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Cover: *The grand chandelier in the Old Superior Courtroom in the Northampton courthouse. Photo by Hon. David S. Ross.*

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# THE ROLE OF PUBLIC POLICY IN JUDICIAL REVIEW OF MASSACHUSETTS PUBLIC SECTOR LABOR ARBITRATION AWARDS

By John M. Becker

In *City of Boston v. Boston Police Patrolmen's Ass'n*<sup>2</sup> (the *Williams* case), the Supreme Judicial Court (SJC) recently addressed the scope of judicial review of labor arbitration awards in the public sector. The case provides an opportunity to discuss the role that public policy plays in determining whether and to what extent the courts will interfere with the dispute resolution process chosen by Massachusetts public employers and the unions that represent their employees. In particular, the *Williams* case highlights three competing public policies that factor into judicial review: (1) the policy in favor of resolving public sector labor disputes through final and binding arbitration; (2) the policy delegating certain employment decisions to the exclusive managerial control of public employers (the “nondelegability doctrine”); and (3) any well-defined policy that disfavors conduct integral to the performance of an employee’s duties and requires termination for such conduct (the “public policy exception”).<sup>3</sup>

This article will review the role of public policy in judicial review of Massachusetts labor arbitration awards involving public employers and public employee unions. Part I is a summary of the *Williams* case. Part II is a brief history of judicial review of labor arbitration in Massachusetts. Part III reviews the policy in favor of arbitrating labor disputes, with a focus on the *Steelworkers Trilogy* and G.L. c. 150E and 150C, and the most common non-policy reasons for vacating those awards. Part IV reviews the two sets of policies commonly cited by courts when vacating arbitration awards: (A) the nondelegability doctrine, and (B) the public policy exception. Part V places the *Williams* case in the context of these public policies.

## I. THE WILLIAMS CASE

On March 16, 2009, Boston Police Officers David Williams and Diep Nguyen reported to Hanover Street in the North End of Boston in response to a call about a dispute over a minor traffic accident.<sup>4</sup> At some point after the officers arrived, Michael O'Brien, one of those involved in the dispute, refused Officer Nguyen's instructions to leave the middle of Hanover Street, where he was using his cell phone to video the incident.<sup>5</sup> When Nguyen attempted to arrest O'Brien, O'Brien resisted, pushing Nguyen away. Williams,



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who saw his fellow officer in trouble, ran over and took O'Brien to the ground, wrestling with him to keep him still so Nguyen could handcuff him.<sup>6</sup> While O'Brien continued to resist, his two friends attempted to interfere with the officers. During the course of subduing O'Brien, Williams placed his arm against O'Brien's neck in a position that he described as a “semi-bear hug” but that Nguyen described as a “choke hold.” O'Brien later claimed that he had been choked and had trouble breathing during the encounter.<sup>7</sup>

After an investigation, the Boston Police Department (BPD) terminated Williams for violating its rule against excessive force.<sup>8</sup> It also found that he was untruthful in denying that he used a choke hold during the arrest.<sup>9</sup> Pursuant to the collective bargaining agreement (CBA) between the City of Boston (City) and William's union, the Boston Police Patrolmen's Association (Union), the Union filed a grievance alleging the termination violated the CBA provision requiring the City to have just cause for discipline or discharge of employees. The grievance proceeded through several internal steps without resolution and eventually reached the final step of the CBA's grievance procedure: arbitration before a neutral third-party selected by both parties.

After hearing witness testimony and reviewing documents, an arbitrator ordered the City to reinstate Williams and make him whole for loss of pay and benefits.<sup>10</sup> The arbitrator found Williams and Nguyen to be credible witnesses, but discredited O'Brien's testimony. He determined that while the hold that Williams used could

1. The author would like to thank Northeastern University School of Law student Ryan Quinn for his research assistance.

2. 477 Mass. 434 (2017). The author represented the union in this case.

3. The public policy exception in the labor arbitration context should not be confused with the public policy exception to the at-will employment rule. *See, e.g., Flesner v. Tech. Commc'ns Corp.*, 410 Mass. 805 (1991); *Hobson v. McLean Hosp. Corp.*, 402 Mass. 413 (1988); *Mercado v. Manny's T.V. & Appliance Inc.*, 77 Mass. App. Ct. 135 (2010).

4. *Williams*, 477 Mass. at 435-36.

5. *Id.*

6. *Id.* at 436-37.

7. *Id.* at 437.

8. *Id.* at 437-38.

9. *City of Boston v. Boston Police Patrolmen's Association*, 477 Mass. at 437-38 (2017).

10. *Id.* at 438-39.

be described as a choke hold, it did not constitute excessive force in violation of the BPD's policy.<sup>11</sup> He also found that, due to the varying definitions of choke hold, Williams was not untruthful when he told officers he did not use a choke hold. To support his decision, the arbitrator noted that: (1) Williams, Nyugen and a high-ranking Boston police official testified that Williams did not use excessive force in subduing O'Brien; (2) the BPD's policies and procedures did not specifically prohibit choke holds; and (3) O'Brien's medical records did not indicate that he had been choked. The arbitrator also noted that Williams had been discharged for choking O'Brien, not for placing him in a choke hold, and that the evidence did not support a finding that Williams choked O'Brien.<sup>12</sup>

The City filed a petition to vacate the award in Superior Court pursuant to G.L. chapter 150C, section 11, arguing that: (1) the police commissioner had the exclusive managerial right to determine when an employee had used excessive force, a right that could not be delegated to an arbitrator; and (2) a public policy against the use of excessive force by police officers required Williams' discharge.<sup>13</sup> A Superior Court judge denied the petition to vacate the award and instead granted the Union's motion to confirm the award pursuant to G.L. c. 150C, section 10. The City appealed and the SJC granted direct appellate review. The SJC rejected the City's arguments. First, it found that the doctrine of inherent managerial rights, as embodied in the Commissioner's Statute,<sup>14</sup> did not extend so far as to include discipline and discharge of employees, which, the court noted, are "core" subjects of collective bargaining.<sup>15</sup> Second, the SJC rejected the argument that any public policy required the BPD to terminate Williams, where, as here, the arbitrator found that Williams had not engaged in excessive force.<sup>16</sup> Because the court was bound by the factual findings of the arbitrator, it did not have an opportunity

to confront the question of whether public policy prohibited the reinstatement of a police officer found to have engaged in excessive force. In dicta, the court suggested that if the BPD policies explicitly prohibited the use of choke holds by police officers, that fact might have provided the basis for vacating the arbitration award.<sup>17</sup>

## II. THE HISTORICAL BACKGROUND OF PUBLIC SECTOR COLLECTIVE BARGAINING IN MASSACHUSETTS

Although the right of Massachusetts public employees to bargain collectively has been recognized since 1958 in a series of ad hoc and piecemeal legislative enactments,<sup>18</sup> it was not until 1973 that the right of public employers and the unions representing their employees to arbitrate grievances was firmly established.<sup>19</sup> In that year, the legislature passed a comprehensive public sector labor law, G.L. c. 150E. Borrowing much of the structure and many of the standards of the National Labor Relations Act,<sup>20</sup> chapter 150E established the right to bargain collectively over "wages, hours, standards or productivity and performance, and any other terms and conditions of employment,"<sup>21</sup> as well as a list of improper collective bargaining behaviors, known as unfair labor practices (ULPs). Chapter 150E designated the Labor Relations Commission as the administrative agency with the power to adjudicate disputes over collective bargaining issues, including questions of representation and ULPs.<sup>22</sup> Section 8 of the new chapter 150E authorized public employers and public employee unions to include in their CBAs grievance procedures for resolving disputes that would culminate in "final and binding" third-party arbitration.<sup>23</sup>

General Laws chapter 150E, section 8, holds that arbitration awards will be "enforceable" under G.L. c. 150C, a 1959 statute setting out standards for judicial review of certain labor arbitration

11. *Id.*

12. *Id.*

13. *Id.* at 439-42.

14. St. 1906, c. 291, as appearing in St. 1962, c. 322, § 11.

15. *City of Boston v. Boston Police Patrolmen's Ass'n*, 477 Mass. 434, 440-42 (2017).

16. *Id.* at 442-45.

17. *Id.* at 445.

18. G.L. c. 149, § 178D (1958) (giving public employees right to join unions and present proposals — excludes police officers); G.L. c. 40, § 4C (repealed 1965) (local option law permitted municipalities to give employees right to collectively bargain); G.L. c. 149, § 178F (repealed 1973) (granted state employees right to collectively bargain over working conditions, but not wages); G.L. c. 149, §§ 178G-N (repealed 1973) (gave municipal employees right to bargain over wages hours other terms and conditions) (repealing G.L. c. 40, § 4C (repealed 1965)).

19. G.L. c. 150E (2016), added by St. 1973, c. 1078, § 2.

20. 29 U.S.C.A. §§ 151 et seq. (2012).

21. G.L. c. 150E, § 6 (2016).

22. A 2007 reorganization created the Division of Labor Relations and the Commonwealth Employee Relations Board to take over these functions. St. 2007, c. 145. Four years later, St. 2011, c. 3 changed the Division of Labor Relations to the Department of Labor Relations.

23. G.L. c. 150E, § 8 (2016) provides:

The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. In the absence of such grievance procedure, binding arbitration may be ordered by the commission upon the request of either party; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supercede [sic] any other-wise applicable grievance procedure provided by law; and further provided that binding arbitration hereunder shall be enforceable under the provisions of chapter 150 C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections 39 and 41 to 45, inclusive, of chapter 31, section 16 of chapter 32, or sections 42 through 43 A, inclusive, of chapter 71. Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall, or appointment and where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance, notwithstanding any contrary provisions of sections 37, 38, 42 to 43 A, inclusive, and section 59 B of chapter 71.

awards.<sup>24</sup> Although the language of G.L. c. 150E, section 8, appears on its face to allow parties to use G.L. c. 150C only for enforcing (that is, confirming) arbitration awards, courts have from the early days of chapter 150E assumed that parties could also use chapter 150C to vacate awards. The assumption that the drafters of chapter 150E intended public sector labor arbitration awards to be subject to both the confirmation and vacation provisions of chapter 150C is in tension with the legislature's expressed desire that labor arbitration awards should be "final and binding."

Section 11(a) of G.L. c. 150C sets out five grounds for vacating awards:

- 1) the award was procured by corruption, fraud or other undue means;
- 2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
- 3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law;
- 4) the arbitrators refused to postpone the hearing upon a sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five as to prejudice substantially the rights of a party;
- 5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section two and the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award.

24. Added by St. 1959, c. 546, § 1. Until 1973 and the passage of G.L. c. 150E (2016), G.L. c. 150C (2016) applied only to arbitrations between employers covered under G.L. c. 150A (2016) and the unions representing their employees. G.L. c. 150A (2016), passed in 1938, gave collective bargaining rights to certain private sector employees not covered by the National Labor Relations Act. St. 1938, c. 345, § 2.

25. Note that the provisions of G.L. c. 150C (2016) also apply to statutory arbitrations of teacher discipline and discharge under G.L. c. 71, § 42 (2016). The Appeals Court held in *Groton-Dunstable Reg'l Sch. Comm. v. Groton-Dunstable Educators Ass'n*, 87 Mass. App. Ct. 621, 623 (2015), that the statute offered the exclusive route for teachers seeking review of discharges. Courts reviewing arbitrators' awards issued under G.L. c. 71, § 42 (2016) give them less deference than arbitrators' awards under a CBA. *See Sch. Comm. of Lexington v. Zagaeski*, 469 Mass. 104, 112 (2014) (judicial review of the arbitrator's interpretation of the authorizing statute . . . is "broader and less deferential" than in cases of judicial review of an arbitrator's decision arising from the interpretation of a private agreement [quotation and citation omitted]).

26. *See, e.g., Sch. Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 758 (2003); *Bureau of Special Investigations v. Coal. of Pub. Safety*, 430 Mass. 601, 603 (2000); *Mass. Highway Dep't v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 93*, 420 Mass. 13, 16 (1995) (AFSCME); *Mass.*

*As discussed infra*, the most commonly cited reason for vacating awards is section (a)(3).<sup>25</sup>

### III. THE PUBLIC POLICY FAVORING JUDICIAL DEFERENCE TO ARBITRATION AWARDS

A strong public policy favors the resolution of labor disputes through final and binding arbitration.<sup>26</sup> Any attempt to vacate an arbitration award therefore detracts from or pushes against that policy. The reasons for this public policy are various. The earliest reference to a "strong public policy favoring arbitration" in the context of a chapter 150C labor arbitration proceeding is in 1981, but the rationale behind the public policy was not given.<sup>27</sup> In the commercial arbitration context, a long line of precedent holds that there is a "strong public policy favoring arbitration as an expeditious alternative to litigation for settling commercial disputes."<sup>28</sup> This rationale, without the reference to commercial disputes, migrated into the field of labor arbitration in 1995.<sup>29</sup>

In the private sector, the agreement to arbitrate disputes over the meaning of the CBA is the "quid pro quo for an agreement not to strike."<sup>30</sup> Although public employees in Massachusetts have no right to strike, Massachusetts courts commonly turn to the principles articulated by the United States Supreme Court in a series of 1960 decisions known as the *Steelworkers Trilogy*<sup>31</sup> to flesh out the importance of (and limitations on) the enforcement of labor arbitration awards.

The central principle of the *Steelworkers Trilogy* is that "the inclusion of a provision for arbitration of grievances in the collective bargaining agreement" is "[a] major factor in achieving industrial peace."<sup>32</sup> In elaborating on this principle, the Court made two important related points. First, grievance arbitration is not a "last resort," but a crucial and necessary means for the parties to flesh out the rules that govern their relationship over time. Because no CBA can possibly address every aspect of the employment relationship, grievances and grievance arbitrations provide a beneficial method for filling in the inevitable gaps and enforcing unwritten policies and practices.

*Highway Dep't v. Mass. Org. of State Eng'rs & Scientists*, 81 Mass. App. Ct. 334, 339 (2012); *Falmouth Police Superior Officers Ass'n v. Town of Falmouth*, 80 Mass. App. Ct. 833, 836 (2011); *Town of Duxbury v. Duxbury Permanent Firefighters Ass'n, Local 2167*, 50 Mass. App. Ct. 461, 464 (2000).

27. *Painters Dist. Council No. 35 v. J. A. L. Painting, Inc.*, 11 Mass. App. Ct. 698, 702 (1981).

28. *Town of Danvers v. Wexler Const. Co.*, 12 Mass. App. Ct. 160, 163 (1981); *see also Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007 (1990) (same).

29. *AFSCME*, 420 Mass. at 16, (quoting *Plymouth-Carver Reg'l Sch. Dist.*, 407 Mass. at 1007).

30. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) (statute allowing courts to enforce labor arbitration awards supports federal policy that "industrial peace can be best obtained only in that way").

31. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (*Steelworkers I*); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (*Steelworkers II*); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (*Steelworkers III*).

32. *Steelworkers II*, 363 U.S. at 578.

[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement.<sup>33</sup>

Second, the Court explained that arbitrators, not judges, are in the best position to resolve workplace disputes.

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. ... [The arbitrator] ... 'is ... part of a system of self-government created by and confined to the parties.' [34]... The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. ... The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.<sup>35</sup>

Against this general rule in favor of arbitration, the Court identified two general exceptions. First, arbitration of a dispute is not permitted where one of the parties has not agreed to submit the matter to arbitration. In such cases, the dispute is not "substantively arbitrable." The Court set out certain guidelines in determining

arbitrability: (1) the determination of substantive arbitrability is for the courts, not the arbitrator, unless the parties agree otherwise;<sup>36</sup> (2) there is a presumption of arbitrability: a grievance should be considered arbitrable "unless it may be said with positive assurance that the arbitration cause is not susceptible of an interpretation that covers the asserted dispute" and any "[d]oubts should be resolved in favor of coverage;"<sup>37</sup> and (3) in making a determination of substantive arbitrability, "a court is not to rule on the potential merits of the underlying claims."<sup>38</sup>

In *Steelworkers III*,<sup>39</sup> the Court set out another type of exception, that each arbitration award that results from this process must "draw its essence" from the CBA:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

The Court cautioned that its inquiry is significantly limited. It will not inquire into the merits of the grievance and it will not substitute its interpretation of the CBA for that of the arbitrator. In interpreting a contract in which the parties have agreed to submit all grievances over CBA disputes to arbitration, the reviewing court should be highly deferential:

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.<sup>40</sup>

33. *Id.* at 581. This rationale explains why arbitrators commonly refer to the past practice of the parties in grievance arbitration, either to interpret ambiguous language or to enforce an unwritten but mutually-accepted practice of the parties. Courts have found that by enforcing a past practice as an independent unwritten term of the CBA, an arbitrator does not "add to, subtract from, or modify [the CBA]." Chief Admin. Justice of the Trial Court v. Serv. Emps. Int'l Union, Local 254, AFL-CIO, CLC, 383 Mass. 791, 792-93 (1981); *see also* Cape Cod Gas Co. v. United Steelworkers of Am., Local 13507, 3 Mass. App. Ct. 258, 261 (1975) (in relying on past practice, arbitrator did not add to, subtract from, change or modify the CBA). "Where the provisions of an agreement are not clear and unequivocal, the arbitrator may rightly look to past practice to resolve ambiguities." Town of Duxbury v. Duxbury Permanent Firefighters Ass'n, Local 2167, 50 Mass. App. Ct. 461, 465 (2000); *see* Chief Admin. Justice of the Trial Court, 383 Mass. at 792-93 (employer could not unilaterally terminate past practice that was clearly stated and understood, maintained over a reasonable time, and accepted by both parties).

34. H. Shulman, "Reason, Contract, and Law in Labor Relations," 68 HARV. L. REV. 999, 1016 (1955).

35. *Steelworkers II*, 363 U.S. at 581-82.

36. *Cf.* Am. Fed'n of State, Cnty., & Mun. Emps., Council 93, AFL-CIO v. Sch. Dep't of Burlington, 462 Mass. 1009 (2012) (union could not challenge arbitrator's determination of substantive arbitrability in court, where employer raised question of arbitrability at the arbitration hearing and union did not object to arbitrator's authority to determine arbitrability either at the hearing or in its post hearing brief).

37. *Steelworkers II*, 363 U.S. at 582-83.

38. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986); *see* 363 U.S. at 568.

39. *Steelworkers III*, 363 U.S. at 597.

40. *Steelworkers I*, 363 U.S. at 567-68; *see also Steelworkers III*, 363 U.S. at 599.

Despite the *Steelworkers Trilogy*'s defense of arbitrators over judges as the final word in labor disputes, the SJC's enumeration of these limits on arbitral power opened the door for judges to review the awards of arbitrators in a surprising number of cases.

Although enacted before the *Steelworkers Trilogy*, chapter 150C incorporates the same basic principles. Section 2 provides the right of either party to challenge the substantive arbitrability of a grievance. As a practical matter, because almost all grievances are filed by unions, almost all challenges to substantive arbitrability are made by employers. As discussed *infra*, public employers who invoke the nondelegability doctrine often claim that the matter is not substantively arbitrable. The provision in G.L. c. 150C, § 11 permitting a court to vacate an arbitration award where the arbitrators have "exceeded their powers" echoes the SJC's requirement that the arbitration award must "draw its essence" from the CBA and may be vacated if an arbitrator is dispensing his or her own brand of industrial justice.

In addressing petitions to vacate labor arbitration awards in the years since the 1973 enactment of chapter 150E and the linking of chapter 150E with chapter 150C, Massachusetts appellate courts have generally applied the principles of the *Steelworkers Trilogy*, particularly the principle of judicial deference to labor arbitration awards. Consistent with the *Steelworkers Trilogy*, Massachusetts courts have noted that the unusually broad judicial deference to such awards arises from a "strong public policy in favor of arbitration,"<sup>41</sup> that "[a]rbitration [is] ... a particularly appropriate and effective

means to resolve labor disputes,"<sup>42</sup> and that this policy is "especially pronounced" where the parties' choice of arbitration "forms part of a collective bargaining agreement."<sup>43</sup>

Because the parties have granted the arbitrator the authority to interpret the meaning of their CBA, the arbitrator's award, once issued, is entitled to be enforced as if it were a mutually agreed-upon provision of the CBA. Courts recognize that they owe the same deference to a labor arbitrator's award as they would to any collectively bargained agreement between labor and management. "It was the arbitrator's interpretation of the bargained-for language that the [employer] and the union had agreed to accept, not the interpretation by a court acting upon a subsequent application under G.L. c. 150C, § 11."<sup>44</sup>

Proper deference to the arbitrator requires courts to accept awards that contain errors — even gross errors — of law and fact.<sup>45</sup> Courts "are strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent or unsupported by the record at the arbitration hearing. ... 'An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference.'"<sup>46</sup>

The principle that courts "do not review the arbitrator's findings of fact or conclusions of law for error"<sup>47</sup> has a long history in the appellate courts of the commonwealth.<sup>48</sup> Courts in the federal system apply the same principle to judicial review of private sector arbitration awards.<sup>49</sup>

41. Sch. Dist. of Beverly v. Geller, 435 Mass. 223, 228 (2001) (Cordy, J., concurring), citing Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007 (1990).

42. Sch. Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 758 (2003).

43. City of Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. 813, 818 (2005); see also Sch. Comm. of Pittsfield, 438 Mass. 753, 758 (2003).

44. Sheriff of Suffolk Cty. v. AFSCME Council 93, Local 419, 68 Mass. App. Ct. 222, 226 (2007).

45. City of Lynn v. Thompson, 435 Mass. 54, 61-62 (2001). Judicial review of arbitration awards is thus significantly more deferential than review of administrative agency decisions under G.L. c. 30A, §14 (1954), according to which courts review decisions of these agencies to see if they are supported by substantial evidence and are free from error of law.

46. *Thompson*, 435 Mass. at 61-62, (quoting *Delta Air Lines Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 671 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989)).

47. Am. Fed'n of State, Cnty., & Mun. Emps., Council 93, AFL-CIO v. Sch. Dep't of Burlington, 462 Mass. 1009, 1010 (2012) (citations and quotations omitted).

48. See, e.g., *City of Boston v. Boston Police Superior Officers Fed'n*, 466 Mass. 210, 212 (2013); *Sch. Comm. of Lowell v. Robishaw*, 456 Mass. 653, 660-61 (2010); *Dep't of State Police v. Mass. Org. of State Eng'rs & Scientists*, 456 Mass. 450, 455 (2010); *Mass. Bay Transp. Auth. v. Boston Carmen's Union, Local 589, Amalgamated Transit Union*, 454 Mass. 19, 25 (2009); *City of Boston v. Boston Police Patrolmen's Ass'n*, 443 Mass. 813 (2005); *Lyons v. Sch. Comm. of Dedham*, 440 Mass. 74, 79 (2003); *Sch. Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 758 (2003); *City of Lynn v. Thompson*, 435 Mass. 54, 64 (2001); *Bureau of Special Investigations v. Coal. of Pub. Safety*, 430 Mass. 601, 605 (2000); *Mass. Highway Dep't v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 93*, 420 Mass. 13, 16 (1995); *City of Boston v. Boston Police Patrolmen's Ass'n, Inc.*, 403 Mass. 680, 684 (1989); *Sch. Comm. of*

*Waltham v. Waltham Educators Ass'n*, 398 Mass. 703, 705 (1986); *Concerned Minority Educators of Worcester v. Sch. Comm. of Worcester*, 392 Mass. 184, 187-88 (1984); *Sch. Comm. of Marshfield v. Marshfield Educ. Ass'n*, 84 Mass. App. Ct. 743, 758 (2014); *O'Brien v. New England Police Benevolent Ass'n, Local 911*, 83 Mass. App. Ct. 376, 382-83 (2013); *Falmouth Police Superior Officers Ass'n v. Town of Falmouth*, 80 Mass. App. Ct. 833, 837 (2011); *City of Boston v. Boston Police Patrolmen's Ass'n*, 74 Mass. App. Ct. 379, 382 (2009); *Town of Duxbury v. Rossi*, 69 Mass. App. Ct. 59, 65 (2007); *Boston Police Patrolmen's Ass'n v. City of Boston*, 60 Mass. App. Ct. 672, 677 (2004) (members of the author's firm represented a party in this case); *City of Boston v. Boston Police Superior Officers Fed'n*, 52 Mass. App. Ct. 296, 299 (2001); *City of Boston v. Boston Police Patrolmen's Ass'n*, 41 Mass. App. Ct. 269, 272-273 (1996); *City of Boston v. Boston Police Superior Officers Fed'n*, 29 Mass. App. Ct. 907, 908 (1990); *Sch. Comm. of Quincy v. Quincy Educ. Ass'n*, 22 Mass. App. Ct. 914, 915 (1986); *City of Boston v. Boston Police Patrolmen's Ass'n, Inc.*, 8 Mass. App. Ct. 220, 226 (1979); *Essex Cnty. Sheriff's Dep't v. Essex Cnty. Corr. Officers Ass'n*, No. 10-P-2185, 2011 WL 4820026, \*1-3 (Mass. App. Ct.) (Rule 1:28 order).

49. See, e.g., *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000) ("we must treat the arbitrator's award as if it represented an agreement between [management] and the union as to the proper meaning of the contract's words 'just cause'"); *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 37-38 (1987) ("it is the arbitrator's view of the facts and of the meaning of the contract that [the parties] have agreed to accept"); *UMass Mem'l Med. Ctr. Inc. v. United Food & Commercial Workers Union*, 527 F.3d 1, 5 (1st Cir. 2008); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 (1st Cir. 2008); *Wonderland Greyhound Park Inc. v. Autotote Sys. Inc.*, 274 F.3d 34, 35 (1st Cir. 2001); *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940, 945 (1st Cir. 1988) ("The factual findings of the arbitrator are not subject to judicial challenge."); *Unión De Tronquistas De Puerto Rico, Local 901 v. United Parcel Serv. Inc.*, 149 F. Supp. 3d 246, 250 (D.P.R. 2016).

When a court reviews whether an arbitrator has exceeded his or her powers, whether an award violates public policy or whether the nondelegability doctrine renders the award unenforceable, it does so only after deferring to the findings of fact and rulings of law made by the arbitrator.<sup>50</sup> The only exception is when the court considers a pre-emptive motion to stay an arbitration proceeding before it begins on the grounds that it is not substantively arbitrable, in which case the matter is decided on the law without benefit of arbitral findings of fact.<sup>51</sup>

#### A. G.L. c. 150C, § 11(a)(3): Arbitrator Exceeds Powers

The public policy in favor of deferring to arbitrators' awards has resulted in few examples of courts vacating such awards for one of the enumerated reasons set out in G.L. c. 150C, § 11(a). As noted *supra*, the most commonly cited reasons for vacating labor arbitration awards are found in G.L. c. 150C, § 11(a)(3): the arbitrators exceeded their powers or the award requires a party to violate the law. In analyzing the legitimacy of the challenge, the courts engage in what appears to be a *de novo* review. "[T]he question [of] whether the arbitrators acted in excess of the authority conferred on them ... is always open for judicial review."<sup>52</sup> The courts review the subject matter of the arbitration award (particularly the remedy) in light of: (1) the collective bargaining agreement (particularly the management rights clause); (2) applicable state statutes; and (3) common law principles regarding the relationships between public employers and their employees. The party asserting that the arbitrator exceeded his or her powers must "demonstrate both a factual and a legal basis for its claim."<sup>53</sup>

The majority of cases decided under the "exceeded their powers" clause involve the nondelegability doctrine, one of the public policy exceptions discussed *infra*. There are few reported cases in which a court finds that arbitrators have exceeded their powers (or exceeded

their authority, which phrase is often substituted for the statutory language) on grounds other than public policy.<sup>54</sup> Two examples will suffice:

In *Sheriff of Suffolk County v. AFSCME Council 93, Local 419*,<sup>55</sup> an arbitrator was asked to determine the seniority of an employee who had retired due to a physical injury but had since recovered and returned to his former position pursuant to G.L. c. 32, § 8(2). In resolving the grievance, the arbitrator interpreted the state law and its application to the employee, even though the law was not incorporated in the CBA, nor did the CBA explicitly give the arbitrator the authority to construe statutes. The Appeals Court ruled the arbitrator exceeded his authority in construing the employee's statutory rights.<sup>56</sup>

In *Boston Housing Authority v. National Conference of Firemen & Oilers, Local 3*,<sup>57</sup> an arbitrator found that the employer had violated the just cause provision of a CBA by discharging employees and ordered them reinstated. The SJC held that the arbitrator had exceeded his authority and vacated the award. The court noted that the CBA had expired before the discharges had arisen, and therefore the arbitrator had no power to apply the just cause provision. The union pointed out that the CBA contained an "evergreen clause" by which its terms remained in full force and effect until the parties negotiated a successor agreement, but the SJC ruled that evergreen clauses violated G.L. c. 150E, § 7(a), which limits the duration of public sector CBAs to three years.<sup>58</sup>

#### B. G.L. c. 150C, § 11(a)(3): Violation of Law

Cases under the second part of G.L. c. 150E, § 11(a)(3) — which states that an arbitrator may not render an award requiring a person to "commit an act or engage in conduct prohibited by state or federal law" — are even more rare.<sup>59</sup> There is no question that when a CBA provision (including an arbitrator's award) materially conflicts

50. See *City of Boston v. Boston Police Superior Officers Fed'n*, 466 Mass. 210, 212 (2013) (relying on arbitrator's findings of fact, even where court found police commissioner's statute made subject matter inarbitrable); *Town of Duxbury v. Rossi*, 69 Mass. App. Ct. 59, 65 (2007) (rejecting petition to vacate arbitrator's award where each of the employer's "contention[s] is based on assumptions that the facts found by the arbitrator are not the facts").

51. See, e.g., *Dep't of State Police v. Mass. Org. of State Eng'rs & Scientists*, 456 Mass. 450, 455 (2010); *Town of Framingham v. Framingham Police Officers Union*, 93 Mass. App. Ct. 537, 546 (2018); *Plymouth Pub. Sch. v. Educ. Ass'n of Plymouth & Carver*, 89 Mass. App. Ct. 643, 650 (2016).

52. *Sch. Comm. of W. Springfield v. Korbut*, 373 Mass. 788, 792 (1977).

53. *Town of Athol v. Prof'l Firefighters of Athol, Local 1751, I.A.F.F.*, 470 Mass. 1001, 1002 (2014) (citing *Fazio v. Emp'rs' Liab. Assurance Corp.*, 347 Mass. 254, 257 (1964)). Note that this is another example of the courts importing legal principles from commercial arbitration into labor cases brought under G.L. c. 150C (2016).

54. See *Boston Hous. Auth. v. Nat'l Conference of Firemen & Oilers, Local 3*, 458 Mass. 155, 164-65 (2010) (arbitrator lacked authority to reinstate employees where CBA had expired and "evergreen clause" violated G.L. c. 150E, § 7(a) (2016)); *Sch. Dist. of Beverly v. Geller*, 435 Mass. 223, 231 (2001) (Cordy, J., concurring) (arbitrator exceeded authority by applying just cause after finding that teacher had committed one of the offenses enumerated in G.L. c. 71, § 42 (2016)); *City of Marlborough v. Marlborough Pub. Works Equip. Operators*

*Ass'n*, 85 Mass. App. Ct. 1117 (2014), No. 2014-P-0108 (Rule 1:28 order); see also *Sch. Comm. of Lexington v. Zagaeski*, 469 Mass. 104, 112 (2014) (arbitrator exceeded authority in statutory teacher discharge arbitration under G.L. c. 71, § 42 (2016)).

55. 67 Mass. App. Ct. 702, 706-07 (2006).

56. Note that there are numerous cases in which arbitrators' interpretations of statutory provisions have been upheld by the courts, where there is evidence that the parties have given the arbitrator the appropriate authority either by statute, the CBA, or the submission of issues to the arbitrator by the parties. See, e.g., *Sch. Comm. of Marshfield v. Marshfield Educ. Ass'n*, 84 Mass. App. Ct. 743, 745 (2014) (interpreting G.L. c. 71, § 38G (2016)); *Town of Duxbury v. Duxbury Permanent Firefighters Ass'n, Local 2167*, 50 Mass. App. Ct. 461, 466 (2000) (interpreting G.L. c. 41, § 111F (2016)); *City of Everett v. Teamsters, Local 380*, 18 Mass. App. Ct. 137, 139-40 (1984) (interpreting G.L. c. 31 (2016)).

57. 458 Mass. 155, 164-65 (2010).

58. The result of the case was later abrogated by St. 2011, c. 198, §§ 2, 3.

59. See, e.g., *Sch. Comm. of Marshfield v. Marshfield Teachers Ass'n*, 383 Mass. 881, 882 (1981) (award violated workers' compensation law); *Boston Teachers Union, Local 66, Am. Fed'n of Teachers (AFL-CIO) v. Sch. Comm. of Boston*, 370 Mass. 455, 467-68 (1976) (arbitrator had no legal power to make an award that required municipality to pay funds for purpose for which municipal funds may not be expended); *City of Everett v. Teamsters, Local 380*, 18 Mass. App. Ct. 137, 139-40 (1984) (award violated civil service statute).

with a statute, the terms of the statute prevail over any conflicting provisions of the CBA, unless the statute is listed in G.L. c. 150E, § 7(d) as one of those statutes over which, in the event of a conflict, the CBA will prevail.<sup>60</sup> Judicial analysis of an assertion that an arbitrator's award is barred by a contrary statute "begins with the presumption that the collective bargaining agreement compels the outcome directed by the award and ends with a determination whether that outcome materially conflicts with the asserted conflicting statute."<sup>61</sup> For a material conflict to exist, it is not enough that the statute and the award address the same subject matter; the award must materially impinge on or interfere with the operation of the statute. Where a grievance addresses subject matter that relates to but does not conflict with a statute or statutory scheme, however, courts will confirm the arbitration award.<sup>62</sup>

The courts have explored the question of conflicts between statutes and CBAs in a number of contexts, including that of civil service, which applies to many public employees in Massachusetts. The civil service statute, G.L. c. 31, is not listed in G.L. c. 150E, § 7(d) and so its provisions will prevail in the event of a conflict with a CBA or arbitration award. In *City of Somerville v. Somerville Municipal Employees Ass'n*,<sup>63</sup> where an arbitrator's award "condoned unauthorized promotional appointments ... made in violation of the civil service law," the court vacated the award under G.L. c. 150C, § 11(a)(3). Similarly, in *City of Leominster v. International Brotherhood of Police Officers, Local 338*,<sup>64</sup> the Appeals Court vacated an arbitration award that relied on a CBA provision giving just cause protection to employees who were considered probationary under chapter 31. Because the CBA was in direct conflict with the statute, the arbitration award could not stand.<sup>65</sup> On the other hand, in a number of other cases involving civil service employees and implicating some aspects of civil service law without directly conflicting with a particular statutory provision, the courts rejected claims under section 11(a)(3) and confirmed the arbitration awards.<sup>66</sup>

60. *City of Somerville v. Somerville Mun. Emps. Ass'n*, 451 Mass. 493, 497 (2008). For a case involving a material conflict between a CBA (as interpreted by an arbitrator) and a statute that is listed in G.L. c. 150E, § 7(d) (2016), see *Town of Duxbury v. Duxbury Permanent Firefighters Ass'n, Local 2167*, 50 Mass. App. Ct. 461, 466 (2000) (CBA provision prevails over conflicting provisions of G.L. c. 41, § 111F (2016)).

61. *City of Somerville v. Somerville Mun. Employees Ass'n*, 80 Mass. App. Ct. 686, 688 (2011) (quoting *City of Somerville v. Somerville Mun. Emps. Ass'n*, 451 Mass. 493, 497 (2008)).

62. See, e.g., *Chief Justice for Admin. & Mgmt. of the Trial Court v. Office & Prof'l Emps. Int'l Union, Local 6, AFL-CIO*, 441 Mass. 620, 628-29 (2004) (no material conflict between CBA and the powers and duties of the Chief Justice of the Trial Court set out in G.L. c. 211B, §§ 9-10 (1978)); *City of Somerville v. Somerville Mun. Employees Ass'n*, 80 Mass. App. Ct. 686, 689 (2011) (no material conflict between out-of-grade pay provisions of CBA and civil service law); *City of Fall River v. AFSCME Council 93, Local 3177, AFL-CIO*, 61 Mass. App. Ct. 404, 410-11 (2004) (CBA provision giving provisional employee right not to be discharged without justifiable cause did not conflict with civil service law); *Town of Dedham v. Dedham Police Ass'n (Lieutenants & Sergeants)*, 46

## IV. THE PUBLIC POLICY EXCEPTIONS

In Massachusetts, most challenges to arbitration awards — even when they cite to one or more provisions of Chapter 150C — allege that the award violates public policy. These public policy challenges usually take one of two forms: (1) the "public policy exception," which is normally (but not exclusively) invoked to challenge the reinstatement of employees accused of serious misconduct; or (2) the nondelegability doctrine, which holds that CBAs (and, by extension, arbitrators' awards interpreting CBAs) cannot impinge on the nondelegable managerial rights of public employers. Although the two types of cases are normally analyzed separately, this article takes the position that both exceptions are, in fact, two prongs of a single public policy exception. In the case of what is traditionally referred to as the "public policy exception," courts ask whether the arbitration award (usually an order to reinstate an employee discharged for misconduct) offends some public policy to such an extent that the court should override the public policy in favor of resolving labor disputes through final and binding arbitration and vacate the award. The nondelegability doctrine represents a special case of the public policy exception, which is founded on a public policy, derived from common law and statutes, granting public employers certain inherent managerial prerogatives that cannot be circumscribed through collective bargaining.

### A. The Public Policy Exception

#### 1. The Three-Pronged Test

Despite the policy in favor of extraordinary deference to arbitrators' awards, the courts have carved out a narrow exception in cases where the award violates a well-defined public policy. Courts in Massachusetts and in the federal court system have adopted a three-part test for determining whether an arbitration award reinstating an employee should be overturned on public policy grounds.

Mass. App. Ct. 418, 421 (1999) (CBA provision allowing selection of vacation and shifts by seniority did not materially conflict with civil service law); see also *Adams v. City of Boston*, 461 Mass. 602, 614-15 (2012) (rejecting employees' claim that CBA provision permitting municipalities to pay only 50% of educational incentive materially conflicted with G.L. c. 41, § 108L (2016) (the Quinn Bill)) (members of the author's firm represented a party in this case).

63. 20 Mass. App. Ct. 594, 602-03 (1985).

64. 33 Mass. App. Ct. 121, 127 (1992).

65. See also *City of Everett v. Teamsters, Local 380*, 18 Mass. App. Ct. 137, 139-40 (1984) (vacating arbitration award that violated civil service law).

66. See, e.g., *City of Springfield v. Local Union No. 648, Int'l Ass'n of Firefighters, AFL-CIO*, 88 Mass. App. Ct. 1, 5 (2015) (remedies for illegal promotions); *City of Somerville v. Somerville Mun. Emps. Ass'n*, 80 Mass. App. Ct. 686, 694 (2011) (out-of-grade pay); *City of Fall River v. AFSCME Council 93, Local 3177, AFL-CIO*, 61 Mass. App. Ct. 404, 412 (2004) (application of CBA's just cause standard to provisional civil service employee); *City of Fall River v. Teamsters Union, Local 526*, 27 Mass. App. Ct. 649, 654 (1989) (use of seniority in promotions).

First, the public policy “must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”<sup>67</sup> Second, the exception “does not address ‘disfavored conduct in the abstract, but disfavored conduct which is integral to the performance of employment duties.’”<sup>68</sup> Third, the party invoking the exception must show that the award “violates public policy to such an extent that the employee’s conduct would have required dismissal.”<sup>69</sup> The question to be answered in the third prong of the test, then, is not whether the behavior of the employee violates public policy, but whether the parties’ agreement to reinstate that employee does so.<sup>70</sup> As shown *infra*, it is the third prong of the test that has provoked the most litigation.

## 2. Applying the Test

The history of the public policy exception in Massachusetts shows a strong reluctance to overturn arbitrators’ awards in discipline cases. Despite this reluctance, Massachusetts appellate courts have overturned several arbitration awards on public policy grounds, beginning in 2005 with *City of Boston v. Boston Police Patrolmen’s Ass’n* (the *DiSciullo* case).<sup>71</sup>

The first major case examining the public policy exception in Massachusetts was *Massachusetts Highway Department v. American Federation of State, County & Municipal Employees, Council 93*.<sup>72</sup> There, the SJC examined an arbitration award reinstating a state highway department employee who brought a loaded gun with an obliterated serial number to work in his toolbox. Despite the employer’s citation of work rules and criminal statutes prohibiting such conduct, the court refused to apply the public policy exception.<sup>73</sup> Addressing the second prong of the test, the court concluded that the disfavored conduct was not integral to the employee’s performance of his job duties.<sup>74</sup> Nor did the nature of the job make the employee’s conduct an immediate threat to the general public.<sup>75</sup>

The case also failed the third prong. Not all conduct that might be considered integral to the performance of employment duties requires overturning an arbitrator’s order of reinstatement.<sup>76</sup> In *Massachusetts Highway Department*, the court looked at the employer’s written policies against possessing weapons and the applicable CBA and found that they did not require dismissal, but instead permitted the imposition of a penalty less severe than

permanent discharge. For these reasons, the court refused to vacate the arbitration award.<sup>77</sup>

The SJC reaffirmed its view of the test in *Bureau of Special Investigations v. Coalition of Public Safety*,<sup>78</sup> which involved an arbitrator’s award reinstating two government fraud investigators who illegally accessed confidential tax records without authorization. The court found that the misconduct was integral and directly related to the employees’ performance of their job duties, thus satisfying the second prong.<sup>79</sup> Nevertheless, the court, citing *Massachusetts Highway Department*, found that the third prong of the test was not met. The arbitrator had found that misconduct had occurred and imposed a penalty (three-month unpaid suspension). The court then looked to the parties’ CBA as a policy source and determined that it gave the arbitrator “final authority to sanction employees who commit misconduct.”<sup>80</sup> It concluded that there was no public policy requiring dismissal of those engaged in such misconduct, and so declined to vacate the award.<sup>81</sup>

In *City of Lynn v. Thompson*,<sup>82</sup> the court held that reinstatement of a police officer who engaged in conduct unbecoming an officer by making insensitive remarks to a mentally ill woman did not violate public policy. The arbitrator found that the police officer had used force in restraining the woman, breaking the woman’s arm, but that such force was not excessive or unnecessary. On these facts, the court found that the officer did not pose “an ongoing risk of public injury to members of the public,” and so affirmed the arbitrator’s award.<sup>83</sup> The court specifically left open the question of whether the reinstatement would have violated public policy if the arbitrator had found that the officer had used excessive force. In a concurring opinion, Justice Roderick L. Ireland opined that such a finding would have prohibited the officer’s reinstatement.

In *School District of Beverly v. Geller*,<sup>84</sup> a majority of the court voted to overturn an arbitrator’s award that reinstated a public school teacher who physically assaulted three sixth-grade students. Although four members of the court voted to overturn the award, no majority formed around a rationale for doing so. Justice Robert J. Cordy drafted a concurring opinion, which was joined by Chief Justice Margaret H. Marshall and Justice John M. Greaney.<sup>85</sup> This opinion derives its rationale from the language of the Education Reform Act of 1993.<sup>86</sup> The act specifically articulates several grounds for dismissal of a tenured teacher, including “conduct unbecoming

67. Mass. Highway Dep’t v. Am. Fed’n of State, Cnty. & Mun. Emps., Council 93, 420 Mass. 13, 16 (1995) (quoting *W. R. Grace & Co. v. Local Union 759*, Int’l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 (1983)); see *E. Associated Coal Corp. v. United Mine Workers of Am.*, District 17, 531 U.S. 57, 61-62 (2000).

68. Mass. Highway Dep’t, 420 Mass. at 17 (quoting *Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665, 671 (1988) (emphasis in original)).

69. *Bureau of Special Investigations v. Coal. of Pub. Safety*, 430 Mass. 601, 605 (2000) (BSI); see also Mass. Highway Dep’t, 420 Mass. at 19 (“[a]rbitration awards reinstating employees are therefore upheld if the public policy, while disfavoring the employees’ conduct, does not require dismissal”).

70. See *E. Associated Coal Corp.*, 531 U.S. at 62-63.

71. 443 Mass. 813 (2005). The author represented the union in this case.

72. 420 Mass. 13 (1995).

73. *Id.* at 20-21.

74. *Id.* at 17.

75. *Id.* at 18.

76. *Id.* at 19-20.

77. *Id.* at 20.

78. 430 Mass. 601 (2000).

79. *Id.* at 605.

80. *Id.* at 606.

81. *Id.*

82. 435 Mass. 54 (2001).

83. *Id.* at 64-65.

84. 435 Mass. 223 (2001).

85. *Id.* at 224.

86. St. 1993, c. 71.

a teacher,” which formed the basis for the employer’s termination decision. The concurring justices found that, when an agreement (or, as here, a statute) specifically enumerates grounds for dismissal, and the arbitrator finds facts to support a violation of one of those grounds, the arbitrator does not have the authority to judge whether discharge is an excessive penalty.<sup>87</sup> In a second concurrence, Justice Ireland (joined by Justice Cordy) agreed with the Appeals Court that the reinstatement violated a strong public policy against the use of physical force by a teacher against a student.<sup>88</sup>

The three dissenting justices, in an opinion authored by Justice Judith A. Cowin, disagreed with both concurrences. In response to Justice Cordy’s opinion, the dissenters interpreted the language of section 42 to give arbitrators the authority to reinstate a teacher, even when the school had provided evidence that the teacher had engaged in activity enumerated as just cause for dismissal. In response to Justice Ireland, they concluded that the public policy invoked by the employer was not specific enough to meet the strict public policy exception standard set out in *Massachusetts Highway Department and Bureau of Special Investigations*. The dissenting justices stated that “a legislative or regulatory requirement of discharge” was necessary to prohibit reinstatement.<sup>89</sup> Neither a general policy disfavoring the misconduct nor enumeration of possible grounds for dismissal would suffice.<sup>90</sup> The lack of a majority opinion in *Geller* left the rule established in *BSI* and *Massachusetts Highway Department* intact.<sup>91</sup>

The SJC answered the question left open in *Geller, Thompson* and prior cases (what does it take to satisfy the third prong?) in the *DiSciullo* case.<sup>92</sup> The case involved a police officer who was fired for his conduct during and after a traffic stop. According to the employer, the officer got into an altercation with two people in a double-parked car. After an investigation, the employer concluded that the officer had assaulted the individuals, filed false criminal charges against them (assaulting a police officer and resisting arrest), and lied to the employer throughout the investigation and during an internal hearing.

The arbitrator agreed with the employer that the officer had filed false criminal charges and lied under oath throughout the investigation and also at the arbitration hearing, but she reduced the discipline to a 12-month unpaid suspension. The arbitrator’s decision to reduce the penalty was based on three factors: (1) the employer did not prove the assault and battery charges, which the arbitrator believed were the most serious allegations of misconduct; (2) the union provided evidence of several cases in which the same employer had

imposed significantly lesser discipline for similar (and worse) misconduct; and (3) the officer was a 10-year veteran with no previous discipline.

The employer appealed on public policy grounds. The Superior Court and Appeals Court (“albeit with a distinct lack of enthusiasm”) upheld the arbitrator’s award on the grounds that no public policy absolutely prohibited reinstating this officer.<sup>93</sup> The SJC granted the employer’s application for further appellate review and reversed, vacating the arbitration award as violating public policy.

The SJC agreed with the two lower courts that the issue in the case was whether the third prong of the three-pronged test had been satisfied. A unanimous SJC found that the arbitrator’s reinstatement award violated such a policy. The court located the policy in four statutes: G.L. c. 41, § 96A (prohibiting a person convicted of a felony from working as a police officer); G.L. c. 268, § 1 (criminalizing perjury); G.L. c. 268, § 6A (criminalizing filing false police reports); and G.L. c. 265, § 37 (criminalizing deprivation of civil rights under color of law).<sup>94</sup> According to the court, these four statutes create a public policy against forcing an employer to employ a police officer who has engaged in certain types of misconduct.

Here, the court said, interpreting the arbitrator’s award, the officer engaged in perjury by: filing false criminal charges under oath; testifying under oath at the arbitration hearing; filing false police reports; and depriving citizens of their civil rights. It was not relevant that the officer was never convicted of or even charged with any of the crimes listed in the cited statutes. The underlying “felonious misconduct”<sup>95</sup> — as reflected in the arbitrator’s findings of fact — was enough. The employer could not be forced to reinstate this police officer, who, in the court’s view, “illegally abused his power and repeatedly lied about it under oath.”<sup>96</sup>

In a footnote, the court rejected the arbitrator’s reliance on disparate treatment evidence. Whether the employer failed to punish, or punished less severely those who committed similar misconduct in the past, is irrelevant to the public policy inquiry, the SJC ruled, unless there is evidence that “the reasons for ... termination were pretexts or motivated by improper considerations.”<sup>97</sup>

The Appeals Court expanded on *DiSciullo* in *City of Boston v. Boston Police Patrolmen’s Ass’n* (the *Docanto* case).<sup>98</sup> In *Docanto*, a police officer was found to have participated in an off-duty altercation that was recorded on security cameras.<sup>99</sup> The officer was charged with assault by means of a dangerous weapon (a shod foot), which is a felony, but was never convicted of any crime.<sup>100</sup> The court vacated

87. *Geller*, 435 Mass. at 232. The position of Justice Cordy’s concurrence became the law of the commonwealth — at least with regard to arbitrations under G.L. c. 71, § 42 (2016) — in 2014. *Sch. Comm. of Lexington v. Zagaeski*, 469 Mass. 104, 112 (2014).

88. *Geller*, 435 Mass. at 236-237 (citing *Sch. Dist. of Beverly v. Geller*, 50 Mass. App. Ct. 290, 294-97 (2000)). The justices also found it significant that the statute explicitly requires arbitrators to take the best interests of the students into account in teacher discipline cases. *See Geller*, 435 Mass. at 235-236, citing G.L. c. 71, § 42, (2016), fifth par. (Cordy, J., concurring).

89. *Geller*, 435 Mass. at 248.

90. *Id.*

91. *See Schrottman v. Barnicle*, 386 Mass. 627, 634 (1982).

92. *City of Boston v. Boston Police Patrolmen’s Ass’n*, 443 Mass. 813 (2005).

93. *See City of Boston v. Boston Police Patrolmen’s Ass’n*, 60 Mass. App. Ct.

920 (2004).

94. It is not clear whether the SJC considered all these statutes to have equal value in determining the public policy. The felony statute is quoted in the text of the decision. The perjury statute is introduced by a “see” signal. The court introduces the other two statutes with “See also.” All three crimes are felonies. *See* G.L. c. 274, § 1 (2016).

95. *DiSciullo*, 443 Mass. at 820.

96. *Id.* at 823.

97. *Id.* at 822 n.9.

98. 74 Mass. App. Ct. 379, 382 (2009). The author represented the union in this case.

99. *Id.* at 379-80.

100. *Id.* at 380.

the arbitration award on public policy grounds. Citing *DiSciullo*, the court found that the officer had engaged in “felonious misconduct” in violation of the public policy embodied in G.L. c. 41, § 96A. Even though, unlike *DiSciullo*, the felonious conduct did not involve untruthfulness and did not take place in the course of the officer’s duties, the court held that public policy barred the officer’s reinstatement.<sup>101</sup>

Most Massachusetts appellate courts that have addressed the public policy argument since *Docanto* have rejected the challenge.<sup>102</sup> Three recent cases may serve as illustrations. In *O’Brien v. New England Police Benevolent Ass’n, Local 911*,<sup>103</sup> the court reminded employers that the facts found by the arbitrator, and not the facts found by the employer, are controlling. In *O’Brien*, the City of Worcester discharged a police officer after an off-duty incident in which he drew his firearm and arrested three boys. The employer found that the officer had used excessive force, but the arbitrator concluded that the officer did not commit any wrongdoing and ordered him reinstated. The employer argued that the reinstatement violated public policies against excessive force and false arrest, but the court rejected the claim. The court ruled that, based on the arbitrator’s finding that no misconduct occurred, there could be no violation of public policy:

Here, the factual and legal underpinnings necessary to the application of the public policy exception are lacking. The arbitrator did not issue an award of reinstatement that flies in the face of factual findings of misconduct; there is no inconsistency between the findings of the arbitrator and his award of reinstatement.<sup>104</sup>

The case of *City of Springfield v. United Public Service Employees Union*<sup>105</sup> reminds us that the existence of an employer rule disfavoring certain conduct does not create a public policy requiring discharge for that conduct. In *City of Springfield*, the Appeals Court rejected a public policy challenge to an arbitration award reinstating a public employee after the employer terminated him for engaging in sexual harassment. Applying the three-pronged test, the court concluded that: (1) Massachusetts has a well-defined and dominant public policy against sexual harassment; and (2) the terminated employee’s sexual harassment was integral to his job duties as a messenger; but that (3) termination was not required because a lesser sanction would not frustrate public policy.<sup>106</sup> The court noted that the city’s sexual harassment policy contemplated progressive discipline, and statutory remedies against sexual harassment included counseling and training components, evidence that public policy does not require discharge of employees who engage in sexual harassment.<sup>107</sup>

Most recently, the SJC rejected a public policy challenge to a police officer’s termination in *City of Pittsfield v. Local 447, International Brotherhood of Police Officers*.<sup>108</sup> The employer discharged a police officer for untruthfulness and falsifying records after he initially stated that he removed a shoplifting suspect from his police vehicle for her safety, then later admitted that it was to allow a security officer to photograph her. An arbitrator reinstated the officer, finding that his statement was “untrue” and “intentionally misleading” but not “intentionally false” because there was “persuasive evidence that the [suspect] [was] act[ing] up in the back [of the cruiser] before she was removed.”<sup>109</sup>

The SJC, citing *Williams* and distinguishing *DiSciullo*, denied the employer’s petition to vacate the arbitration award as violating public policy. After examining statutes criminalizing false reports (G.L. c. 268, § 6A) and misleading statements intended to impede or obstruct a criminal investigation or civil proceeding (G.L. c. 268, § 13B), the court concluded that neither statute applied and thus the reinstatement of the officer did not violate public policy. In dictum, the court stated:

Where a police chief decides to terminate an officer in circumstances in which the officer’s false statements violated G.L. c. 268, § 6A or 13B, or which otherwise resulted in an unjustified arrest or prosecution, or in a deprivation of liberty or denial of civil rights, an arbitration award finding no just cause for such a dismissal and reinstating the officer would violate public policy.<sup>110</sup>

One way to interpret *City of Pittsfield* is to say that the facts found by the arbitrator did not amount to felonious misconduct within the meaning of *DiSciullo* and *Docanto* and, therefore, the third prong of the test was not met. But to the extent that the court in *City of Pittsfield* would find a public policy violation where a police officer did not commit felonious misconduct, the court’s dictum exceeds the rule set out in *DiSciullo* and affirmed in *Docanto*. As stated as early as *Massachusetts Highway Department*, the third prong is not satisfied merely because the employee’s conduct violates a public policy. The best approach, which the SJC’s “felonious misconduct” rule meets, is that there must be specific directive in a statute or other policy requiring discharge of the offending employee. Felonious misconduct meets this test because there is a statute prohibiting felons from being police officers. Such a specific prohibition on employment is rare. Most public policies, as stated in statutes, regulations, employer policies and CBAs, fall far short of such an absolute prohibition and so do not meet the strict requirements of the third

101. *Id.* at 381-82.

102. *See, e.g.*, *City of Pittsfield v. Local 447, Int’l Bhd. of Police Officers*, 480 Mass. 634 (2018) (no public policy violation where police officer’s “intentionally misleading” statement was not intended to impede investigation); *Sch. Comm. of Lowell v. Robishaw*, 456 Mass. 653, 665 (2010) (no public policy violation where employer failed to prove that teacher was not fluent in English); *City of Lynn v. Thompson*, 435 Mass. 54, 64 (2001); *Bureau of Special Investigations*, 430 Mass. at 605 (no policy violation where policy did not require discharge); *Sch. Comm. of Marshfield v. Marshfield Educ. Ass’n*, 84 Mass. App. Ct. 743, 758 (2014) (no public policy violation where lack of teaching license does not require termination) (the author represented the union in this case); *O’Brien v. New England Police Benevolent Ass’n, Local 911*, 83 Mass. App. Ct. 376,

382-83 (2013) (no public policy violation where arbitrator found no misconduct).

103. 83 Mass. App. Ct. 376 (2013).

104. *Id.* at 382-83.

105. 89 Mass. App. Ct. 255 (2016).

106. *Id.* at 259-60.

107. *Id.* at 262.

108. 480 Mass. 634 (2018).

109. *Id.* at 636.

110. *Id.* at 644.

prong of the test. No statute prohibits liars from being police officers, for example, so false statements by a police officer that do not amount to felonious misconduct should not trigger the third prong of the test. No statute prohibits felons from being non-police municipal employees, so felonious misconduct by a public employee who is not a police officer does not meet the test. To adopt the SJC's dictum in *City of Pittsfield* would unreasonably open the floodgates for parties dissatisfied with labor arbitration awards to challenge them whenever an employee engages in misconduct that is merely disfavored. At that point, the exceptions will have outstripped the rule of deference to arbitration and the tail would be wagging the dog.

The dictum in *City of Pittsfield* now takes its place along with two prior examples of dicta that, if adopted, would significantly weaken the third prong analysis. The first example comes from *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County*.<sup>111</sup> In that case, a jail officer was discharged because he was alleged to have witnessed other officers assault a prisoner and then lied about it in a report. The arbitrator did not make a specific finding that the jail officer made a false report. Given that the arbitrator had since died, the court chose not to remand the case but to confirm the award. In the process of doing so, the court stated in dicta:

In a situation where a jail officer actually witnesses fellow officers assault an individual who is held in the sheriff's custody, and then lies about this fact and files false reports that memorialize the falsity, we have little doubt that established public policy would condemn such conduct and would require the discharge of such an officer.<sup>112</sup>

The dictum appears to be based on a misreading of *DiSciullo*, another case involving false statements. The difference in *DiSciullo* was that the false statements constituted "felonious misconduct" and because DiSciullo was a police officer, a specific public policy — embodied in G.L. c. 41, § 96A — prohibited felons from working as police officers. There is no cognate statute prohibiting felons from becoming jail officers, however, so it is not clear what public policy would "require the discharge" of the jail officer in the SJC's hypothetical.

The second example comes from the recent *Williams* case. Justice Geraldine S. Hines, writing for a unanimous SJC, stated that "[h]ad the city prohibited choke holds as excessive force, an arbitrator who found a choke hold reasonable would have exceeded his authority."<sup>113</sup> This statement also does not square with the prior case law

interpreting the third prong. It would be a different case if there were a policy that specifically enumerated grounds for summary discharge and placing someone in a choke hold (or, more broadly, using excessive force) was on that list.<sup>114</sup> It would also be a different case if there were a finding that every police officer who uses a choke hold is thereby engaged in "felonious misconduct," thus implicating G.L. c. 41, § 96A's prohibition against police officer felons. It is unclear, however, how a policy prohibiting the use of choke holds, by itself, would satisfy the third prong of the public policy test.

The only other case in which a Massachusetts appellate court vacated an arbitration award reinstating a discharged employee after *Docanto* is an outlier and, as an unpublished case, is not controlling precedent. In its Rule 1:28 decision in *Essex County Sheriff's Department v. Essex County Correctional Officers Association*,<sup>115</sup> the Appeals Court held that an award reinstating employees who posted "harassing, vulgar, threatening, sexist and/or racist messages" on their union's website violated public policy. The arbitrator found no just cause because there was a lack of notice that the behavior could result in discharge. After finding that the first two prongs of the public policy test were met, the court ruled that the third prong was satisfied because of employer policies and collective bargaining provisions condemning racism and sexism, even though there was no evidence that any statute, regulation, rule or other source of positive law required termination for employees who engaged in such behavior. The case appears to be at odds with the more strict interpretation of the third prong in the published cases of the SJC and Appeals Court.

## B. The Nondelegability Doctrine<sup>116</sup>

### 1. Applying the Doctrine

The challenge that has resulted in the majority of vacated public sector labor arbitration awards in Massachusetts arises in the context of appeals that the award infringes on the nondelegable managerial rights of a public employer. The appeal may be presented as an argument (either before or after the arbitrator issues an award) that the grievance is not substantively arbitrable under G.L. c. 150C, § 2, or it can be brought post-award as a petition to vacate under G.L. c. 150C, § 11(a)(3) on the grounds that the arbitrator exceeded his or her powers. As mentioned above, it is the position of this article that the nondelegability doctrine is a special subset of a larger public policy exception, although the courts do not use the traditional three-pronged test to analyze these cases.

111. 451 Mass. 698 (2008).

112. *Id.* at 702 (the opinion was authored by Justice Margot G. Botsford).

113. *City of Boston v. Boston Police Patrolman's Ass'n*, 477 Mass. 434, 445 (2017).

114. In a collective bargaining context, such a list would need to be bargained by the employer and the union; otherwise, such a policy would presumably conflict with the CBA's just cause provision.

115. No. 10-P-2185, 2011 WL 4820026, \*1-3 (Mass. App. Ct.) (Rule 1:28 order).

116. The courts have used a number of different terms to describe what this article will refer to as the nondelegability doctrine: "nondelegable managerial prerogative" (*Dep't of State Police v. Mass. Org. of State Eng'rs & Scientists*, 456 Mass. 450, 455 (2010)); "nondelegable prerogative" (*Town of Billerica v. Int'l*

*Ass'n of Firefighters, Local 1495*, 415 Mass. 692, 694 (1993)); "nondelegable authority" (*Chief Justice for Admin. & Mgmt. of Trial Court v. Commonwealth Emp't Relations Bd.*, 79 Mass. App. Ct. 374, 388 (2011)); "nondelegability doctrine" (*Sheriff of Middlesex Cty. v. Int'l Bhd. of Corr. Officers, Local R1-193*, 62 Mass. App. Ct. 830, 833 (2005)); "nondelegable managerial authority" (*Sheriff of Middlesex Cty. v. Int'l Bhd. of Corr. Officers, Local R1-193*, 62 Mass. App. Ct. 830, 833 (2005)); "core managerial prerogatives" (*City of Worcester v. Labor Relations Comm'n*, 53 Mass. App. Ct. 106, 113 (2001) (2002)); "exclusive managerial prerogative" (*City of Lynn v. Labor Relations Comm'n*, 43 Mass. App. Ct. 172, 175 (1997)); "inherent management prerogative" (*City of Lynn v. Labor Relations Comm'n*, 43 Mass. App. Ct. 172, 182 (1997)); "nondelegable right of management" (*Sch. Comm. of Natick v. Educ. Ass'n of Natick*, 423 Mass. 34, 41 (1996)).

The courts have analyzed the scope of the authority of various types of public employers: school committees, school administrators, police commissioners, police chiefs, fire chiefs, mayors, quasi-public authorities and others. Although the details of the nondelegable authority may vary according to the applicable statutes and the nature of the job duties being performed, the general principle is the same: “An arbitrator exceeds his authority when his award requires conduct by a public employer beyond that to which the public employer may bind itself or allow itself to be bound.”<sup>117</sup>

Because of this doctrine, the arbitrator who accepts the plain language of the CBA as a controlling text does so at his or her peril. “Decisions which are in the zone of managerial authority are nondelegable and, to the extent subjects within that zone find their way into a collective bargaining agreement, the provisions of the collective bargaining agreement are not enforceable.”<sup>118</sup> Furthermore, “[t]he fact that the [public employer] agreed to arbitrate the grievance is of no legal consequence if the issue is beyond the authority of the arbitrator.”<sup>119</sup>

As the nondelegability doctrine has developed over the past half-century, the courts have adopted a case-by-case analysis that does not lend itself easily to categorization. Some cases adopt a helpful three-part analysis used by the Appeals Court in *City of Lynn v. Labor Relations Commission*,<sup>120</sup> a case brought under G.L. c. 150E. In *City of Lynn*, a union claimed that the City committed an unfair labor practice by forcing a firefighter into involuntary superannuation retirement without first bargaining with the union over the matter, which the union claimed was a mandatory subject of bargaining pursuant to G.L. c. 150E, § 6. The City, on the other hand, claimed that it acted pursuant to a nondelegable managerial right, which was not subject to collective bargaining. In analyzing the case, the Appeals Court collected and synthesized a wide variety of cases, some unfair labor practice cases under chapter 150E, but also a number of arbitration appeals made pursuant to chapter 150C, to arrive at three classifications:

- (1) When an employer acts under the authority of a statute, bylaw or regulation listed in G.L. c. 150E, § 7(d), the court found, “the employer’s freedom of action is always subject to collective bargaining in relation to the mandatory subjects listed in § 6, including wages and terms and conditions of employment.”<sup>121</sup>

- (2) “Where the public sector employer is operating under the authority of statutes that define in broad, general terms the employer’s management powers, the scope of exclusive management powers has been worked out on a case by case basis, with results not always easy to reconcile.”<sup>122</sup> In this category, which includes:

the majority of ... reported [cases], ... the inquiry has been directed towards defining the boundary between subjects that by statute, by tradition, or by common sense must be reserved to the sole discretion of the public employer so as to preserve the intended role of the governmental agency and its accountability in the political process.<sup>123</sup>

One rule of thumb expressed by the Appeals Court in making the case-by-case determination is that “substantive policy decisions are not to be dealt with by arbitration,” particularly where it would “defeat a declared legislative purpose.”<sup>124</sup>

- (3) The third category includes those few cases in which the governmental employer acts ... under the authority of a statute or law authorizing the employer to perform a specific, narrow function or, alternatively, acts with reference to a statute specific in purpose that would be undermined if the employer’s freedom of action were compromised by the collective bargaining process or by arbitration. Within this range of cases, ... the characterization of the subject matter as ‘compensation’ or ‘terms or conditions of employment’ will not require submission of the matter to the bargaining or arbitration processes if to do so ‘will defeat [ ] a declared legislative purpose.’<sup>125,126</sup>

Among the subjects commonly (with exceptions) found to be exempt from collective bargaining under the nondelegability doctrine are decisions about: substantive policy; job duties; level of services, including staffing levels; appropriations; appointments; and assignments. Many of the nondelegability doctrine cases have arisen in the context of public safety generally, and the BPD in particular. In *City of Boston v. Boston Police Superior Officers Federation*,<sup>127</sup> the court identified as nondelegable matters in the police context: “staffing

117. *Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth.*, 392 Mass. 407, 411 (1984).

118. *City of Boston v. Boston Police Superior Officers Fed’n*, 29 Mass. App. Ct. 907, 908 (1990).

119. *City of Boston v. Boston Police Patrolmen’s Ass’n, Inc.*, 41 Mass. App. Ct. 269, 270 n.3 (1996); see generally Shaw, *The Judiciary’s Efforts to Save Public Employers from the Bargains They Have Made: The Non-Delegability and Against Public-Policy Doctrines*, 28 Hofstra Lab. & Emp. L.J. 363, 379 (2011).

120. 43 Mass. App. Ct. 172 (1997).

121. *Id.* at 177.

122. *Id.* at 177-78 (citation and quotation omitted).

123. *Id.* at 178.

124. *Id.* (citations and quotations omitted). Although *City of Lynn* speaks in terms of statutory authority exclusively, at least some of the cases rely on the common law, not a statute, as the source of broad powers of nondelegable managerial authority. See, e.g., *Sch. Comm. of Boston v. Boston Teachers Union, Local 66, Am. Fed’n of Teach-ers (AFL-CIO)*, 378 Mass. 65, 70 (nondelegable authority may be “explicit or implicit in statute or decisional law, or ... neither”

[quotation and citation omitted]); see also *Town of Billerica v. Int’l Ass’n of Firefighters, Local 1495*, 415 Mass. 692, 694 (1993) (no statutory basis for nondelegability doctrine cited).

125. *City of Lynn*, 43 Mass. App. Ct. at 177–81. What the court in *City of Lynn* (and every other case applying the nondelegability doctrine) fails to address are the practical consequences of these decisions for unions. In no case that a bargained-for provision of the CBA is found to be unenforceable are the parties ordered back to the bargaining table so that the union can renegotiate its agreement. Presumably, the union gave up on other benefits or proposals in order to obtain the benefit that the court has declared unenforceable, yet while the public employer is relieved of its part of the bargain, the union remains obliged to follow the remainder of the CBA to the letter. The court’s failure to remedy (or even acknowledge) this asymmetry is puzzling.

126. For a rare case of an employee discharge that fits under *City of Lynn*’s third narrow-statute category, see *Dep’t of State Police v. Mass. Org. of State Eng’rs & Scientists*, 456 Mass. 450, 456 (2010) (G.L. c. 22C, § 9 (2016) gave the employer the nondelegable managerial authority to discharge a civilian chemist).

127. 29 Mass. App. Ct. 907, 908 (1990).

levels, assignments, uniforms, weapons and definition of duties.<sup>128</sup> A court found that an arbitrator could not order the Boston police commissioner to assign two officers to a police cruiser, despite an unambiguous CBA provision.<sup>129</sup> An arbitrator's award providing that certain mandatory overtime assignments were actually third-party paid details and should have been paid at the higher detail rate infringed on management rights,<sup>130</sup> as did an award prohibiting the BPD from removing an officer from an assigned position.<sup>131</sup> Sections of an interest arbitration award providing mandatory indemnification for civil suits and allowing officers to remain exempt from a residency requirement after being promoted to another bargaining unit were also struck down.<sup>132</sup> The SJC has also held that the Boston police commissioner has the nondelegable authority to transfer police officers within the BPD.<sup>133</sup>

The courts in the Boston police cases rely on a statute giving the police commissioner certain broad powers,<sup>134</sup> but the courts appear to interpret the scope of the statute as co-extensive with the common law nondelegability doctrine, at least as it applies to police departments. "Absent express statutory provision to the contrary, the power of assignment inheres by implication in the relationship of a police chief to the officers serving under his command."<sup>135</sup>

Another source of statutory authority, in the case of municipal police departments, is G.L. c. 41, § 97A, which was relied on in the recent case of *Town of Framingham v. Framingham Police Officers Union*.<sup>136</sup> The case affirms and clarifies the holding of *City of Boston v. Boston Police Superior Officers Federation*<sup>137</sup> that assignments of police personnel are excluded from collective bargaining by the nondelegability doctrine. In *Town of Framingham*, the Appeals Court enjoined an attempt to arbitrate the reassignment of a police officer from his position as a detective in the Framingham Police Department. Citing the powers of the police chief under G.L. c. 41, § 97A, the court ruled that assignment of officers and other aspects of deployment of law enforcement resources were excluded from the purview of arbitrators under the nondelegability doctrine. The court noted that, had detective been a rank instead of an assignment, the

removal would have qualified as a demotion — a type of discipline — and would be arbitrable under *Williams*.

Examples from other contexts show the breadth of the nondelegability doctrine. In the case of the *Massachusetts Bay Transportation Authority*, in which collective bargaining is governed by a statute that includes a comprehensive extensive management rights provision,<sup>138</sup> an arbitrator exceeded his authority by ordering that vacancies be filled by seniority.<sup>139</sup> A court also vacated portions of an interest arbitration award that restricted the percentage of part-time employees in relation to full-time and gave full-time employees preference in certain cases.<sup>140</sup>

Collective bargaining in the public schools exists within the framework of the Education Reform Act of 1993, and courts interpreting CBAs within the context of that law have found several grounds for vacating arbitration awards under the nondelegability doctrine. Most of these cases involve arbitral awards that arguably impinge on the employer's right to make specific appointment determinations and decisions to abolish positions. In *Higher Education Coordinating Council/Roxbury Community College v. Massachusetts Teachers' Ass'n/Massachusetts Community College Council*,<sup>141</sup> the court vacated that portion of an arbitrator's award that declared the existence of a vacancy and ordered the employer to appoint a specific individual to that vacancy. In *School Committee of Beverly v. Geller*,<sup>142</sup> discussed *supra*, a plurality of the SJC also found a statutory rationale for vacating the award. It read a provision of the enabling statute to require that any teacher who commits an offense listed there as just cause for termination must be terminated — the arbitrator has no discretion.

## 2. Exceptions to the Nondelegability Doctrine

Courts will not vacate every arbitration award that implicates nondelegable managerial prerogatives: even the exception has exceptions. The three most common reasons for some or all of an arbitrator's award being upheld in this context are: (1) the funding cases; (2) procedure, not substance;<sup>143</sup> and (3) damages, not equitable

128. See also *City of Boston v. Boston Police Superior Officers Fed'n*, 466 Mass. 210, 215-16 (2013) (involuntary transfers); *City of Boston v. Boston Police Patrolmen's Ass'n, Inc.*, 403 Mass. 680, 684 (1989) (number of officers in patrol cars); *City of Boston v. Boston Police Superior Officers Fed'n*, 52 Mass. App. Ct. 296, 299 (2001) (assigning officers to temporary duties); *City of Boston v. Boston Police Patrolmen's Ass'n, Inc.*, 41 Mass. App. Ct. 269, 272-73 (1996) (determining and assigning overtime); *City of Boston v. Boston Police Patrolmen's Ass'n, Inc.*, 8 Mass. App. Ct. 220, 226 (1979) (issuing firearms).

129. *City of Boston v. Boston Police Patrolmen's Ass'n, Inc.*, 403 Mass. 680 (1989).

130. *City of Boston v. Boston Police Patrolmen's Ass'n, Inc.*, 41 Mass. App. Ct. 269 (1996); see also *Town of Andover v. Andover Police Patrolmen's Union*, 45 Mass. App. Ct. 167, 170 (1998) (relying on G.L. c. 41, §§ 97, 97A (2016) to reach similar result).

131. *City of Boston v. Boston Police Superior Officers Fed'n*, 52 Mass. App. Ct. 296 (2001).

132. *City of Boston v. Boston Police Patrolmen's Ass'n, Inc.*, 48 Mass. App. Ct. 74 (1999).

133. *City of Boston v. Boston Police Superior Officers Fed'n*, 466 Mass. 210, 215 (2013).

134. St. 1906, c. 291, §§ 10 and 11, as appearing in St. 1962, c. 322, § 1.

135. *Town of Andover v. Andover Police Patrolmen's Union*, 45 Mass. App. Ct.

167, 170 n.7 (1998).

136. 93 Mass. App. Ct. 537 (2018).

137. 466 Mass. 210 (2013).

138. G.L. c. 161A, § 19 (2016).

139. *Mass. Bay Transp. Auth. v. Local 589, Amalgamated Transit Union*, 406 Mass. 36 (1989).

140. *Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth.*, 392 Mass. 407 (1984).

141. 423 Mass. 23 (1996).

142. 435 Mass. 223, 231 (2001).

143. As the Appeals Court pointed out in *City of Lynn*:

[W]hile an underlying decision may be reserved to the exclusive prerogative of the public employer under the public policy test, the public employer may be required to arbitrate with respect to ancillary matters, such as procedures that the employer has agreed to follow prior to making the decision; or, if the exclusive prerogative decision may be implemented in various ways, some touching on terms and conditions of employment, the public employer may be required to bargain about the impact of such decisions with the employee representative.

43 Mass. App. Ct. at 179-80 (citations and footnotes omitted).

relief.<sup>144</sup> The first exception involves job security (no layoff) clauses and minimum staffing provisions. In both cases, the courts have stated that if public employers agree to such provisions, notwithstanding their management rights, the provisions are enforceable during each year that they are funded by the legislative body of the employer.<sup>145</sup> This is contrary to the general rule that, if the parties sign a three-year CBA, funding a cost item in the first year binds the employer to fund all three years.<sup>146</sup> In the case of job security and minimum staffing, however, the employer is free to ignore the provision in the second and third years of the CBA unless there is a supplemental appropriation.

The procedure/substance distinction often arises in the public education context. The CBA may allow the employer to dismiss non-tenured teachers, or to remove teachers from certain specialized positions, without just cause. The Massachusetts courts have held that a public employer can agree to be bound by certain pre-termination procedures without impinging on its management rights.<sup>147</sup> “[T]he means of implementing managerial decisions, especially touching on compensation, may be the subject of an enforceable provision in a collective bargaining agreement.”<sup>148</sup> Furthermore, the remedy for such violations can include reinstatement and back pay. Presumably, the employer can then take the same action, providing it goes through the contractually bargained procedures first. A variation on this theme is the case in which an employer removed individuals from temporary promotional positions just before the CBA required that they begin to receive pay at a higher level.<sup>149</sup> The court found that was not an exercise of management rights but a subterfuge to avoid paying a collectively bargained benefit, and so let the arbitration award stand.

In the third exception, courts distinguish between types of arbitral remedies: equitable relief, such as ordering the employer to appoint, transfer, reinstate, remove, assign or otherwise change its way of doing business structurally (as opposed to monetarily), is more likely to implicate management’s authority, while money damages usually will not. An arbitrator could not order a teacher to be appointed to a position, but he could award damages for the CBA violation.<sup>150</sup> On the other hand, courts have overturned damages awards against public employers on the ground that the award would require the public entity to incur an expenditure for which there is no appropriation, in violation of state statute.<sup>151</sup> But this argument fails (and the award is upheld) when the award asks the

employer to pay monies due under a multi-year CBA, where the first year already has been funded.<sup>152</sup>

## V. THE WILLIAMS CASE AND PUBLIC POLICY

The recent history of labor arbitration in Massachusetts is marked by a clash of competing public policies. On the one hand, the courts continue to aver that a strong public policy favors resolution of collective bargaining disputes through final and binding grievance arbitration by a neutral who is an expert in the law of the shop, without interference from the judicial branch. But every case that brings another type of employer decision within the ambit of the nondelegability doctrine pushes back against this pro-arbitration policy, and, beginning in 2005, arbitrators’ decisions have also been overturned on the basis of the public policy exception. The Massachusetts appellate courts have seemed more and more willing to “save public employers from the bargains they have made.”<sup>153</sup>

In light of this trend, the *Williams* case stands out as a signal that the public policy in favor of public sector labor arbitration, while certainly in tension with other public policies, remains the cornerstone of judicial review. In *Williams*, the SJC had an opportunity to address both the traditional public policy exception and the nondelegability doctrine in the context of the discharge of a public safety employee. In mounting its appeal, the City of Boston argued first that the arbitration award impinged on the nondelegable authority of the police commissioner to determine when an officer had used excessive force against a citizen and to determine the level of discipline to impose on that officer. Second, the city argued that the arbitration award ordering the reinstatement of Williams violated a well-defined public policy against the use of excessive force and untruthfulness. Relying on *DiSciullo* and *Docanto*, the city claimed that Williams had engaged in felonious misconduct, and, therefore, pursuant to the statute prohibiting felons from becoming police officers, public policy required his discharge.

The SJC disposed of the public policy challenge by noting that the arbitrator found that Williams had not used excessive force or lied under oath, and so there was no felonious misconduct and the third prong of the three-part test could not be satisfied. In many ways, this result was not much different than that in *City of Lynn v. Thompson* or *O’Brien v. New England Police Benevolent Ass’n, Local 911*.

The court also disposed of the nondelegability argument on the grounds that the arbitrator’s findings of fact contradicted the city’s

144. On this point, the Appeals Court in *City of Lynn* states:

[E]ven where the decision in question lies within the exclusive managerial prerogative of the governmental employer, a collective bargaining agreement may provide for, and an arbitrator may order, compensation to employees affected by the decision.

43 Mass. App. Ct. at 180 (citations and footnotes omitted).

145. *Town of Billerica v. Int’l Ass’n of Firefighters, Local 1495*, 415 Mass. 692 (1993) (minimum staffing levels); *Sch. Comm. of Boston v. Boston Teachers Union, Local 66*, 395 Mass. 232, 236-37 (1985) (job security clause); *Town of Saugus v. Newbury*, 15 Mass. App. Ct. 611, 614-15 (1983) (no layoff clause).

146. *Boston Teachers Union, Local 66 v. Sch. Comm. of Boston*, 386 Mass. 197 (1982).

147. *Sch. Comm. of West Springfield v. Korb*, 373 Mass. 788 (1977).

148. *City of Boston v. Boston Police Superior Officers Fed’n*, 29 Mass. App. Ct. 907, 908 (1990).

149. *Id.*

150. *Higher Educ. Coordinating Council/Roxbury Cmty. Coll. v. Mass. Teachers’ Ass’n/Mass. Cmty Coll. Council*, 423 Mass. 23 (1996).

151. *See Boston Teachers Union, Local 66, Am. Fed’n of Teachers (ALF-CIO) v. Sch. Comm. of Boston*, 370 Mass. 455 (1976).

152. *Boston Teachers Union, Local 66 v. School Comm. of Boston*, 386 Mass. 197 (1982).

153. Shaw, *The Judiciary’s Efforts to Save Public Employers from the Bargains They Have Made: The Non-Delegability and Against Public-Policy Doctrines*, 28 HOUS-TRA LAB. & EMP. L.J. 363, 379 (2011).

position that Williams had used excessive force and lied. But the court went on to discuss the broader question raised by the city's appeal, that is, does the nondelegability doctrine encompass a police commissioner's determinations that a police officer committed misconduct or the level of discipline to impose upon such a determination? The answer was an emphatic "no." The SJC held unambiguously that matters of discipline and discharge, like wages and compensation, were core subjects of collective bargaining, and could not be brought under the umbrella of the nondelegability doctrine without serious damage to the collective bargaining rights granted to public employees by G.L. c. 150E.

After a series of decisions in which the nondelegability doctrine appeared to gobble up provisions benefiting employees in CBAs (and arbitration awards interpreting those provisions), *Williams* states clearly and unambiguously that the doctrine has limits. Many questions remain about the scope of the nondelegability doctrine, but the *Williams* decision establishes some clear guidelines for both labor and management advocates. If we can detach the *Williams* case from the national debate about the use of excessive force and choke holds by police and focus on the legal principles underlying the decision, it becomes clear that public sector labor arbitration remains a vital process for resolving disputes between public employers and the unions representing their employees.

## VI. CONCLUSION

While labor and employment lawyers are often lumped together, the issue of arbitration is one that divides them. Lawyers representing non-union employees often see arbitration as the enemy: forced arbitration of employment disputes can give employers an unfair advantage and deprive employees of rights (including trial by jury) and benefits (including certain types of damages and attorneys' fees) that they would be entitled to in a judicial forum. Lawyers representing unions, on the other hand, generally prefer the arbitral forum. Labor arbitration is normally faster and cheaper than litigation in the courts, and, as the *Steelworkers Trilogy* acknowledged, an experienced labor arbitrator is more qualified than a judge to resolve workplace disputes.

The idea is that labor arbitration is final and binding. The parties accept the results, even if the arbitrator is wrong on the law and the facts, because finality has its own value. But from the very beginning, the courts and legislatures were reluctant to give labor arbitrators carte blanche to do anything they wanted. Both the *Steelworkers Trilogy* and G.L. c. 150C recognize that there may be situations in which a court should step in to vacate a labor arbitration award. The question that the Massachusetts courts have grappled with since the 1970s is where to draw the line: how much should courts intervene in the dispute resolution process that was negotiated by the parties? The two public policy exceptions are the battlegrounds on which labor and management have been fighting this tug of war.

In the case of public sector employers — particularly in the public safety context — the courts have shown a willingness to become very involved with the process, to save public employers from the bargains they have made, by finding that certain negotiated agreements are null and void because they impinge on the inherent management rights of the public employer. As noted above, when a court essentially writes a CBA provision out of the agreement, it makes no effort to correct the bargaining imbalance that this creates. In the give and take of collective bargaining negotiations, the union likely gave up other goals or made concessions in order to get the benefit that the court just invalidated, yet the court's cases fail to correct

for the unfair advantage thereby created. The lesson for unions is clear: beware of employers bringing gifts of nondelegable rights to the bargaining table. Do not give up anything to get an unenforceable CBA provision.

Future cases will continue to flesh out which areas are core subjects of collective bargaining, such as wages and discipline, and which are nondelegable management rights. It would make sense for the courts to interpret the scope of the nondelegability doctrine in reviewing labor arbitration awards consistent with the review of the bargaining obligation under chapter 150E. The synthesis of arbitration and chapter 150E cases provided by the Appeals Court in *City of Lynn* provides a workable framework that can provide predictability for practitioners in the area.

In the case of the public policy exception, the key is how strictly or broadly the courts interpret the third prong of the three-part test. The *DiSciullo* case should be interpreted narrowly to hold that, where a policy explicitly mandates termination of employees who engage in certain misconduct, an arbitration award reinstating that employee violates public policy. In *DiSciullo* and *Docanto*, that policy was embodied in a statute prohibiting felons from becoming police officers. Because the facts found by the arbitrators in those cases made out the elements of various felonies, the courts found the rare case in which public policy required vacating the awards.

The SJC should not follow the dicta in recent cases that would loosen the third prong to allow vacating arbitration awards based solely on the seriousness of the misconduct. This is exactly what the third prong of the test was designed to avoid. The better course is to follow a bright line test: if the public policy does not explicitly require termination as the sole remedy for the misconduct, then the award must be confirmed. Most public policies that apply to public employees encourage progressive discipline, rehabilitation, treatment and other forms of punishment less than termination for nearly every type of misconduct. The statute prohibiting felons from becoming police officer is the rare case of a no-exceptions policy.

It is the opinion of this article that labor-management relations would be improved if fewer arbitration awards were appealed under G.L. c. 150C. Now that the parties have a better sense of the outlines of the nondelegability doctrine, they should be in a better position to avoid bargaining unenforceable provisions into CBAs. If the courts establish a bright line test for the public policy exception — limiting it to cases in which a policy explicitly requires discharge for a particular offense — then parties dissatisfied with the results of an arbitration will be less likely to prolong the process through lengthy and expensive litigation over discharges.

Collective bargaining is a unique process in that it is designed to function outside the normal judicial processes. Arbitration of collective bargaining disputes is designed to work best without court interference. Parties submit their cases to a neutral expert, accept the results and move on. If they have a problem with the decision, the ideal solution is to address the issue at the bargaining table, in the give and take of the collective bargaining process. Resorting to the courts to resolve labor disputes should be a rare event, but court decisions that encourage dissatisfied parties to appeal arbitration awards have upset the balance anticipated by the *Steelworkers Trilogy* and the drafters of chapters 150E and 150C. It is the hope of this article that decisions like *Williams* and *City of Pittsfield* will signal to management and labor alike that judicial deference to arbitration awards remains the rule and the exceptions will remain just that: exceptions.

# SEXUAL HARASSMENT IN EDUCATION IN MASSACHUSETTS: ARE SCHOOLS, COLLEGES AND UNIVERSITIES STRICTLY LIABLE FOR THE CONDUCT OF THEIR STAFF?

By Justice John M. Greaney and Jeffrey E. Poindexter

## I. INTRODUCTION

It has been only a year since the #MeToo movement first hit the national stage. In that short span of time, famous entertainers, media moguls and political figures are in disrepute. It is a new moment. The nation has turned a page on how it responds to allegations of sexual assault and harassment. Claims that could have been brushed off in the not-too-distant past may now mean the end of a career.

Schools, colleges and universities are not immune to the problem of sexual harassment and assault. As the #MeToo movement reshapes public attitudes, it becomes increasingly clear that these institutions need to be prepared to investigate and defend claims of sexual harassment and assault, and they may face a legal landscape in which they are held strictly liable for assault and harassment occurring with their institutions.

Three Massachusetts cases are illustrative of the issue:

- The male athletic director of a Massachusetts community college was reported to have provided alcohol to female students in exchange for sexual favors.<sup>1</sup> Several years later, more complaints about his behavior led the college to implement a policy to prevent sexual harassment.<sup>2</sup> Reports of further inappropriate conduct led to an investigation, ultimately leading to an agreement, in 1988, that he would no longer coach female athletic teams.<sup>3</sup> However, the athletic director continued to work at the school and eventually resumed coaching the women's basketball team.<sup>4</sup> Students who had been coached by the athletic director brought claims of sexual harassment against him and against the school.<sup>5</sup>
- During an investigation into the rape of a student by a teacher at a Massachusetts high school, it was disclosed that a male guidance counselor had been involved in sexual misconduct with students.<sup>6</sup> The superintendent of the school district acknowledged that he was aware of continuing reports about the guidance counselor's inappropriate relationships with students after a female



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student alleged that the counselor had brought her to his home on two occasions and attempted to coerce her into having sex.<sup>7</sup>

- Parents reported the inappropriate conduct of a male middle school science teacher to the vice principal and a guidance counselor.<sup>8</sup> The teacher had made inappropriate comments and touched female students, and had been told by school officials to stop on three occasions.<sup>9</sup> The teacher was fired after an internal investigation, but not before he allegedly molested an 11-year-old student.<sup>10</sup>

1. Morrison v. N. Essex Cmty. Coll., 56 Mass. App. Ct. 784, 787 (2002).

2. *Id.* at 788.

3. *Id.* at 788-89.

4. *Id.* at 789.

5. *Id.* at 792.

6. Doe v. Fournier, 851 F. Supp. 2d 207, 212 (D. Mass. 2012) (Ponsor, J.).

7. *Id.* at 212-13.

8. Doe v. Town of Hopkinton, No. 1281CV03399, WL 1553440 at \*2 (Mass. Sup. Ct. March 7, 2017) (Kazanjian, J.).

9. *Id.*

10. *Id.* at \*1.

These cases highlight the need for policies, and prompt discipline, in educational institutions to ensure that students are not subject to unlawful sexual conduct by teachers, counselors, coaches and other personnel. This article will discuss the laws that make Massachusetts educational institutions subject to liability for failing to prevent sexual harassment perpetrated against students and the critical, and currently open, question of whether schools, colleges and universities may face strict vicarious liability for the sexual misconduct of their staff against students.

## OVERVIEW OF STATUTES PROHIBITING SEXUAL HARASSMENT IN EDUCATIONAL INSTITUTIONS

Massachusetts General Laws (G.L.) chapter 151C, the Massachusetts Fair Educational Practices Act (MFEPA), provides students who have been subjected to sexual harassment by a teacher, coach, guidance counselor or other school personnel with a cause of action against the educational institution.<sup>11</sup> MFEPA declares that “[i]t shall be an unfair educational practice for an educational institution . . . [t]o sexually harass students in any program or course of study in any educational institution.”<sup>12</sup> The statute’s enforcement mechanism is through the Massachusetts Commission Against Discrimination (MCAD) (which applies only in the case of defined students<sup>13</sup>) or under G.L. c. 214, § 1C, which gives “[t]he superior court . . . the jurisdiction to enforce” the right to be free from sexual harassment, as defined in chapter 151C.<sup>14</sup> An aggrieved student who does not meet the definition of a plaintiff eligible to seek relief from the MCAD may pursue relief in court against an educational institution that has allowed offensive or inappropriate sexual conduct to occur or has failed to provide a student with an environment free from sexual harassment.<sup>15</sup> Sexual harassment is broadly defined by G.L. c. 151C, § 1(e) as:

any sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

(i) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services or as a basis for the evaluation of academic achievement; or (ii) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual’s education by creating an intimidating, hostile, humiliating or sexually offensive educational environment.<sup>16</sup>

*Morrison v. Northern Essex Community College* is the only reported Massachusetts appellate decision involving a claim under chapter 151C by students against an educational institution.<sup>17</sup> The case concerned two female athletes who alleged that they were sexually harassed by the male athletic director and basketball coach.<sup>18</sup> On the college’s motion, the Superior Court entered summary judgment against the plaintiffs, concluding that the action was barred by the statute of limitations.<sup>19</sup> The Appeals Court vacated the judgment and remanded for a determination of whether the period of limitations had been delayed due to the continuing nature of the alleged conduct.<sup>20</sup> The Appeals Court decision left open several questions about the application of chapter 151C, including whether consent, under certain circumstances, might be a factor in determining the liability of educational institutions,<sup>21</sup> whether peer-to-peer sexual harassment is actionable,<sup>22</sup> and, the subject of this article, whether educational institutions can be held strictly vicariously liable under G.L. c. 151C for sexual harassment.

Other causes of action are also available to victims of sexual harassment in a school setting.<sup>23</sup> An aggrieved student may bring constitutional claims against a school under 42 U.S.C. § 1983, when the school is a municipal entity, or under G.L. c. 12, §§ 11H-11J, the Massachusetts Civil Rights Act, which applies to private

11. G.L. c. 151C, § 2(g) (2018).

12. *Id.*

13. Enforcement by the Massachusetts Commission Against Discrimination (MCAD) is authorized directly by G.L. c. 151C, § 3(a) but only in narrow circumstances, namely cases where the plaintiff is “seeking admission as a student” or “enrolled as a student in a vocational training institution.” *Id.*

14. G.L. c. 214, §1C (2002) (allowing for “damages and other relief provided in the third paragraph of [G.L. c. 151B, § 9]”); see *Fournier*, 851 F. Supp.2d at 216 (“The proper vehicle for bringing claims of violations of § 2(g) by plaintiffs who do not fall under section 3(a) is G.L. ch. 214, § 1C”).

15. See *Morrison*, 56 Mass. App. Ct. at 786.

16. G.L. c. 151C, § 1(e) (2002).

17. 56 Mass. App. Ct. at 786.

18. *Id.* at 785.

19. *Id.*

20. *Id.* at 200.

21. The issue of consent, as a defense, was raised directly by a school district and another defendant in *Chancellor v. Pottsgrove School Dist.*, 501 F. Supp. 2d 695 (E.D. Pa. 2007), which involved a claim pursuant to Title IX. There, a former student at Pottsgrove High School brought suit against the defendant

and the high school principal. *Id.* at 698. The student, during her junior and senior years, had numerous consensual sexual encounters with the school’s male band director. *Id.* at 698-99. The plaintiff was 17 and 18 years of age during the relationship. *Id.*

The court rejected the defense of consent, concluding, based on the custodial and in loco parentis relationships between a school and its staff and its students, that consent could not be a defense as matter of law because the student, although not a minor, still lacked the legal capacity to consent. *Id.* at 712; see also *Fournier*, 851 F. Supp. 2d at 220 (holding open the possibility that consensual sexual relations with a student over the age of consent may constitute a substantive due process violation due to “[t]he inherent imbalance of power between a guidance counselor in a public school and a student [which] may render opportunistic sexual predation sufficiently shocking, even with a ‘consenting’ student over 16, to form the basis of a substantive due process claim”).

22. See *Harrington v. City of Attleboro*, 172 F. Supp.3d 337, 351-52 (D. Mass. 2016) (Casper, J.).

23. The exclusive remedy for sexual harassment in the workplace is G.L. c. 151B, see *Green v. Wyman-Gordon Co.*, 422 Mass. 551, 557-58 (1996), but no court has held that G.L. c. 151C is similarly exclusive. See *Rinsky v. Trs. of Bos. Univ.*, No. 10-cv-10779-NG, 2010 WL 5437289, \*7 (D. Mass. Dec. 27, 2010) (Gertner, J.).

institutions. The constitutional bases for such claims would be the right to bodily integrity or the right to equal protection.<sup>24</sup> A student may bring a Title IX claim of sexual harassment claim against an educational institution<sup>25</sup> that receives federal funding.<sup>26</sup> Other tort claims, such as negligent hiring, negligent supervision or negligent infliction of emotional distress, may also be brought against an educational institution that failed to provide a student with a learning environment free of sexual harassment.<sup>27</sup>

### FEDERAL LAW: LIABILITY UNDER TITLE IX

The federal counterpart of chapter 151C is Title IX. Enacted in 1972, Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>28</sup> To prevail on a claim under Title IX, a plaintiff must prove that the sexual harassment or misconduct occurred with actual knowledge and deliberate indifference on the part of an educational institution.<sup>29</sup> Sexual harassment can constitute sex discrimination under Title IX,<sup>30</sup> but, unlike G.L. c. 151C, the statute does not provide an explicit definition of sexual harassment. The United States Supreme Court, however, has determined that there are two different theories for possible recovery based on a claim of sexual harassment under Title IX:

One theory, popularly known as “quid pro quo” harassment or discrimination, occurs most often when some benefit or adverse action, such as change in salary at work or a grade in school, is made to depend on providing sexual favors to someone in authority; the other theory, under the rubric “hostile environment,” applies where the acts of sexual harassment are sufficiently severe to interfere with the workplace or school opportunities normally available to the work or student.<sup>31</sup>

The first case in which sexual harassment was recognized as sex discrimination actionable under Title IX was *Alexander v. Yale University* in 1977.<sup>32</sup> Reviewing an array of student and faculty claims related to sexually harassing conduct, the court held that some

directly harassing conduct could support a Title IX claim, concluding, “it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education . . . .”<sup>33</sup> After this decision, in the words of feminist legal scholar Catherine A. MacKinnon, “many steps forward in policy and culture commenced, as educational institutions reasonably recognized that they faced exposure to risk of loss — perhaps substantial liability, at least litigation — if they failed to address sexual harassment that occurred on their campuses.”<sup>34</sup> The progress was halted in 1998, however, by the Supreme Court’s imposition of a higher burden for plaintiffs suing an educational institution under Title IX in *Gebser v. Lago Vista Independent School District*.<sup>35</sup>

In *Gebser*, a female high school student and her parents sued the student’s school district, seeking monetary damages under Title IX for a teacher’s sexual harassment of the student.<sup>36</sup> The Supreme Court held that an implied private right of action for monetary damages under Title IX by reason of a school’s staff member’s sexual harassment of a student will not lie in the absence of: 1) actual notice on the part of the school district; and 2) a showing that the school district “fail[ed] to adequately respond” to the defendant’s conduct after actual notice of the conduct, and instead was “deliberately indifferen[t]” to the conduct.<sup>37</sup> The Court affirmed the grant of summary judgment in favor of the school district because the district lacked actual notice of the sexual relationship between the teacher and the student, and, therefore, could not have been deliberately indifferent.<sup>38</sup>

Since *Gebser*, an appropriate official of an educational institution must have actual knowledge of sexual harassment by its personnel in order for the institution to be held vicariously liable for sexual harassment under Title IX, and then only after acting with deliberate indifference toward the perpetrator of the harassment.<sup>39</sup> A finding of deliberate indifference requires that the indifference be “reckless or callous.”<sup>40</sup> “The causal link between supervisor action or inaction and subordinate wrongdoing must be tight: Deliberate indifference will be found only ‘if it would be manifest to any reasonable official that his conduct was very likely to violate an individual’s constitutional rights.’”<sup>41</sup>

24. See *Rinsky*, 2010 WL 5437289, at \*7.

25. 20 U.S.C. § 1681 (1986).

26. See *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65 (1st Cir. 2002).

27. The Massachusetts Tort Claims Act (MTCA) permits a plaintiff alleging sexual harassment to bring negligence claims against public entities. *Doe v. Bradshaw*, 203 F. Supp.3d 168, 186-88 (D. Mass. 2016).

28. 20 U.S.C. § 1681(a) (1986).

29. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

30. See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

31. *Willis v. Brown Univ.*, 184 F.3d 20, 25 (1st Cir. 1999) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986)); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

32. 459 F. Supp. 1 (D. Conn. 1977).

33. *Alexander*, 459 F. Supp. at 4.

34. Catherine A. MacKinnon, *Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2062-63 (2016), available at [http://www.yalelawjournal.org/pdf/h.2038.MacKinnon.2105\\_d85guon3.pdf](http://www.yalelawjournal.org/pdf/h.2038.MacKinnon.2105_d85guon3.pdf).

35. 524 U.S. 274, 289-90 (1998).

36. *Id.* at 278.

37. *Id.* at 290.

38. *Id.* at 291.

39. See *Id.* at 285 (“[W]e conclude that it would ‘frustrate the purposes’ of Title IX to permit a damages recovery against a school district for a teacher’s sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official.”).

40. *Doe v. Bradshaw*, 203 F. Supp. 3d 168, 178 (D. Mass., 2016).

41. *Id.* at 178 (quoting *Pineda v. Toomey*, 533 F.3d 50, 54 (1st Cir. 2008)).

In *Morrison*, the Appeals Court commented on the considerations behind the Supreme Court's *Gebser* decision to require actual knowledge:

In *Gebser*, the court concluded that, under Title IX, the “funding recipient” must have actual notice of discriminatory behavior before being required to take remedial action. The court distinguished between Title IX, which conditions Federal funding on an educational institution's promise not to engage in discriminatory behavior, [and] Title VII, which creates an outright prohibition against discriminatory behavior. The court also observed that Title IX encompasses an implied private right of action for monetary damages, while Title VII encompasses an explicit private right of action for monetary damages.<sup>42</sup>

The difficult standard stated in *Gebser* severely limits the ability of plaintiffs to recover against educational institutions by restricting their rights to recover damages when school officials are unaware of the sexual harassment taking place or when they act with less than prompt and complete remediation. As Justice John Paul Stevens explained in his dissent in *Gebser*, “[a]s long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability.”<sup>43</sup>

#### LIABILITY STANDARD UNDER CHAPTER 151C

With Title IX liability limited by the federal funding contingency, and further restricted by the difficult standard governing recovery, plaintiffs will look to state law to seek redress for sexual harassment in the school environment. Because enforcement by the MCAD is limited to cases of sexual harassment where the plaintiff is “seeking admission as a student” or “enrolled as a student in a vocational training institution,”<sup>44</sup> the most available direct remedy will be found in chapter 151C, section 2(g), which, by its terms, categorically prohibits “sexual harass[ment] of students in any program or course of study in any educational institution” and provides, as noted, a broad definition of the term “sexual harassment.”<sup>45</sup>

The immediate problem raised by G.L. c. 151C is whether, similar to Title IX, actual knowledge on the part of a school administrator

coupled with deliberate indifference to remedying the harassment is required or whether G.L. c. 151C imposes strict liability for the institution once the harassment is disclosed. The Supreme Judicial Court (SJC) has not yet provided an answer to this question and only three decisions — one state and two federal — have spoken about the problem, and then, only ambiguously.

In *Morrison v. Northern Essex Community College*, as discussed above, the principal issue was whether the G.L. c. 151C claim was barred by the applicable three-year statute of limitations.<sup>46</sup> The only reference to the standard for liability under chapter 151C was a footnote, where the court stated that “[w]e . . . do not address whether a chapter 151C claim against an educational institution requires that its administrators have knowledge of harassment perpetrated by its coaches or teachers, a requirement imposed on claims under Title IX.”<sup>47</sup>

The first federal decision to address the liability standard under G.L. c. 151C was *Doe v. Bradshaw*.<sup>48</sup> In *Bradshaw*, a school para-professional and soccer coach was accused of sexually abusing the plaintiff, and others, and it was alleged that school officials both knew about the sexual harassment and had failed to take appropriate action to correct it.<sup>49</sup> The plaintiff brought a variety of federal and state statutory and common law claims against the town, the school committee and school officials.<sup>50</sup> Among those claims were one under G.L. c. 151C, § 1(e), and one under G.L. c. 214, § 1C.<sup>51</sup> The plaintiff claimed that G.L. c. 151C and G.L. c. 214 imposed “strict vicarious liability on an educational institution for sexual harassment by any employee vested with authority to care for and/or supervise students.”<sup>52</sup> The defendants argued that the Title IX standard of actual knowledge and deliberate indifference on the part of a school administrator governed chapter 151C sexual harassment claims.<sup>53</sup>

Judge Douglas P. Woodlock denied a motion for summary judgment brought by the defendants.<sup>54</sup> He observed that the Appeals Court in *Morrison* had reserved the question of whether chapter 151C claims require that school administrators have knowledge of the harassment and there was no definitive guidance from the Massachusetts courts on the deliberate indifference versus strict liability standard.<sup>55</sup>

42. *Morrison v. N. Essex Cmty. Coll.*, 56 Mass. App. Ct. 784, 795 n.17 (2002) (citing and quoting *Gebser*, 524 U.S. at 280-90).

43. 524 U.S. at 300-01 (Stevens, J., dissenting).

44. *See supra* note 6.

45. G.L. c. 151C, §2(g) (2018).

46. 56 Mass. App. Ct. at 795

47. *Morrison*, 56 Mass. App. Ct. at 795 n. 17. A recent Superior Court decision, *Doe v. Town of Hopkinton*, applied the strict liability standard. In *Town of Hopkinton*, claims were brought by a student and her parents, who alleged that a teacher at the student's middle school assaulted her repeatedly. Although there was evidence introduced that there had been repeated reports of inappropriate conduct by the teacher that put the school on notice, and that the school had not responded adequately to that notice, the court did not conclude that proof

of the school's knowledge was necessary for an imposition of liability, but rather, held that “a school is strictly liable under c. 151C for the sexual harassment of a student by a teacher.” *Doe v. Town of Hopkinton*, No. 1281CV03399, WL 1553440 (Mass. Sup. Ct. March 7, 2017) (Kazanjan, J).

48. 203 F. Supp. 3d at 189.

49. *Id.* at 173.

50. *Id.* at 176.

51. *Id.* at 188.

52. *Id.* at 189-90.

53. *Id.* at 189-90.

54. *Doe v. Bradshaw*, 203 F. Supp. 3d 168, 192 (D. Mass., 2016).

55. *Id.* at 189.

Judge Woodlock then addressed the applicable standard of liability under a G.L. c. 151C claim.<sup>56</sup> He held that the legislature's intent could not be gleaned by "[t]he text of ch. 151C" or "the origins of the strict liability and deliberate indifference standards in related statutory schemes."<sup>57</sup> "Strict liability for the sexual harassment of agents does exist under chapter 151B, which prohibits sexual harassment in the workplace, and which, like chapter 151C, can support chapter 214 claims," the judge recognized.<sup>58</sup> "However, strict liability was found there based on statutory language present in 151B but not 151C," he observed.<sup>59</sup>

At the same time, Judge Woodlock found "the reasons for imposing a 'deliberate indifference' standard on Title IX sexual harassment claims [to be] equally inapplicable."<sup>60</sup> As he explained, "[t]he Supreme Court emphasized that a deliberate indifference standard was important because Title IX imposed quasi-contractual funding conditions rather than directly regulating behavior, making notice particularly important, and because liability from Title IX's implied remedies should not exceed that from its express remedies, where notice was required."<sup>61</sup> But, the judge noted, "[u]nlike Title IX, chapters 214 and 151C provide an express cause of action that is not couched as a funding condition."<sup>62</sup>

In light of his "obligation to predict what standard the state courts would apply," Judge Woodlock noted "that Justice Duffy, then speaking for the Appeals Court [in *Morrison*], while reserving the question, did dwell on the distinctions between Title IX and chapter 151C, indicating a discomfort with the deliberate indifference standard."<sup>63</sup> "Recognizing that discomfort," he decided to "apply a strict vicarious liability standard" at that stage of the litigation.<sup>64</sup>

The second federal decision was *Harbi v. Massachusetts Institute of Technology*.<sup>65</sup> *Harbi* was brought by a student who alleged sexual harassment by a professor while she was enrolled in an online course he was teaching.<sup>66</sup> Judge F. Dennis Saylor IV noted that it is "an unsettled question under Massachusetts law what the proper standard is for determining institutional liability for sexual harassment claims made pursuant to chapter 214, 1C, where those claims are defined by G.L. c. 151C."<sup>67</sup> Citing to *Morrison* and *Bradshaw*, Judge Saylor stated that he would defer consideration of MIT's claim that a deliberate indifference standard, rather than a strict liability standard, should apply to the trial stage of the litigation.<sup>68</sup>

## ARGUMENTS FOR AND AGAINST STRICT VICARIOUS LIABILITY

How might the SJC decide the open issue of the standard of liability under chapter 151C? There are a number of possible arguments for, and against, imposing strict vicarious liability, including the following.

One argument for strict liability is that subsection 2(g) of chapter 151C proscribes "sexually harass[ing] students in any program or course of study in any educational institution."<sup>69</sup> The language constitutes a categorical prohibition on educational institutions permitting sexual harassment of their students. An imposition of strict liability conforms to this prohibition and is supported by the application of principles of statutory construction.<sup>70</sup>

Second, the statute is intended to protect a vulnerable population from harm by those entrusted with their care. As such, it is entitled to a liberal interpretation in favor of the class it is designed to protect. Furthermore, school officials are in the best position to prevent and correct problems, and, as matter of public policy, it is sensible to subject schools to strict liability for sexual harassment of students by school employees vested with authority to care for and/or supervise students.<sup>71</sup>

Third, there is no reason to construe liability under chapter 151C differently from liability under chapter 151B. Statutory construction principles recognize the value of drawing on "the meaning that has settled on the same language in other legislation" and that such referencing is particularly appropriate "when the two statutes relate to the same class or persons or things or share a common purpose."<sup>72</sup> If strict liability for sexual harassment of an employee by a supervisor is appropriate under chapter 151B to protect employees, who are typically adults, it is certainly appropriate to impose strict liability in student sexual harassment cases when the harasser is a school employee vested with authority to care for and supervise students, who are often minors.

Finally, the liability standard from Title IX should not be applied to chapter 151C, because Title IX is only implicated where federal funding is involved, and, as the *Bradshaw* court noted, in the Title IX context, "[t]he Supreme Court emphasized that a deliberate indifference standard was important because Title IX imposed quasi-contractual funding conditions rather than directly regulating

56. *Id.*

57. *Id.*

58. *Id.* (citing *Coll.-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination*, 400 Mass. 156, 163-64 (1987)).

59. *Id.* (citing *Coll.-Town*, 400 Mass. at 163-64, and noting as an example its indication that "'G.L. c. 151B, § 4, prohibits discrimination by 'an employer, by himself or his agent.'").

60. *Doe v. Bradshaw*, 203 F. Supp. 3d 168, 189 (D. Mass., 2016).

61. *Id.* (citing *Gebser*, 524 U.S. at 286-90).

62. *Id.* at 189.

63. *Id.* at 190.

64. *Id.*

65. No. 16-cv-12394-FDS, 2017 WL 3841483 (D. Mass. Sept. 1, 2017) (Saylor, J).

66. *Id.* at \*1.

67. *Id.* at \*5 n. 2.

68. *Id.*

69. G.L. ch. 151C, § 2(g) (2018).

70. See *Terra Nova Ins. Co. v. Fray-Witzer*, 449 Mass 406, 418 (2007) (remedial statute is one "intended to address misdeeds suffered by individuals, rather than one that punishes public wrong").

71. See *Currier v. National Bd. of Med. Examiners*, 462 Mass. 1, 18 (2012) (remedial statute should be given liberal construction favoring intended purpose).

72. *Commonwealth v. Smith*, 431 Mass. 417, 420 (2000).

behavior, making notice particularly important, and because liability from Title IX's implied remedies should not exceed that from its express remedies, where notice was required."<sup>73</sup> Chapter 151C contains no such explicit notice requirement, nor is it conditioned on funding, but rather, it is framed as an express prohibition on sexual harassment in education.<sup>74</sup> In addition, Title IX's liability standard is not suited to the remedial purposes of chapter 151C.

Arguments against strict liability also rely on statutory construction and public policy. In regard to statutory construction, use of different language in chapter 151C and chapter 151B means they should be interpreted differently. "[C]anons of statutory construction teach[] that related statutes are to be construed together to produce a harmonious, systemic whole and that differences in language between such statutes must reflect different intended meanings."<sup>75</sup> Strict liability for sexual harassment of students, no matter the perpetrator, is poor public policy because it places too great a burden on educational institutions.

Second, as a matter of public policy, educational institutions, many of which must educate any and all students who wish to attend, should not be burdened with having to oversee all employee-student interactions to prevent sexual harassment from occurring.<sup>76</sup>

## CONCLUSION

While the liability standard under G.L. c. 151C remains unsettled, there is a significant possibility that schools, colleges and universities will be judged under a strict liability standard. In view of the remedial purposes of the statutory scheme, the SJC may impose strict liability when the harasser is a person with authority to care for and supervise students in order to protect students from sexual harassment and exploitation by those most readily positioned to prevent it — the educational institutions the students attend. As a result, it is advisable for all schools, whether or not they receive federal funding, to keep their sexual harassment, disciplinary and hiring policies up to date, to appropriately train and supervise their employees to protect students from the conduct prohibited under G.L. c. 151C, and to act quickly and decisively when faced with a complaint of sexual harassment to remediate any misconduct. To do otherwise is to violate the special relationship between vulnerable students and those who are mandated to protect them as part of the educational process.

73. *Bradshaw*, 203 F. Supp. 3d at 189.

74. G.L. ch. 151C, § 2(g) (2018).

75. *Martha's Vineyard Land Bank Comm'n v. Bd. of Assessors of W. Tisbury*, 62 Mass. App. Ct. 25, 30 (2005).

76. See *Luoni v. Berube*, 431 Mass. 729, 734-35 (2000); *Cremins v. Clancy*, 415 Mass. 289, 296 (1993) (O'Connor, J., dissenting) ("We owe to everyone a duty not to act in such a way as to put him or her at risk unreasonably, but ordinarily we do not owe others a duty to take action to rescue or protect them from conditions we have not created").

# CASE COMMENT

## Porting the Tort Law of Causation to Legal Malpractice

*Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass 111 (2017)

A legal malpractice claim arising out of litigation mistakes presents difficult issues regarding the concept of “proximate cause.” That is especially true when the attorney asserts judicial error as an intervening cause in defense of the client’s claim of negligence.

In negligence cases involving errors and omissions by professionals other than lawyers (doctors, accountants and financial advisors, for example), the factfinder hears evidence about the alleged mistake as well as expert testimony about the standard of care and then decides whether the negligence (if any) caused harm to the plaintiff. This paradigm works as well when a legal malpractice claim arises out of mistakes made by transactional lawyers. The question in each of these scenarios is whether this plaintiff, with this professional exercising the proper standard of care, would have achieved a better result.

But when the professional malpractice claim is based upon mistakes by a lawyer in litigation, the plaintiff must retry the case, adding yet another layer of complexity. “The new trier of fact does not attempt subjectively to determine what the earlier trier of fact would have done; neither the judge nor the jurors at the earlier trial may testify at the new trial as to what they would have done under different circumstances.”<sup>1</sup> “Rather, the new trier of fact makes an independent determination as to what reasonably would have been the outcome of the earlier trial in the absence of negligence, based on the applicable law and the evidence presented at the new trial.”<sup>2</sup>

Given the wide spectrum of results depending on the composition of the jury or the particular leanings or temperament of the judge, arbitrator or other trier of fact, this rule — known as the “trial within a trial,” imposes a nuanced burden on plaintiffs, while also often feeling, to the lawyer-defendants at least, as though their clients have a second chance of success with another, wholly different set of circumstances for which the lawyers now have to pay from their own coffers. The question in cases involving litigation errors is whether this plaintiff, with this professional but a different factfinder, would have achieved a better result.

But what if the judge made a mistake in the original case? That was the question in *Kiribati Seafood Company LLC v. Dechert LLP* (*Kiribati*).<sup>3</sup> Should the judge’s mistake not override the lawyer’s original error or omission? Is this not the proverbial Mack truck, crashing into the second car, demolishing both it and the first car, thus relieving the driver of the second car from liability for a fender bender? Is judicial error not a superseding cause of harm? Surely

lawyers do not have a duty to protect against judicial errors.

To quote the Ohio Court of Common Pleas in *Ohio Willow Wood Co v. Standby Law Group LLP*, decided while the appeal in *Kiribati* was pending, “Oh, if life were only so simple!”<sup>4</sup> In that case, the court “decline[d] to recognize any broad ‘judicial error’ defense that essentially could block every legal malpractice case when counsel’s mistake is later ratified by a trial judge.”<sup>5</sup>

The Supreme Court of Texas, in *Stanfield v. Neubaum*,<sup>6</sup> which also predates *Kiribati* and which the Massachusetts Supreme Judicial Court (SJC) later quoted in its decision, offered guidance as to when, in principle, judicial error might relieve attorneys from liability for legal malpractice, despite counsel’s litigation errors, and when it will not:

When a judicial error intervenes between an attorney’s negligence and the plaintiff’s injury, the error can constitute a new and independent cause that relieves the attorney of liability. To break the causal connection between an attorney’s negligence and the plaintiff’s harm, the judicial error must not be reasonably foreseeable. . . . Theoretically, it is always foreseeable that a judge might err in some manner, however, it is not typically foreseeable on what issues a judge will err and on what issues a judge will rule correctly. . . . But if the judicial error alleged to have been a new and independent cause is reasonably foreseeable at the time of the defendant’s alleged negligence, the error is a concurring cause as opposed to a new and independent, or superseding cause.<sup>7</sup>

These nuances in matters of causation were put to the test in *Kiribati*, one of the first cases in Massachusetts to delineate the role of judicial error as a defense to a legal malpractice case.

The procedural background of the underlying case is complex, primarily because the matter involved issues of international law, was litigated in the Commercial Court of Papeete in Tahiti, and ultimately appealed to the Court of Appeal of Papeete. The plaintiff, Kiribati Seafood Company (*Kiribati*), owned a fishing vessel leased to two other entities.<sup>8</sup> The vessel sustained damage to a rudder, but when the dry dock located in Tahiti to which the boat was ported for repairs collapsed, *Kiribati*’s insurer, Lloyd’s of London (Lloyd’s), determined the further damage to be a total loss.<sup>9</sup> *Kiribati* retained

1. *Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass. 111, 117 (2017).  
2. *Id.* (citing 4 Ronald E. Mallen, *Legal Malpractice*, § 33:8, at 677 (2017 ed.)).  
3. *Kiribati*, 478 Mass. at 111-12.  
4. *Ohio Willow Wood Co. v. Standley Law Grp. LLP*, No. 14CV-11292, 2017 Ohio Misc. LEXIS 1, \*12 (Ct. Com. Pl. Jan. 4, 2017).

5. *Id.* at \*13.  
6. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016).  
7. *Id.* at 99-100 (citations omitted).  
8. *Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass. 111, 112 (2017).  
9. *Id.*

Coudert Brothers to sue the port.<sup>10</sup> When the two attorneys handling the matter became partners at Dechert LLP (Dechert), Kiribati engaged Dechert.<sup>11</sup>

Lloyd's paid Kiribati \$1.76 million, which covered some, but not all, of the losses.<sup>12</sup> Thereafter Lloyd's, which had subrogation rights as a result of its payment to Kiribati, entered into a joint prosecution agreement with Kiribati, whereby the insured and insurer agreed to split counsel fees to recover from the port the full amount of the damages to the fishing vessel and attendant losses.<sup>13</sup> Disputes arose between Lloyd's and Kiribati over the fee-sharing agreement, as Kiribati contended it was paying more than its fair share, resulting, ultimately, in an assignment by Lloyd's to Kiribati of its right of subrogation and a release by Kiribati of Lloyd's of any claim for contribution.<sup>14</sup>

The Tahitian court entered judgment in favor of Kiribati, awarding it damages that included the full amount of the subrogation claim, approximately \$1.76 million.<sup>15</sup> The "Tahitian courts are part of the French legal system."<sup>16</sup> That commercial court ruled that the assignment between Lloyd's and Kiribati, two foreign entities, was valid under "foreign law," noting that the assignment said nothing about whether or not French law would apply.<sup>17</sup> The port then appealed the decision to the Court of Appeal of Papeete in Tahiti.<sup>18</sup> The port's principal argument on appeal was that Kiribati was seeking "double compensation" leading to "unjust enrichment" in violation of French law.<sup>19</sup> The court of appeals upheld the validity of the assignment under foreign law, but held that enforcement of the judgment against a French defendant (the port) must be determined under French law, which prohibits "double compensation of the same damages."<sup>20</sup> Accordingly, the court of appeals deferred its decision to allow Kiribati time to prove the amount it paid in consideration of the assignment from Lloyd's.<sup>21</sup>

After receipt of the appellate court's decision to defer its decision to allow Kiribati to produce additional evidence, Dechert sought, from an attorney in another law firm acting as Kiribati's general counsel, documentation of the consideration paid by Kiribati to Lloyd's in exchange for the assignment of Lloyd's subrogation rights.<sup>22</sup> In response, the attorney produced four documents to Dechert: (1) a letter he wrote demanding Lloyd's pay its equal share of legal fees together with documentation showing that Kiribati had paid more in legal fees than Lloyd's; (2) a release by Kiribati of all claims under the policy issued by Lloyd's; (3) correspondence identifying the claims released; and (4) an unsworn statement from

Lloyd's attesting that subrogation rights were assigned for valuable consideration, but declining to disclose the amount on the grounds of privilege.<sup>23</sup> Dechert submitted only the demand letter, but without the backup documentation of Kiribati's payments, and the unsworn statement that did not disclose the amount of the consideration.<sup>24</sup> As the SJC explained only at the end of the decision in *Kiribati*, Dechert withheld this information allegedly because of a confidentiality provision in one of the settlement agreements between Kiribati and Lloyd's that prevented disclosure of the agreement without Lloyd's approval, which Lloyd's had withheld.<sup>25</sup>

The port in the Tahitian appeal responded that Kiribati had failed to provide evidence of the attorneys' fees it had advanced that Lloyd's was required to pay.<sup>26</sup> Upon learning of the port's position, another of Kiribati's lawyers (at the firm acting as general counsel) re-sent Dechert the documents provided earlier and informed Dechert that it had to submit the payment records and the policyholder release to establish consideration from the assignment.<sup>27</sup> Dechert did not supplement the record.<sup>28</sup> In its final decision, the Tahitian court of appeals, finding that Kiribati had failed to provide evidence that it paid attorneys' fees Lloyd's was required to pay or released the insurer from claims Kiribati otherwise would have brought, reduced the award by the amount of the assigned subrogated claim.<sup>29</sup>

Kiribati could have appealed the decision of the Court of Appeal of Papeete to the Cour de Cassation in Paris, the French equivalent of the Supreme Court.<sup>30</sup> Dechert advised against that appeal, however, because of the time and expense involved, and the risk that the port might challenge the entirety of the ruling, resulting in suspension of enforcement of the award.<sup>31</sup> Based on that advice, Kiribati waived its right to appeal.<sup>32</sup>

Two years later, Kiribati sued Dechert in Massachusetts for its failure to submit the requisite evidence to the Court of Appeal of Papeete — evidence that Dechert had in its possession.<sup>33</sup> On cross-motions for summary judgment, each supported by experts in French law (although Kiribati's expert was disqualified), the motion judge held that judicial error superseded Dechert's negligence, relieving the firm of liability.<sup>34</sup> Based on an affidavit submitted by Dechert's expert in French law, the Massachusetts lower court determined that the Tahitian appellate court made a mistake when it ruled against Kiribati because Dechert had failed to prove on behalf of Kiribati that the judgment would not result in an impermissible double recovery.<sup>35</sup>

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 112-13.

14. *Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass. 111, 113 (2017).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 114.

20. *Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass. 111, 113-14 (2017).

21. *Id.*

22. *Id.* at 114.

23. *Id.*

24. *Id.*

25. *Id.* at 122-23.

26. *Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass. 111, 114 (2017).

27. *Id.* at 114.

28. *Id.* at 114-15.

29. *Id.* at 115.

30. *Id.*

31. *Id.*

32. *Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass. 111, 115 (2017).

33. *Id.*

34. *Id.* at 116.

35. *Id.*

The SJC, which transferred Kiribati's appeal on its own motion,<sup>36</sup> refused to adopt a blanket rule that judicial error excuses attorney negligence.<sup>37</sup> It imposed upon attorneys the obligation to take "reasonable and prudent steps," to forestall the judicial error where that judicial error could have been anticipated.<sup>38</sup> "Where the client can still prevail on the facts even if the court errs as to the law, the attorney is negligent where he or she fails to take reasonable steps to demonstrate to the court why the client still wins under the court's erroneous, but foreseeable, view of the law."<sup>39</sup>

Dechert's counter argument, on appeal, was a technical one.<sup>40</sup> The law firm asserted that, under the litigation malpractice paradigm — the trial within a trial — the new trier of fact would have to find, applying French law, that the Tahitian court was wrong because Kiribati should have prevailed without proof of consideration, and therefore judicial error, not the firm's negligence, was the proximate cause of the client's harm.<sup>41</sup>

In rejecting this analysis, the SJC enunciated the four criteria a legal malpractice defendant must satisfy to establish that his negligence was not the proximate cause of his former client's harm: Quoting Ronald Mallen's treatise *Legal Malpractice*,<sup>42</sup> the court held that "[a] superseding cause in legal malpractice '(1) must have occurred after the original negligence; (2) cannot [be] the consequence of the attorney's negligence; (3) created a result that would not otherwise have followed from the original negligence; and (4) was not reasonably foreseeable."<sup>43</sup> When the attorney can establish each of those criteria, the judicial error will be deemed a "new and independent cause" eliminating the "causal connection" between the negligence and harm.<sup>44</sup> However, where the judicial error was foreseeable, and the attorney fails to take mitigating measures, then the judicial error — the intervening cause — becomes a "concurring cause,"<sup>45</sup> that does not absolve the attorney of liability.

In an unusual move, the court, rather than remand the case to the trial court, entered summary judgment in Kiribati's favor, finding it could do so because its review of a motion judge's decision on summary judgment was "de novo."<sup>46</sup> It made the factual determination based on the motion papers that Dechert was so plainly negligent, no expert testimony was required.<sup>47</sup> While finding it "perfectly reasonable" for Dechert to believe that under French law it need not prove the consideration Kiribati paid for the assignment of Lloyd's subrogation rights, it was "plainly unreasonable" for Dechert not to simultaneously head off an adverse ruling by providing the very documentation the Tahitian court erroneously was requiring the client to produce.<sup>48</sup> The SJC rejected Dechert's interpretation of the

settlement agreement with Lloyd's, finding that none of the provisions cited by Dechert barred disclosure of the agreement in the Tahitian litigation.<sup>49</sup>

Finally, the SJC addressed the duty of the client to mitigate damages, a burden, it held, that falls to the lawyer-defendant to prove.<sup>50</sup> The court posited that in some cases, a client might be obligated to appeal a ruling to correct an error of law as a mitigation measure, but, as Dechert itself recommended against a further appeal, Dechert would be unable to establish that Kiribati acted unreasonably in failing to do so.<sup>51</sup>

The SJC's grant of summary judgment in Kiribati's favor on appeal raises some questions and reflects the difficulties of the "trial within a trial" paradigm when applied to this case. The appellate briefs reflect that Kiribati paid less than \$1.76 million to acquire an assignment from Lloyd's of its right of subrogation. Shouldn't the jury or trial judge have decided whether, assuming the Tahitian Court of Appeals was wrong on the law in insisting upon proof of consideration, submission of the evidence Dechert chose not to submit would, in fact, have caused that court to rule in Kiribati's favor? Alternatively, should the trial judge or jury determine, on remand in the context of a "trial within a trial" in which an erroneous application of the law is presumed, whether the consideration was sufficient to allow Kiribati to recover the additional \$1.76 million? The SJC, without any expert testimony about either the standard of care or causation, made its own finding that, had Dechert submitted the requested evidence, Kiribati would have recovered the \$1.76 million on its subrogation assignment.

*Kiribati* is relatively new law in Massachusetts, and it remains to be seen how lawyers and courts will parse the concepts of "intervening cause," "new and independent cause," "concurring cause" and "superseding cause" in the context of legal malpractice in this jurisdiction. On one hand, the procedural machinations of the case through the Tahitian court system make this case complex and sui generis; on the other, the facts that propelled the SJC to enter summary judgment in Kiribati's favor on appeal were simple. The Tahitian court asked Dechert for information, and Dechert declined to provide it, even though the firm had that information in its possession. Without necessarily stating so explicitly, the court seemed to borrow, from basic tort law, the notion of "last clear chance" to avoid the train wreck a tortfeasor sees coming.

— Jessica Block

36. *Id.*

37. *Id.* at 120-23.

38. *Id.* at 118-19.

39. *Id.* at 118.

40. Although not explicitly discussed in the decision, Dechert's argument in its appellate brief was that its negligence, if any, was irrelevant because the Court of Appeal of Papeete was wrong from the outset in imposing a requirement to prove consideration.

41. *Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass. 111, 119-20 (2017).

42. 1 Ronald E. Mallen, *Legal Malpractice* § 8:25 at 1049 (2017).

43. *Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass. 111, 120 (2017).

44. *Id.*

45. *Id.* at 120-21.

46. *Id.* at 116.

47. *Id.* at 122.

48. *Id.*

49. *Kiribati Seafood Co. LLC v. Dechert LLP*, 478 Mass. 111, 123 (2017).

50. *Id.* at 123-24.

51. *Id.* at 124.

# CASE COMMENT

## Religion in the Public Square

*Caplan v. Town of Acton*, 479 Mass. 69 (2018)

The Town of Acton, home to about 24,000 residents, sits just inside Route 495 about 30 miles northwest of Boston. Founded in 1735, the town's rich history includes the heroic actions of Isaac Davis, who led Acton's contingent of Minutemen at the battle of Lexington and Concord and was killed at North Bridge during the fight. A monument to Davis stands in the middle of the Acton Centre Historic District, a small area that has served as the town center since its founding.<sup>1</sup> Nearby in the district are the Acton Town Hall, the library, the Acton Congregational Church and the John Fletcher and Abner Hosmer Houses, which, like the church itself, date from the mid-19<sup>th</sup> century.

Today, the church is an active affiliate of the United Church of Christ with a congregation of more than 800 members.<sup>2</sup> According to its mission statement, it seeks "to preach and teach the good news of the salvation that was secured for us at great cost through the life, death and resurrection of Jesus."<sup>3</sup> The main church building is "used for worship services and religious educational programs; it also houses a local daycare center, meeting spaces for various community groups, and a thrift shop. The two houses . . . originally were private residences but were later acquired by the church and are now rented to local families."<sup>4</sup>

Time took its toll on the church and the nearby buildings, and, at some point, it found itself with insufficient funds to make needed repairs and restorations. As a result, it filed with the town's Community Preservation Committee two applications for restoration funding. One application, in the amount of \$49,500, was to fund creation of a master plan for historic preservation of the church and the two adjacent buildings. The other, in the amount of \$51,000, was for restoration of stained-glass windows in the main church building.<sup>5</sup> The windows had a distinctly religious focus. One depicted Jesus and a kneeling woman, and another featured "a cross and the hymnal phrase, 'Rock of Ages Cleft for Me.'"<sup>6</sup> The restoration work was designed to seal the windows to prevent further deterioration, but also to install new glazing so that the windows would have "complete transparency" and could be appreciated outside the church itself.<sup>7</sup>

In its applications, the church stated that it could not make the window restorations or complete a master plan with its own funds because, as the church explained,

mainstream churches have not been growing for years, and the financial strain is significant. [The church] has weathered the storm better than many churches, but the reality is that we have had to cut programs and personnel. The cuts can further exacerbate the financial problem by not offering the congregation what draws them to their church.<sup>8</sup>

Accordingly, it turned to the Community Preservation Committee.

The committee, like its counterparts elsewhere, is a creature of the commonwealth's Community Preservation Act,<sup>9</sup> which allows municipalities to create local funds for preservation of historic resources. Monies in the fund come from surcharges on local property taxes and disbursements from a commonwealth trust fund that holds the proceeds of surcharges on all real estate transactions recorded at the commonwealth's registries of deeds.<sup>10</sup> After evaluating funding applications it receives, the committee makes recommendations to the Town Meeting regarding whether the applications should be granted or denied. The Town Meeting has the final say.

The committee recommended approval of the church's applications and, with certain restrictions, the Town Meeting, having been warned that the proposed "work will protect the stained-glass windows, an integral part of the church's historical significance,"<sup>11</sup> agreed. Before the grants were actually made, however, George Caplan and 13 other Acton taxpayers, acting pursuant to Massachusetts General Laws (G.L.) c. 40, § 53 and invoking the anti-aid amendment to the Massachusetts Constitution,<sup>12</sup> sought a preliminary injunction to prevent disbursement of the funds. A judge of the Superior Court denied their request.

Advancing two principal arguments, the plaintiffs appealed. First, they argued that the anti-aid amendment absolutely prohibits grants of Community Preservation funds to religious institutions. Secondly, they argued, if the amendment left some room for grants to religious institutions, the Superior Court judge used the wrong analysis to decide how much room there was. On appeal, the parties were joined by six amici, one of whom<sup>13</sup> supported the plaintiffs' claim regarding the anti-aid amendment's absolute prohibition and the other five of whom<sup>14</sup> took more nuanced positions.

The Supreme Judicial Court affirmed the judge's denial of a

1. *Caplan v. Town of Acton*, 479 Mass. 69, 72 (2018).

2. *Id.* at 71-72.

3. *Id.* at 72.

4. *Id.*

5. *Id.* at 73.

6. *Id.*

7. *Caplan v. Town of Acton*, 479 Mass. 69, 73 (2018).

8. *Id.*

9. G.L. c. 44B (2016).

10. *Caplan*, 479 Mass. at 72 n.3.

11. *Id.* at 100 (Kafker, J., concurring).

12. MASS. CONST. amend. art. XVIII, § 2, *amended by* MASS. CONST. amend. art. XLVI, CIII.

13. American Civil Liberties Union (ACLU) and ACLU of Massachusetts.

14. The Attorney General; the Becket Fund for Religious Liberty; the Massachusetts Municipal Law Association and Community Preservation Coalition; the National Trust for Historic Preservation; and the Boston Preservation Alliance, Historic Boston Incorporated, Historic New England, North Bennet Street School, and Preservation Massachusetts.

preliminary injunction with respect to the master plan but reversed with respect to the stained-glass windows and, on remand, allowed circumscribed discovery into the reasons underlying the committee and Town Meeting approval of the church's application. To get there, the court issued three separate opinions: one by Chief Justice Ralph D. Gants for himself and Justices Barbara A. Lenk, David A. Lowy and Kimberly S. Budd; one by Justice Scott L. Kafker for himself and Justice Frank M. Gaziano; and a dissent by Justice Elspeth B. Cypher. Read separately and collectively, the decisions illustrate the difficult problems that almost invariably arise when state action affects religious institutions.

Chief Justice Gants began by rejecting the plaintiffs' claim that the anti-aid amendment contained an absolute prohibition on any state funding that benefitted any religious institution, a rejection with which all seven justices agreed. In doing so, he traced the amendment's evolution beginning with art. 3 of the original Declaration of Rights. Adopted in 1780, Article 3 expressly permitted public support of religion, though that support was effectively limited to the Congregational Church.<sup>15</sup> The limitation led to considerable strife throughout the commonwealth and, as a result, Article 3 was amended in 1833 to provide equal protection to "all religious sects and denominations."<sup>16</sup> A statute enacted the following year provided that no citizen could be taxed to support "any parish or religious society whatever, other than to that of which he is a member."<sup>17</sup>

Those limitations, however, did not end extensive battles over religious claims to public monies, particularly monies to support religious educational institutions. In 1855, the extent and energy of those battles, which had been exacerbated by waves of Irish immigration and proliferation of Roman Catholic schools, led to adoption of Article 18 of the amendments to the constitution. Article 18 prohibited expenditure of "moneys raised by taxation in the towns and cities for the support of public schools" unless the schools were conducted "under the order and superintendence of the authorities of the town or city in which the money is to be expended."<sup>18</sup>

Nevertheless, controversy persisted, producing both political strife and litigation. The latter led to an opinion of the justices issued in 1913 in which they all agreed that Article 18 prohibited expenditure of public monies for support of religious primary and secondary schools but did not prohibit expenditures for schools of higher education. Beyond that, the justices split, 4-3, "on whether Article 18 allowed appropriations to a church or religious denomination."<sup>19</sup>

Apparently, enough was enough, and in 1917 Article 18 was amended to provide expressly for "the free exercise of religion" and to prohibit any use of public money

for the purpose of founding, maintaining or aiding any

. . . infirmary, hospital, institution . . . or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the [c]ommonwealth or federal authority or both . . . [or] for the purpose of founding, maintaining or aiding any church, religious denomination or society.<sup>20</sup>

Those are the relevant provisions of the anti-aid amendment as it exists today and against which the parties in *Caplan* made their competing claims.

After canvassing that history, Chief Justice Gants rejected the categorical prohibition urged by the plaintiffs because, in his view, such an approach was inconsistent with the language of the anti-aid amendment. Moreover, he stated, a categorical approach of the kind the plaintiffs proposed ran the risk of violating the free exercise clause of the constitution, article 2 of the Massachusetts Declaration of Rights, and Article 1, § 1 of the anti-aid amendment itself.<sup>21</sup>

Instead, he employed three related criteria the court had used in determining the propriety of earlier applications of the anti-aid amendment, albeit in different contexts.<sup>22</sup> Slightly recast, the criteria were: "[1] whether a motivating purpose of each grant is to aid the church; [2] whether the grant will have the effect of substantially aiding the church; and [3] whether the grant avoids the risks of the political and economic abuses that prompted the passage of the anti-aid amendment."<sup>23</sup>

Having identified the appropriate criteria, Chief Justice Gants then applied them to the record. In considering the first of the three, he said that, while the grant on its face sought funds for historic preservation accompanied by conservation restrictions, some discovery was required to determine whether there was a forbidden "hidden purpose" underlying the application and award.<sup>24</sup> Applying the second factor, he concluded that the grants involved large amounts of money and would "substantially aid the church," both because of their size and because they would "help defray planning and restoration costs that the church would otherwise have to shoulder on its own, allowing the money saved to be used to support its core religious activities."<sup>25</sup>

Insofar as the third factor was concerned, he concluded that the grants presented a substantial risk of the political and economic abuses that had prompted passage of the anti-aid amendment. He thought that the funding, particularly of the stained-glass window restoration, risked adverse impacts on the liberty of conscience of the taxpayers who did not share the religious beliefs the windows depicted and raised the specter of excessive entanglement between government and religion because the grants contained town-enforced restrictions on post-restoration alteration of the windows.<sup>26</sup>

15. *Caplan v. Town of Acton*, 479 Mass. 69, 76 (2018).

16. *Id.*

17. *Id.* at 77.

18. MASS. CONST. amend. art. XVIII, § 2, *amended by* MASS. CONST. amend. art. XLVI, CIII.

19. *Caplan*, 479 Mass. at 79; *see In re* Opinion of Justices, 214 Mass. 599, 601 (1913).

20. *Caplan*, 479 Mass. at 82; MASS. CONST. amend. art. XVIII, § 2, *amended by* MASS. CONST. amend. art. XLVI. Art. XVIII was amended again in 1974, MASS. CONST. amend. art. XVIII, § 2, *amended by* MASS. CONST. amend. art. CIII, but the 1974 amendments are not material to the issues raised in *Caplan*.

21. *Caplan* 479 Mass. at 83-84.

22. *Commonwealth v. Sch. Comm. of Springfield*, 382 Mass. 665 (1981) (payments to private schools pursuant to G.L. c. 71B (2016), inserted by St. 1972, § 766); *Helmes v. Commonwealth*, 406 Mass. 873, 876 (1990) (grants made to a private foundation for rehabilitation and maintenance of the battleship *Massachusetts*).

23. *Caplan v. Town of Acton*, 479 Mass. 69, 71 (2018).

24. *Id.* at 87-88.

25. *Id.* at 89.

26. *Id.* at 91-93.

Finally, he concluded that

[g]rants for the renovation of churches — using funds that could potentially have been dedicated to open space, soccer fields, low-income housing, or other historic preservation projects, including projects for the renovation of houses of worship of other religious denominations — pose an inevitable risk of making ‘the irritating question of religion’ a politically divisive one in a community, the more so where those grants are for the renovation of a worship space or of a stained-glass window with explicit religious imagery.<sup>27</sup>

Justice Kafker, joined by Justice Gaziano, concurred but wrote separately to emphasize that application of the anti-aid amendment to the church was tightly controlled by the First Amendment’s Establishment and Free Exercise clauses. Noting that the grants were part of a “generally available public benefit program designed to promote community conservation” of historic buildings, Justice Kafker observed that the United States Supreme Court “has warned that only a very narrow category of exclusions are allowed by the free exercise clause from such generally available public benefit programs.”<sup>28</sup>

In his view, the anti-aid amendment contained greater Establishment prohibitions than those contained in the First Amendment but those prohibitions had implications for the First Amendment’s Free Exercise guarantees. Explaining, he wrote that “[t]o be excluded from a generally available public benefit program, the funding must be sought for an ‘essentially religious endeavor’ raising important state constitutional antiestablishment concerns.”<sup>29</sup>

Parting company with Chief Justice Gants on analysis of the first of the three factors, he concluded that the record sufficiently revealed “that conservation is the primary purpose of the grants... [and was devoid of] any indicia of a scheme or technique of circumvention.”<sup>30</sup> Remaining, however, was

the difficulty of separating conservation from religious purposes when the grant is being given to preserve a religious component of a church building. Even if the purpose of the grantors is conservation, and not the promotion of religion, it is obvious to anyone voting on the grants that both purposes would be served. [In his view, that was] particularly true for the stained-glass grant where the windows convey an express sectarian religious message.<sup>31</sup>

On the other factors, Justice Kafker essentially agreed with Gants, particularly in his establishment and entanglement analysis

of the stained-glass windows. Indeed, in Justice Kafker’s view, there are “‘few areas in which a state’s antiestablishment interests come more into play’ than paying for stained glass windows with sectarian religious symbolism.”<sup>32</sup> He therefore agreed with the remand order.

Justice Cypher dissented. Like her colleagues, she agreed that the three-part inquiry was applicable but she disagreed with the results they obtained and also disagreed with the notion that “grants of community preservation funds to active religious institutions warrant particularly ‘careful scrutiny.’”<sup>33</sup> Two overriding principles drove her analysis. The first was her view that, as the very existence of the Community Preservation Act implied, preservation of the commonwealth’s historic buildings was a critically important undertaking. She saw no reason for treating churches differently from any other building because “[h]istoric churches and meeting houses are, like secular historic buildings, an indispensable part of our historic landscape, and warrant the same degree of preservation.”<sup>34</sup> Indeed, “[d]uring Massachusetts’s early history, civic and religious life were in many ways one [and] the same. The meeting house — perhaps the most iconic feature of a ‘quintessential New England town’ — served as the center of gravity for both public administration and religious worship. . . . Colonial laws often required homes to be constructed within one mile of the meeting house.”<sup>35</sup> Given the historical significance of those buildings in those towns, she concluded, “we should be careful not to impose undue restrictions on their access to needed preservation funds.”<sup>36</sup>

If churches like the Acton Congregational Church are viewed as historical objects and not as current-day houses of worship, then, in Justice Cypher’s view, principles expressed by the Supreme Court of the United States in *Trinity Lutheran Church of Columbia Inc. v. Comer*<sup>37</sup> required that the church be treated no differently from any other applicant for community preservation funds. Her colleagues’ analysis, she stated, placed an “active congregation . . . at a distinct disadvantage when seeking funds under the [Community Preservation Act] — at least for purposes of a court’s anti-aid scrutiny of that building’s grant application — compared to historic religious buildings that are no longer active.”<sup>38</sup>

The thoughtful opinions just summarized illustrate the difficulty of applying the anti-aid amendment to an application for financial assistance made by a religious organization. The difficulty is not ameliorated by the three factors the court chose to use in determining whether the amendment permits a contested grant of assistance. Indeed, the third of those factors is a requirement for broad historical research and analysis rather than a decision-making tool. Moreover, the court’s decision-making is necessarily executed in the shadow of the First Amendment’s Establishment and Free Exercise

27. *Id.* at 93-94.

28. *Id.* at 96, (Kafker, J., concurring).

29. *Caplan v. Town of Acton*, 479 Mass. 69, 98 (2018) (Kafker, J., concurring).

30. *Id.* at 101.

31. *Id.*

32. *Id.* at 104 (quoting *Locke v. Davey*, 540 U.S. 712, 722 (2004)).

33. *Id.* at 107 (Cypher, J., dissenting).

34. *Id.*

35. *Caplan v. Town of Acton*, 479 Mass. 69, 112 (2018) (Cypher, J., dissenting).

36. *Id.*

37. 137 S. Ct. 2012 (2017).

38. *Caplan*, 479 Mass. at 111 (Cypher, J., dissenting). Interestingly, however, after engaging in that analysis, Justice Cypher wrote that if she were free to decide the case “without concern for our own precedent or the [ ] Supreme Court’s decisions,” she might well conclude, as did Justice Sonia M. Sotomayor in *Trinity Lutheran*, that the religion clauses of the First Amendment “separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government,” and thus that “government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship.” *Id.* at 107 n.2 (quoting *Trinity Lutheran Church of Columbia Inc. v. Comer*, 137 S. Ct. 2012, 2041 (2017) (Sotomayor, J., dissenting)).

clauses along with similar provisions of the commonwealth's constitution. And the truth is that no precise navigational principles ever provide a clear path to decision at the intersection of government and religion. As Justice Arthur Goldberg observed more than 50 years ago, there is at that intersection "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible."<sup>39</sup>

Here, the church's application raised serious questions under the Establishment and Free Exercise clauses of the First Amendment as well as questions that went to the heart of the anti-aid amendment. The difference between Justice Cypher and her colleagues turned principally on whether the stained-glass windows were viewed as historical objects or as components of religious worship. As historical objects, their preservation ensured that visitors to Acton's Historic District could see what villagers and travelers had seen as they walked through that district 150 years ago. So treated, they are little different from the religious statues in the main lobby of the John Adams Courthouse in downtown Boston, or the monument to the Ten Commandments on the grounds of the Texas State Capitol the Supreme Court let stand in *Van Orden v. Perry*.<sup>40</sup>

But they also are windows in an active church, a church in the midst of financial difficulties that made it difficult to "offer[] the congregation what draws them to their church."<sup>41</sup> Viewed as a draw to the congregation, the windows are frankly religious objects. As religious objects, they are perhaps beyond any governmental control or, as Chief Justice Gants noted, even if voluntarily cabined by governmental restrictions after restoration funding was provided, at least risked a constitutionally unacceptable level of governmental entanglement if the church later sought to alter them for religious reasons.<sup>42</sup> The decision-making difficulty, of course, arises because they are both secular and spiritual.

Compounding that difficulty is the increasing muscle both the congress and the Supreme Court of the United States have found in the First Amendment's Free Exercise clause. It is safe to say that, although it contains a free exercise provision, the anti-aid amendment was designed to serve what was in 1917 a widespread antiestablishment animus. At least on a national scale, times have changed, and, with the passage of the Religious Freedom Restoration Act of 1993 (RFRA)<sup>43</sup> and its full-throated endorsement by a Supreme Court majority in *Burwell v. Hobby Lobby Stores Inc.*,<sup>44</sup> Free Exercise

principles have gained power at least co-equal to that which the Establishment clause had long wielded.

The Court's decision in *Trinity Lutheran Church of Columbia Inc. v. Comer*<sup>45</sup> two terms ago added strength to Free Exercise principles on purely constitutional grounds. There, the Court ruled that the State of Missouri's denial of Trinity Lutheran's request for a state-funded playground surface for the nursery school it ran on church property violated the Free Exercise clause of the First Amendment. The state provided those playground surfaces to public and private schools, but rejected Trinity Church's application for one of them on grounds that the Missouri Constitution prohibited payments of state money "in aid of any church, sect or denomination of religion."<sup>46</sup> Application of that constitutional provision to Trinity Lutheran's playground request, the Court held, "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. . . . [S]uch a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny."<sup>47</sup> The state's action, it went on to hold, failed to survive that scrutiny.<sup>48</sup>

The stained-glass windows at issue in this case surely are more directly religious than the playgrounds at the center of *Trinity Lutheran*. But they are also historical objects with a value distinct from their value as religious icons. Particularly is that true in New England because of the role local churches have played in town and village affairs ever since the earliest New England settlements. Many of those churches remain active places of worship, while at the same time serving as places and structures of historical significance and current community identity. At the same time, and although the United States remains more religious than any other Western industrialized nation,<sup>49</sup> church membership is declining in many areas and, with the decline, revenues to maintain these historic sites are declining, too. But access to governmental funding to maintain those sites must navigate an increasingly narrow gap between impermissible establishment and prohibited discrimination. In the absence — indeed the impossibility — of clear guidelines or universal principles for navigating that gap, case-by-case analysis with the thoughtful, vigorous and informed discussion the court displayed in *Caplan* is the best outcome for which one can hope.

— James F. McHugh

39. Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). Of similar import is Justice Stephen G. Breyer's view that "the court has found no single mechanical formula that can accurately draw the constitutional line in every case." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring). In a similar vein, Justice David H. Souter, writing for the majority in a different case decided during the same term, observed that "Establishment Clause doctrine lacks the comfort of categorical absolutes." *McCreary Cty. v. Am. Civil Liberties Union*, 545 U.S. 844, 859 n.10 (2005).

40. 545 U.S. 677 (2005).

41. *Caplan*, 479 Mass. at 73.

42. *Caplan*, 479 Mass. at 91-93; see also *Soc'y of Jesus v. Boston Landmarks*

Comm'n, 409 Mass. 38 (1990) (dealing with the Landmarks Commission's decision to designate aspects of the interior of a church as a historic landmark, thus making any changes subject to commission approval).

43. 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb et seq. (2012)).

44. 134 S. Ct. 2751 (2014).

45. 137 S. Ct. 2012 (2017).

46. *Id.* at 2017.

47. *Id.* at 2021.

48. *Id.*

49. *Law and Religion: A Critical Anthology 2* (Stephen M. Feldman ed., 2000).

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