Plaintiff alleged that she was subjected to gender-based discrimination. In November 2006, after returning from maternity leave, the Plaintiff received two negative reviews. In February 2007, several senior attorneys in her practice group requested that she be separated from the firm. Instead, however, the firm's chairman decided to demote her by "setting her back" in seniority. Plaintiff thereafter retained a lawyer and filed an internal complaint that the decision to set her back was the result of gender discrimination.

On six occasions between May 8, 2007 and November 14, 2008, "on instructions from her attorney, the plaintiff conducted targeted searches [of the firm's internal document system] seeking other documents that might be related to her case or to other issues of gender discrimination. In the course of these searches, the plaintiff accessed and forwarded dozens of documents to her personal electronic mail addresses."

In November 2008, the firm learned that the Plaintiff had conducted a number of searches on its document management site related to her litigation against the firm, and, based on its findings, terminated the Plaintiff for cause. The firm also filed a complaint with the board of bar overseers claiming that "the plaintiff's searches of [the firm's computer system] in order to advance her litigation against the firm was a violation of her ethical duties as an attorney."

The Plaintiff argued that firm's proffered reason for firing her – engaging in self-help discovery in support of her discrimination claims – was unlawful because her self-help discovery constituted a protected activity under G.L. c. 151B. The court ultimately held that self-help discovery "may in certain circumstances constitute protected activity under that statute, but only if the employee's actions are reasonable in the totality of the circumstances." In evaluating whether an employee's actions were reasonable, a court will balance an "employer's recognized, legitimate need to maintain an orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions."

The Court placed two limitations on its holding: (i) the protections for self-help discovery only apply to claims under G.L. c. 151B; and (ii) the protections only protect acts determined to be reasonable under the circumstances. To determine whether self-help discovery is reasonable, a court will look to a number of factors including, but not limited to, how the employee came to possess and/or access the documents, the nature and content of the document, and what the employee did with the document.

The Supreme Judicial Court did not apply its self-help discovery test to the Plaintiff, but instead left the question for a jury to decide whether the Plaintiff's actions were reasonable.

8. The Superior Court held that the former Commissioner of the Department of Corrections who voluntarily resigned his employment under threat of termination was not entitled to be restored to his prior civil service position as Correction Officer II.

Luis S. Spencer v. Civil Service Commission, CV 15-03723 (Mass. Super. Ct. August 25, 2016).

Plaintiff, Luis Spencer, was the Commissioner of the Department of Corrections (the "DOC"). On July 22, 2014, the Secretary of the Executive Office of Public Safety and Security requested Plaintiff's resignation. Plaintiff responded that he would resign as Commissioner if the Secretary granted his request to revert back to his last uniformed position as Captain. The Secretary rejected the Plaintiff's offer and informed him that his resignation must be unconditional or he would be terminated. Plaintiff then resigned without any assurances that he would be reinstated as Captain.

Thereafter, on July 28, 2014, the Secretary notified Plaintiff that he would not be reinstated at the Department of Corrections as a Captain. Plaintiff then requested that he be reinstated to the position of Correction Officer II. After it became clear to him that he would not be reinstated, Plaintiff filed a complaint with the Civil Service Commission alleging that he had a right to be restored as a Correction Officer pursuant to G.L. c. 30 § 46D. § 46D, in relevant part, provides that:

> upon termination of his service in the position to which he was so promoted, the manager or employee shall, if he so requests, be restored to the position from which he shall have been promoted... however, that if his service in the position to which he was promoted shall have been terminated for cause, his right to be restored shall be determined by the civil service commission.

The DOC filed a motion to dismiss the Plaintiff's complaint which was later granted by the Civil Service Commission. In its decision, the Commission argued that "(1) [Plaintiff's] service was not 'terminated' and thus he does not have the right to return to his former position and (2) the Commission does not have the authority to determine [Plaintiff's] right to be restored under § 46D because [Plaintiff] was not 'terminated for cause; rather [Plaintiff] chose voluntarily to resign from the DOC." The Commission found Plaintiff's termination to be voluntary notwithstanding Plaintiff's argument that he resigned under threat of termination.

The Plaintiff later sought judicial review of the Civil Service Commission's decision in the Superior Court. In looking at the plain text of the statute – and affording substantial deference to the Civil Service Commission's finding – the Superior Court held § 46D as inapplicable to the Plaintiff. Like the Civil Service Commission, the Superior Court noted that the statute only comprehends restoration to a position in the event an employee's employment is terminated – not in circumstances where the employee voluntarily resigns. The Superior Court concluded by noting that, "[e]ven taking [Plaintiff's] allegation as that he resigned under threat of termination as true, such a threat still does not rise to the level of 'fraud, coercion, or duress' sufficient to render a resignation involuntary."

The Plaintiff has since appealed the Superior Court's decision to the Appeals Court.

9. **The Supreme Judicial Court held that, under the doctrine of sovereign immunity, a public employer is not liable for post-judgment interest accruing on a judgment under G.L. c. 151B § 9.**

Helen Brown v. Office of the Commissioner of Probation, SCJ-11987 (October 11, 2016).

The plaintiff sued the Office of the Commissioner of Probation for sex discrimination, race discrimination, and retaliation, pursuant to G.L. c. 151B § 9. A jury awarded the Plaintiff a judgment on her retaliation claim in the amount of $6,000.00 in compensatory damages, and, ultimately $108,000.00 in punitive damages. Attorneys' fees in the amount of $233,463.48 and costs of $13,294.47 were also ordered to the Plaintiff. The Plaintiff sought post-judgment interest on the punitive damages, attorneys' fees and costs, claiming that G.L. c. 151B generally waives sovereign immunity for public employers as to post-judgment interest. The Supreme Judicial Court disagreed.

First, the Supreme Judicial Court observed that G.L. c. 151B § 9 does not expressly waive sovereign immunity of public employers as to post-judgment interest. Rather, §9 provides:

> If the court finds for the petitioner, it may award the petitioner actual and punitive damages. If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust.

Second, the Court noted that although G.L. c. 151B § 9 evidenced a strong intent to vindicate individual rights and eradicate systemic discrimination by providing a "broad range of remedies, including compensatory and punitive damages, costs, and attorney's fees," there was no evidence that the legislature intended to compensate c. 151B plaintiffs for all losses whatsoever, including the loss of the time value of the money awarded – the purpose that post-judgment interest serves.

Accordingly, the Plaintiff was not entitled to post-judgment interest from the Office of the Commissioner of Probation under G.L. c. 151B § 9.

10. The Supreme Judicial Court held that there was sufficient evidence for a jury to find that a hemodialysis nurse at Massachusetts General Hospital was subjected to retaliation by her supervisor for exercising her right to take leave under the Family Medical Leave Act.

Esler v. Sylvia-Reardon, 473 Mass. 775 (2016).

The Supreme Judicial Court held that there was sufficient evidence for the jury to conclude that Marie Esler ("Plaintiff"), a hemodialysis nurse at Massachusetts General Hospital, who was replaced by another nurse, was subjected to retaliation for exercising her right to take leave under the Family Medical Leave Act ("FMLA").

In November 2008, Plaintiff requested and received FMLA leave for symptoms relating, in part, to a blood disorder, including anxiety and fatigue. Plaintiff's doctor advised her to engage in pleasurable activities and light exercise during her leave to relieve her stress. In accordance with her doctor's instructions, Plaintiff traveled to New York City to visit friends. While there, Plaintiff was ice skating and injured her wrist. Plaintiff informed her supervisor, Mary Sylvia-Reardon ("Defendant"), about her injury. The Defendant was taken aback that Plaintiff was "vacationing" while she was supposed to be on FMLA and responded, "[w]ell, Marie, I need to have you back here next week or I can't hold your job." Plaintiff was, however, granted an extension of her FMLA leave to allow for additional recovery from her wrist injury.

Plaintiff later informed Defendant that she could return to work on February 16, but that she was subject to certain physician-imposed restrictions including (i) not lifting more than 5 lbs., and (ii) needing to wear a splint or brace. Defendant informed Plaintiff that she could not accommodate Plaintiff's request, claiming that Plaintiff could not perform her job with those restrictions. Defendant ultimately replaced Plaintiff with a nurse she hired in December 2008 to work in the hemodialysis unit on a part-time basis. At the time this nurse replaced Plaintiff, February 2008, she was not fully trained as a dialysis nurse, and, therefore, was not able to perform the same jobs functions as Plaintiff (even in Plaintiff's restricted state).

Plaintiff thereafter filed a lawsuit against Defendant alleging that her decision not to reinstate Plaintiff to her former position after she exhausted her FMLA leave was made in retaliation for Plaintiff's initial use of FMLA (i.e., when she took the trip to NYC).[11] The SJC held that the evidence presented and reviewed was sufficient to support the jury's finding that the reason "advanced by the defendants for [Plaintiff's] termination – an inability to perform fully the duties of a hemodialysis nurse – was pretext for retaliation on account of [Plaintiff's] having taken FMLA leave."

The evidence reviewed by the jury included the fact that Plaintiff, by the time she was able to return to work, had good movement and strength in her wrist. Furthermore, because no component of the hemodialysis equipment handled by the nurses weighed more than five lbs., there were no meaningful restrictions that existed on Plaintiff's ability to perform her job. Plaintiff was also an experienced nurse and the injury was to her non-dominant hand. In addition, the nurse that replaced Plaintiff was far less experienced and, in fact, was not scheduled to complete her training

[11] Plaintiff did not allege that Defendant violated her substantive FMLA rights.

and be able to perform all of the duties of a hemodialysis nurse until April 2009, long after Plaintiff would have been back at full strength.

The foregoing evidence, taken in conjunction with Defendant's disapproval of Plaintiff using her FMLA to go on "vacation" in NYC, and the close proximity between Plaintiff's FMLA use and her termination, was sufficient to permit a jury to find retaliation.

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Worcester Regional Research Bureau, director

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D. is a member of the firm's Labor, Employment and Employee Benefits Group and is the former chair. 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 rarely awarded and is given 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" 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* ©2017 in the fields of Employment Law – Management and Labor Law – Management (Copyright 2017 by Woodward/White, Inc., of Aiken, SC). D. was also named Best Lawyers' 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. In 2015 the Worcester County Bar Association gave D. their Distinguished Service Award.

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

He is a lecturer of labor relations at Clark University.

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

ATTORNEY BIOGRAPHY

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Department of Labor Relations Advisory Council, chair

Labor and Employment Relations Association, MA Chapter chair

Massachusetts Bar Association, Labor and Employment Section Council

MassEdCo, Board of Directors

National Association of College and University Attorneys, Continuing Legal Education Committee

Town of Sherborn, Personnel Board

Greek Orthodox Metropolis of Boston Council, Board of Directors

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Nick is a member of the firm's Labor, Employment and Employee Benefits Group and chair of the 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 significant emphasis on labor relations. Nick regularly counsels clients on traditional labor issues, including election campaigns, 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. Nick has negotiated over 150 collective bargaining agreements and successfully represented public sector clients at the JLMC. He has appeared before numerous state and federal agencies including the National Labor Relations Board, the Massachusetts Department of Labor Relations, the Equal Employment Opportunity Commission, and the Massachusetts Commission Against Discrimination.

Boston magazine and *Law & Politics* have recognized Nick a Massachusetts "Super Lawyers" since 2013 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 Department of Labor Relations Advisory Council and currently serves as the Department of Labor Relation's chair.

Representative Matters

- Successfully represented City in obtaining permanent stay of arbitration based upon unenforceable "Evergreen" claus
- Successfully negotiated sweeping municipality-wide (including School Unions) plan design changes through informal coalition bargaining
- 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
- Co-represented an employer and union 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

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*