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CIVIL LITIGATION

A FEDERAL COURT'S RULING PRESENTS A NEW POTENTIAL FOR SUCCESS ON SUMMARY JUDGMENT IN NEGLIGENCE CASES WITH CAUSATION ISSUES

BY MARGARET J. PASTUSZAK

The United States District Court for the District of Massachusetts recently issued a decision that could impact defendants' strategic approach to summary judgment motions in negligence cases where there is a dearth of evidence on the issue of causation. This decision accentuates the possibility for success of summary judgment motions in negligence cases where there is little or no evidence relating to causation, which, to date, has been typically considered an issue of fact to be evaluated at the time of trial. In this case, *Donahue v. Maggiano's Holding Corp. d/b/a Maggiano's Little Italy Rest.,* No. 1:18-CV-10230-DPW, 2020 WL 730832 (D. Mass. Feb. 13, 2020) (Woodlock, J.), the court found that there "was insufficient evidence for the jury to find that Maggiano's caused" the plaintiff's injury and that negligence cannot be established "simply because there [was] an accident." This decision deviates from the general notion that issues concerning causation in negligence cases are questions of fact for a jury, and it establishes a precedent that summary judgment motions may be successful when the evidence proffered by the plaintiff at the summary judgment stage is clearly deficient.

The plaintiff in *Donahue* was a patron of the defendant's restaurant in the North End neighborhood of Boston and was injured while exiting the restaurant through its revolving door. The plaintiff was attending a dinner in honor of her 75th birthday and, after proceeding through the revolving door, found herself on the sidewalk outside of the restaurant, unable to explain exactly how she got there.

The plaintiff claimed that the revolving door was defective, and the only evidence she submitted in support of this claim was an expert's report that included the expert's finding that the door was properly functioning at the time of his inspection of it. This expert's report came under fire by the court because the court found there was no relevant or reliable evidence within it to support the contention that the door malfunctioned. Therefore, the court found that, as a matter of law, the plaintiff could not establish that the defendant caused the plaintiff's injury, thus allowing the defendant's motion for summary judgment.

Although the key disputes between the parties focused on the mechanics of the plaintiff's injury as well as the functionality of the revolving door, whether the door was properly functioning at the time of the incident became the decisive issue in this case. The dispute involving the mechanics of the injury revolved around the possibility of a young girl also being in the revolving door, and the contention was that the girl's pushing the door caused the door to hit the plaintiff, thus ejecting her onto the sidewalk. However, the court's decision found that, regardless of the mechanics of the injury, the plaintiff was unable to establish that there was a malfunction in the door's operation, and consequently was unable to prove that such a malfunction was the proximate cause of the incident.

The court's focus rested on the expert's report, which conveyed that the door was entirely operational at the time of his inspection 3½ years after the incident, and he purported only that it was "more probable than not" that the door was not properly functioning at the time of the incident. Specifically, the expert's report opined that if the door was functioning properly and the braking system was properly adjusted to industry standards, then the plaintiff would have been able to overcome and withstand any level of force from the door or from anyone pushing it from behind. This was the expert's opinion despite there being absolutely no evidence that the door had been fixed or adjusted since the plaintiff's incident. The court found that the expert's opinion required the acceptance of "the perverse and speculative proposition that a door that was properly functioning at the only time it was examined, three years after the incident, came into compliance of its own accord after some undocumented period of non-compliance that included the date of the incident."

This decision reminds practitioners that, at least for this court, experts must be able to concretely establish causation between the defendant and the pertinent incident through relevant and reliable evidence because an expert's conclusion based only upon the probability of certain facts having occurred is too theoretical to present to a trier of fact. As this plaintiff failed to present any evidence to demonstrate that the defendant was negligent, in effect her argument was that unknown negligence was the cause of her injury, and that was entirely insufficient. Causation must be supported by an identifiable act or omission that goes beyond mere speculation that a defendant's negligence caused a plaintiff's injury. This decision presents an opportunity to bring summary judgment motions in negligence cases when the plaintiff has failed to present sufficient evidence of causation by asking the court to substantively address the admissibility of expert testimony prior to trial. This case demonstrates that, under the right circumstances, such a motion can be meritorious. ■

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ANIMAL LAW UPDATE

WITH THE PASSAGE OF THE PAWS BILL, QUESTION 3 IN 2016, AND MORE BILLS PENDING IN LEGISLATURE, MASSACHUSETTS CONTINUES TO BE ON FOREFRONT OF ANIMAL PROTECTION

BY KARA HOLMQUIST

In 1641, the first law in the nation to protect animals was included in our "Body of Liberties." Today, Massachusetts is consistently at the top of rankings that compare the strength of state animal protection laws.

With the passage of the PAWS (Protect Animal Welfare and Safety) bill in 2014, the Massachusetts Bar Association was named to a task force to complete a systematic review of the laws pertaining to animal cruelty and protection. PAWS gained momentum in the Legislature after officers responded to a cruelty complaint where a puppy — who became known as "Puppy Doe" — was systematically and severely tortured over several months. In addition to the creation of the task force, PAWS increased penalties for animal cruelty and required veterinarians to report suspected animal cruelty.

Chaired by the MBA representative, Elissa Flynn-Poppey, the PAWS task force met over 18 months to create a 118-page report with recommendations that became the foundation of the next PAWS bill, PAWS II, which passed in 2018. This legislation did many things: it prohibited the drowning of animals, added animal crimes to the list of offenses that serve as the basis for a request for a determination of detention and/or release upon conditions in M.G.L. ch. 276 § 58A, ensured that property owners check vacant properties for the presence of abandoned animals, and prohibited the promotion or facilitation of an act involving sexual contact with an animal and forcing a child to engage in sexual contact with an animal.

Two parts of PAWS II created initiatives that are ongoing. The first relates to insurance and dog bites. Starting in January 2019, companies that provide homeowners and renters insurance must provide detailed information on dog bite claims to better understand factors that contribute to dog bites. Insurers have traditionally captured little data on these, with the exception being perceived breed, which has resulted in policy decisions that limit the ability of families to adopt dogs and obtain housing and insurance. This information can also assist with dog bite prevention efforts. The first year of data should be available soon.

Another PAWS II section that created further action relates to facilitating "cross-reporting" — the reporting of abuse and neglect between human service and animal protection agencies. PAWS II allowed animal cruelty to be reported (and removes liability for doing so) by Department of Elder Affairs investigators and Disabled Persons Protection Commission investigators (the Department of Children and Families has had this ability since 2004). Animal control officers were also made mandatory reporters of child abuse, elder abuse, and abuse against disabled persons. Further discussion of mandated reporting issues was left to another commission, led by legislators with more than 18 designated participants. The group has met since the end of 2018 and is in the process of developing a report with guidance on how to move forward to protect both vulnerable animals and people.

Other notable advances for animals include the passage of Question 3 in 2016, a measure that ensures that egg-laying hens, female breeding pigs, and veal calves are not kept in cages where they can't turn around or extend their limbs. The measure also requires that products from these animals (whole eggs and whole uncooked cuts of pork or veal) sold in Massachusetts are compliant with these standards. The law takes effect in 2022.

A statute protecting animals in cars during extreme weather has elevated this issue in recent years and is timely at publication. The 2016 law gives first responders the ability to remove animals kept in vehicles in a manner reasonably expected to threaten the health of the animal due to extreme heat or cold. This bill also allows the public to remove an animal when in immediate danger in a vehicle and no other options exist.

There are many animal protection bills pending in the Legislature. With the recent decision to extend formal sessions beyond July 31 due to COVID-19, as well as the need to finalize key measures in conference committees, there may still be an opportunity for an animal bill to pass in 2020. Among animal-related legislation that could still advance are bills to ban the use of wild animals in traveling animal acts, allowing animal control officers to issue civil citations when animals are kept in certain cruel conditions, and reducing wildlife poaching in our state. Additionally, legislative initiatives would help the state's Massachusetts Animal Fund, which provides health services to animals when their families can't afford it. This will become even more essential given the hardships created or exacerbated by the current pandemic.

For those interested in these issues and others relating to how the law protects (or doesn't) animals, please join the MBA's Animal Law Practice Group (ALPG) within the Civil Litigation Section. This practice group was formed to provide a forum for education and the open exchange of ideas and experiences about legal issues concerning the treatment of all animals, the protection offered to animals, and the rights and responsibilities of people who have an interest in animals. The ALPG was formed in response to a growing number of cases and statutes, and increasing public and practical interest. There are 167 law schools in the U.S. and Canada that offer animal law courses and dozens of state and regional bar associations with sections similar to ours, including the American Bar Association's Animal Law Committee. The ALPG holds meetings to discuss developing areas of animal law. Past topics have included dangerous dog hearings and dog bite liability, advances in legal policy to promote alternatives to animals in research and testing, the Animal Welfare Act and enforcement, careers in animal law and more.

To join the Animal Law Practice Group, email Heather Robertson at HRobertson@MassBar.org. ■

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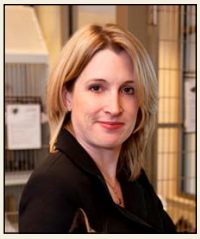

ELECTRIC SCOOTERS: THEIR TIME HAS NOT YET ARRIVED IN MASSACHUSETTS

BY ERIC P. FINAMORE

Electric scooters, commonly known as e-scooters, are an appealing solution to a variety of transportation issues. These lightweight, single-occupant vehicles have become popular for both recreation and transportation. They resemble a classic foot scooter, with two wheels, a footboard and handlebars, and are equipped with electric motors. They generally weigh less than 30 pounds and have a top speed of 15 miles per hour. At the low end, they are marketed as toys by retailers such as Target, for prices around $120. Higher-end models by established manufacturers like Razor and Gotrax can cost between $500 and $1,000.

E-scooters allow a rider to move easily in an urban environment at speeds much faster than the rider could walk, using a minimum of fuel, and without contributing to traffic congestion or air pollution. In theory, they represent a realistic commuting alternative. Various studies have opined that widespread use of e-scooters could increase employment options for residents in areas underserved by public transportation. Of course, weather permitting, riding an e-scooter is also more fun than sitting in a crowded bus.

Big players in ridesharing such as Lime, Bird, Lyft and Jump have maneuvered to capitalize on the popularity of e-scooters by setting up dockless rental programs. Riders can reserve, rent, use and return GPS-equipped e-scooters through smartphone apps, just as they are accustomed to doing with rideshare cars and bicycles. This commercial rental conduit makes it likely that the supply of e-scooters will expand to fill a growing market.

Nevertheless, use of e-scooters on public ways in Massachusetts has not reached the device's seeming potential. Significant legal issues of classification, regulation, insurance and liability remain to be addressed before e-scooters can become a standard means of transportation on public streets in the commonwealth.

Most of the legal issues arise from concerns for safety. Studies suggest that, nationwide, the increased use of e-scooters is associated with a dramatic increase in emergency room treatment of serious head injuries. A research team from the University of California reported that patients presenting at UC hospital emergency rooms between June 2018 and May 2019 showed disproportionately high rates of hospitalization and need for surgery, and that many of the patients had complex facial fractures that threatened or damaged patients' vision. A study published in the Journal of the American Medical Association reported that the number of e-scooter-related injuries jumped 222% between 2014 and 2018, and increased 83% from 8,016 in 2017 to 14,651 in 2018. E-scooter riders ages 18 to 34 were the most likely to be injured, and the vast majority of those injured did not wear helmets. Locally, it was widely reported that a pilot e-scooter project in Brookline, commenced in early 2019, resulted in a head injury to one of the very first riders using the program within a very few minutes of the commencement of the project.

Use of e-scooters on public streets poses a risk of serious injury and death to riders, pedestrians and others. How are these risks going to be properly apportioned? The risk of serious injury raises the question of first-party and third-party insurance coverage. While an injured rider's medical costs may well be covered by their own health insurance, there is currently no obvious source of payment for medical costs or other losses incurred by third parties injured as a result of e-scooter use. Homeowners insurance policies exclude coverage for losses caused by motor vehicles, and therefore would not cover injuries arising out of the use of e-scooters. Household motor vehicle insurance does not provide coverage for such "vehicles." Claimants seeking compensation for injuries caused by a third-party's negligent operation of an e-scooter cannot reasonably expect that there will be coverage through any insurance policy maintained by the owner or driver of the scooter.

Compounding this problem is the fact that, as presently written, Massachusetts' motor vehicle laws would seem to prohibit the use of e-scooters on public ways. Classified as "motorized scooters" by Chapter 90 of the General Laws, the devices are required to have both lights and turn signals. As presently marketed, e-scooters have neither. They do not seem to be legal to operate on streets, bike paths or sidewalks, under any interpretation of the statute. In 2018, the Cambridge City Council canceled a pilot program and ordered vendors to remove e-scooters from public streets because of these legal issues, and out of concern that the scooters were blocking sidewalks.

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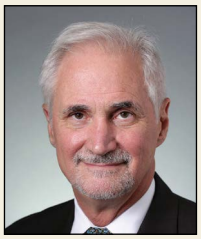

The doubtful legal status for street use makes the likelihood of insurance coverage more remote. Registration for street use of motor vehicles that are legal under Chapter 90 is conditioned upon compliance with mandatory insurance requirements. No such leverage exists for e-scooters, which are therefore only able to be operated illegally and uninsured on public streets, or legally but still uninsured in other locations.

Despite these problems, there is considerable interest in promoting increased use of e-scooters in Massachusetts through private ownership and/or commercial rideshare programs. A variety of legislative proposals, including several bills currently pending, would remove e-scooters from the definition of motorized scooters in Chapter 90, and would establish them as "micro-mobility devices," "electric foot scooters" or other similar categories. Classified as such, e-scooters would then be separately regulated. Licensure, registration, drivers' age requirements, helmets, other mandated safety devices and insurance coverage all are yet to be considered. One bill currently pending in the House of Representatives would require rideshare programs making e-scooters available for rent to provide insurance coverage identical to that required for rideshare vehicles such as Uber and Lyft. This provision could solve part of the problem by allocating the risks inherent in commercial rentals. Yet, the cost of this high-limit coverage could be prohibitive, and industry leaders will have to determine whether the premiums for such insurance render rideshare programs economically unworkable. In any event, such a requirement will do nothing to address the injuries and losses caused by privately owned e-scooters on public ways, for which no present source of coverage exists.

The initial appeal of e-scooters as transportation devices must be tempered by consideration of the losses, injuries and costs they will inevitably cause. The Civil Litigation

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SUPERIOR COURT RULE 20 — WHAT IS IT AND HOW DOES IT WORK? — WITH FOCUS ON SUBPART(2)(H)

BY ROSEMARY MACERO

The Supreme Judicial Court amended Superior Court Rule 20 effective January 2017 and further amended it on March 1, 2018. Chances are, while being generally aware of Superior Court Rule 20, counsel do not appreciate the flexibility the new rule provides to case scheduling or understand the issues that can arise with it.

In general terms, Superior Court Rule 20 is intended to and does provide more flexibility related to individual scheduling for cases that, with agreement of counsel, can provide a more tailored approach to the litigation of each civil case. The Superior Court has provided a Superior Court Rule 20 motion form that takes counsel through many permutations of scheduling adjustments that counsel can agree to in order to streamline the case. The caveat is that the agreed deadlines scheduled cannot exceed the tracking order deadline for the case unless the tracking order for the case is amended (subpart 5). Counsel can be creative as long as it is within the confines of the existing track or the court agrees to the track amendment.

According to an article published by Hon. Douglas H. Wilkins in the *Boston Bar Journal* on Aug. 9, 2017, Superior Court Rule 20 impacts Standing Order 1-88 (tracking orders). The new Superior Court Rule 20, in addition to permitting a method to obtain tracking order flexibility, which can be achieved by agreement of the parties, was intended to "make the courts more responsive to user needs, less expensive, more efficient, less time-consuming and a superior forum for resolving disputes as compared to arbitration." The article focuses on certain mechanical aspects of the rule that allow the parties and counsel more flexibility from the strictures of the tracking orders. The goal of most litigants is to move a case along and to keep the fees to a minimum while securing the best possible result. These competing concerns force prioritization of issues, such as volume of needed case development and cost. Unfortunately, a speedy, cost-effective resolution is not always possible.

In the article, Justice Wilkins mentions the functionality of subpart(2)(h), which offers a hybrid procedural alternative while still providing the ability to request a referral to arbitration or mediation, which is also part of the rule. He specifically discusses how the new Superior Court Rule 20(2)(h) might reduce the "potentially costly and time-consuming need for the parties to prepare detailed proposed findings of fact … the judge may need significant time to issue[] detailed findings … all the while, the judge is probably ready to decide the case at the close of the evidence." The new Superior Court Rule 20(2)(h) states that the parties may, "if they wish," agree to "waive detailed written findings," unless the judge orders otherwise, "for good cause." Presuming agreement by the court, the parties can agree upon a waiver of specific findings and rulings under Superior Court Rule 20(2)(h). Under subpart(2)(h), the judge can make findings, after a bench trial, that need only comply with the requirements of Superior Court Rule 20(8). (Of note, Superior Court Rule 20(8) expressly supersedes now-rescinded Standing Order 1-17, which was effective from Jan. 1, 2017 to March 1, 2018.). Superior Court Rule 20(8) lists the requirements of these "special jury verdicts," and states that findings "shall, at a minimum, answer special questions on the elements of each claim, at a level of detail comparable to a special jury verdict form … unless the parties explicitly choose, or the judge expressly orders, findings in the form as provided by Rule 49(b)." Mass. Civ. Pro. Rule 49(b) is a general verdict accompanied by answers to interrogatories. See Superior Court Rule 20(8)(a). If the judge agrees, after a bench trial, the parties can waive the "detailed findings and rulings," but the judge has to issue a finding that takes the form of a special jury verdict or a general verdict with special questions. Judge Wilkins equates this to a "special jury verdict" after a waiver of detailed findings of fact and rulings of law, which would ordinarily be required after a bench trial that is not conducted using the agreed waiver provisions of subpart(2)(h).

In this streamlined process provided by subpart(2)(h), the litigants may have issues not only with a bench trial, but also with such a waiver of "detailed findings and rulings." The savings of a bench trial are evident. The real issues with a bench trial arise in the findings of fact and rulings of law for the losing side. The preparation of these detailed proposed findings and rulings can be complex, time-consuming, and costly from a client perspective. The impact of a waiver of detailed findings and rulings, in anything more than a very straightforward case (which might have been able to be disposed in summary judgment), may be a trap for the unwary. Although the judge may have been able to determine the outcome readily, the proposed findings and rulings are critical to the ability of the losing party to assert a successful appeal. If the parties waive the right to detailed findings of fact and rulings of law, have the parties preserved their objections to evidence or fact findings for a successful appeal? In the appellate court rulings, if a particular issue has not been raised or preserved for appeal, then the appeal on that issue fails.

The question, then, is whether the purpose of Superior Court Rule 20(2)(h) is to make the court process competitive with arbitration. Justice Wilkins indicates that the purpose is to "make the courts more responsive to user needs, less expensive, more efficient, less time-consuming and a superior forum for resolving disputes as *compared to arbitration*." Without commenting on the caseload of the courts (which has only been exacerbated for the civil docket with the recent prolonged suspension of all but emergency civil matters), to what degree is Superior Court Rule 20(2)(h) trying to convert a court proceeding into an arbitration? Were this to be the goal, then the questions about a truncated or streamlined proceeding (in terms of the use of a waiver of detailed findings and rulings), which may or may not be in the control of the parties, may make the selection of such a process envisioned by subpart(2)(h) fraught with peril. What is the client giving up in terms of rights and procedure to achieve a more "speedy" and "cost-effective" result?

Back to the question of what happens if the loser wants to appeal. How does the waiver of detailed findings and rulings impact issues on appeal? Does expediency in the bench trial process and the waiver of detailed findings and rulings lead to a waiver of rights on appeal, a less than optimal record

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SUPERIOR COURT RULE 20
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on appeal, a more costly appeal preparation, or a problematic record? If it is comparable to arbitration, is the record the same? Are the same rules on appeal that pertain to an arbitration intended to apply? In the absence of "detailed findings and rulings," are the issues on appeal adequately preserved? Is the record adequate or available to address the evidentiary issues on appeal? Is the appeal limited to those issues that would be reviewable in an arbitration, or is the appeal the same as is available after a trial?

If the subpart(2)(h) process is comparable to arbitration and appellate rights, the real issues are: How does counsel advise the client, and how does counsel explain how this procedure is different from "arbitration" or better than arbitration? Arbitration has become a known quantity in the last 30 years. There are many providers, including the American Arbitration Association, where there are dispute-specific rules and decision types that the parties can request or agree to. The criticism of arbitration is that it is becoming more rule-driven and more like litigation in terms of discovery, formality and findings. Then what benefits does a Superior Court Rule 20(2)(h) bench trial with a party-agreed waiver of detailed findings provide? In arbitration, the parties have the choice of the arbitrator(s), full disclosure of conflicts of interest, and specialized training of the arbitrator in a subject matter area, if requested. The control over selection of arbitrator, as the decision-maker, provides at least some informational context. With this control comes a cost of the arbitrator and the proceeding. In court, the judge is assigned by session and rotated by and to circuits. The background is only what is known through the proceeding or the experience we or others have with the judge. The trade-off is cost versus knowledge and the rights and procedures associated with each process.

Clients can be reluctant to use arbitration unless already bound by contractual language. In advising the client to utilize the Superior Court Rule 20(2)(h) process, counsel needs to be able to adequately differentiate this new process from arbitration and provide the risk and cost-benefit analysis to the client, such that the client knows what is at stake in the event of an adverse outcome. Superior Court Rule 20(2)(h) was intended to make the process more cost-effective and suited to an expedited resolution of the dispute.

Superior Court Rule 20 provides a path to needed flexibility in case handling, which will only become more critical, as we all have to meet the challenges of the backlog of civil cases that has built up over the past few months. If counsel can reach agreement on streamlining scheduling, discovery and/or the use of mediation or arbitration, all of which are encouraged by the rule change, the clients would be better served. With regard to subpart(2)(h), at present, there are just as many concerns about the functionality of this process as there were upon adoption. Superior Court Rule 20(2)(h) may present litigants with another option for a cost-effective process. Until some of the details are known, the risks may outweigh the benefits on the use of the subpart(2)(h) process.

The flexibility of Superior Court Rule 20 promotes and recognizes that the litigation process has to be more nimble to meet the needs of the parties. The courts need to preserve flexibility to remain an effective process for more modest, less complex cases in which the litigants rely upon the courts for their "day in court." This challenge to meet the needs of civil litigants will only become more exacerbated with the backlog of cases. With Superior Court Rule 20, counsel have the tools to meet this challenge. ■

E-SCOOTERS
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Section Council of the Massachusetts Bar Association has established a subcommittee to consider these issues and to monitor pending legislative solutions. Lawyers representing any individuals or companies involved in this equation — private e-scooter owners, injured parties, rental companies, retailers and manufactures — have an interest in the development of orderly and predictable rules by which these claims will be addressed. Development of those rules awaits concerted efforts by the bar, the Legislature and industry. ■

TIPS AND TRAPS FOR VIDEOCONFERENCE DEPOSITIONS

BY ANDREW RAINER AND JULIANA SHULMAN-LANIEL

With the advent of the COVID-19 pandemic, lawyers have been thrust into the world of depositions by Zoom and other videoconferencing services. Videoconference depositions present a few advantages, but mostly a host of challenges and "traps for the unwary." Here is some practical advice for Massachusetts lawyers grappling with this new procedure:

WHO MUST ATTEND IN PERSON

One of the few advantages to videoconference depositions is that they eliminate the need for lawyers, witnesses and other professionals to travel to a deposition. Lawyers in different states and time zones can quickly come together to make a deposition happen. Under the current guidance from the Massachusetts Supreme Judicial Court[1] — which the court has said will remain in effect indefinitely — court reporters can administer the oath and create a transcript remotely. The only person who needs to be present in person is a videographer, if a video is sought, and that requirement, too, can be waived by agreement of the parties. If counsel agree, many court reporting companies can arrange for the streamed videoconference to be recorded remotely. (Note: Using remote videorecording, but not obtaining this agreement, is a potential trap for the unwary.)

WHO CAN ATTEND IN PERSON

The SJC's order of May 26, 2020, also makes clear that "[t]he desire of counsel, a party, or a deponent to appear in person shall not alone be sufficient grounds to quash a notice for a remote deposition or to refuse to make a witness available for a remote deposition." In other words, if a deponent wants his or her lawyer to be present for the deposition, but the lawyer is not able to travel to be physically present, that is not, in itself, sufficient reason to delay the deposition. On the other hand, if a deponent wants his or her lawyer to be present, and the lawyer is able to be present, the other side may wish to put in place precautions to ensure that the deponent is not being improperly coached off camera. This can be done one of two ways — by requiring that the deponent's lawyer be visible on screen during the deposition (with Zoom technology, this can be done during the deposition without that lawyer's image appearing in the recorded videotape of the deposition), or by insisting that one lawyer for the other side be physically present with the deponent and the deponent's lawyer during the deposition. Obviously, the presence of two lawyers with a deponent creates issues with social distancing that also need to be addressed (more on this below).

A different question is raised if the deposing attorney wishes to attend in person. What happens, for example, if the deposing attorney wishes to attend in person in order to facilitate the use of exhibits or in order to observe the body language of the deponent, but the deponent's health or location are such as to preclude the attendance of the deposing attorney? The SJC's order does not specifically address this question, but the tenor of the order suggests that the preferences of the deposing attorney in this respect need not be honored. Depending on the schedule of the case, the deposing attorney may have the ability to delay the deposition in order to see whether the deposition can be taken in person at a later time. However, if the time for discovery is closing, the deposing attorney may simply have to proceed with the deposition remotely.

HOW TO DECIDE WHAT TECHNOLOGY TO USE

Different court reporters use different videoconference platforms, and when scheduling a videoconference deposition, you should be sure you find out which platform will be used and, if possible, test it out before you finalize your choice of court reporter. Some videoconferencing platforms are based on Zoom, and these are probably the easiest for attorneys and clients to use, particularly given how much people have been using Zoom during the pandemic for meetings and other needs. Other platforms require that participants connect on video and separately by phone. Our experience with this setup has been negative because, if two or more participants are in the same location, there can be problems with echoing, as well as confusion with when people are and are not muted.

Some videoconferencing platforms easily allow for the attorneys to be seen on screen alongside the witness, whereas others only allow one person (the witness) to be seen. Some allow the attorney or an associate to easily control how exhibits are shown and marked, while others require that exhibits be provided to the court reporter in advance. Some videoconference platforms will allow the court reporter to provide a live feed of the transcript, though that feed may be through software separate from the videoconference, requiring a viewer to utilize two screens or devices, or to split his or her screen between the deposition and the feed. If the deposition is being recorded by video, all platforms should allow the videographer to timestamp the image (as required by the procedural rules and thus another trap for the unwary). Some platforms record "chats" made during the deposition; some do not. Each of these issues should be considered when choosing a court reporting service and discussed with the court reporting service you choose.

DOING A TEST RUN

Even after the videoconference platform is selected, deposing counsel, counsel for the deponent, and any other counsel who anticipate asking questions should try to schedule a test run. Most court reporting services will arrange for a brief one-on-one session with the witness in advance of the deposition to ensure that the witness has the internet connectivity and meets the other technical requirements necessary for the audio-video feed to function smoothly. The court reporting service may also allow for the attorneys to do a pilot run with the software, at which point attorneys should practice showing exhibits, troubleshoot echoes and any other audio issues, and learn how to mute their feed. If the platform is Zoom-based, the attorney and the witness may also be able to practice on the platform by using it in deposition prep sessions.

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VIDEO DEPOSITIONS
CONTINUED FROM PAGE 7

HOW TO DEAL WITH EXHIBITS

Exhibits pose another challenge. As previously noted, different videoconference platforms have different tools for the displaying of exhibits. If using a Zoom-based technology, only the lawyer doing the examination will be able to scroll through the document, making it difficult for a witness or the opposing attorney to review the entire document before discussion of the exhibit begins. The lawyer doing the examination may also control how the exhibit appears on the screen but not be able to accurately see how it appears to the witness, making it necessary to communicate whether to enlarge or shrink the image so it becomes readable. Counsel for the deponent should be sure to instruct the deponent in advance to request an opportunity to read through the exhibit or at least to orient himself or herself to the exhibit before answering questions about it. Other technologies allow each participant to view the entire exhibit at his or her own pace, but with these technologies, the exhibits must be loaded in advance or time must be taken to load the exhibit for viewing when it is marked.

Some of the time delays inherent in the display of exhibits can be avoided if the exhibits are shared in advance of the deposition. However, lawyers may have legitimate strategic reasons not to disclose their deposition exhibits in advance. An alternative available in this circumstance is an agreement that counsel will share with opposing counsel all of the exhibits he or she intends to use at the time when he or she begins questioning the witness. If a party is represented by more than one attorney, one of the attorneys for that party can then review the exhibits fully before any exhibit is shown to the witness.

SOCIAL DISTANCING CONSIDERATIONS

If a witness is not comfortable accessing videoconference platforms alone, it may be necessary for someone to be present with the witness to assist him or her. This may be unobjectionable to the other side if the person assisting is not a lawyer. Opposing counsel is more likely to object, however, if the person assisting the witness is his or her attorney, and may insist on being present in person as well. This raises the question, if anyone is going to be present in person with the witness, how do you keep the witness and anyone attending the deposition safe?

The answer is that additional safety protocols should be put in place and ideally should be spelled out in the notice of deposition. First, all persons attending must be free of symptoms of disease, and the number of persons attending should be kept to a minimum. Second, all persons should wear masks and remain at least 6 feet apart from one another — a challenge in smaller spaces. Third, all participants should thoroughly wash their hands upon entry to the witness' home or deposition location, and throughout the time together. Fourth, all surfaces in the location of the deposition, including heavily used surfaces such as door knobs, light switches, faucets, toilet handles, etc., should be washed thoroughly at the beginning and end of the deposition.

With respect to exhibits, the safest course is for exhibits to be shown to the witness entirely on screen, although this presents the challenges noted above. If any exhibits are going to be handled physically at the deposition, one way to limit the risks is to insist that all exhibits be single-sided and placed on a table in front of the witness (rather than handing the documents to the witness) and then taken back by the attorney showing the exhibit. Another option is to place exhibits in plastic sheet protectors/sleeves, which can be wiped with disinfecting wipes and handed to a witness for review.

WHAT TO PUT IN THE DEPOSITION NOTICE

A good time to think about all of the issues discussed above is when putting together the notice of the videoconference deposition. This will force you to think about the requirements of the SJC order of May 26, 2020, as well as Rules 30 and 30A of the Massachusetts Rules of Civil Procedure, and make sure that you are meeting all of them (such as, for example, the requirement that the videographer be present in person, or that the video be time-stamped). We suggest that you modify the language normally used in a notice of videotaped deposition to reflect the remote nature of the deposition and to specify who, if anyone, will be physically present with the witness and the safety procedures that will protect the witness and any persons present. You may also want to clarify that any statements that the operator must make at the beginning and end of the deposition will be oral, but not necessarily "on camera." Likewise, the SJC's order requires that all persons participating in the deposition remotely be identified on the record, though not necessarily on camera. What follows is a model notice for a videoconference deposition taken during the COVID-19 era. ■

1. www.mass.gov/doc/sjc-order-regarding-remote-depositions/download.

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HOW TO SUBMIT ARTICLES

To inquire about submitting an article to *SECTION REVIEW*, contact Kelsey Sadoff (KSadoff@MassBar.org).

VIDEO DEPOSITIONS
CONTINUED FROM PAGE 8

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
DOCKET NO. _____

PLAINTIFF
v.
DEFENDANTS

NOTICE OF TAKING OF AUDIOVISUAL VIDEOCONFERENCE DEPOSITION

PLEASE TAKE NOTICE that in accordance with Massachusetts Rules of Civil Procedure 30 AND 30A, and the Order of the Supreme Judicial Court concerning remote deposition, the Plaintiff, by and through his counsel, will take the videotaped videoconference deposition upon oral examination of _____ at 10:00 am on _____, 2020 at [address where witness will be located].

The deposition will be taken using videoconference capabilities before an officer duly authorized to administer oaths, pursuant to the Massachusetts Rules of Civil Procedure and pursuant to the Supreme Judicial Court's Order authorizing the taking of oaths through electronic communication during the current health crisis. The deposition will be used for all purposes, including trial. The deposition will be recorded remotely by stenographic means and [by agreement, will be recorded remotely] by audiovisual means by a person not employed by undersigned counsel, and will continue until the examination is complete. You are hereby invited to attend and cross-examine the witness, either in person or by electronic means.

Pursuant to Mass. R. Civ. P. 30A(c), the following procedures shall be observed in recording this audiovisual deposition:

(1) **Opening of Deposition.** The deposition shall begin with a statement heard on the recording, which includes:
   (i) the operator's name and business address;
   (ii) the name and address of the operator's employer;
   (iii) the date, time and place of the deposition;
   (iv) the caption of the case;
   (v) the name of the witness-deponent;
   (vi) the name of the party on whose behalf the deposition is being taken; and
   (vii) any stipulation by the parties.

The opening statement shall be made by the operator, unless counsel agree that one of counsel will make the statement. [If agreed, the operator will not be physically present at the deposition and his/her image may not be shown on camera, but the operator will identify himself/herself orally on the record at the start of the deposition.]

(2) **Counsel.** Counsel shall identify themselves for the record by stating their names, their addresses, and the names of the parties or persons for whom they appear at the deposition, and nothing more. All persons attending the deposition in person or remotely shall also be identified for the record.

(3) **Oath.** The officer before whom the deposition is taken shall then identify himself/herself and swear or affirm the witness on camera.

(4) **Multiple Units.** When the length of the deposition requires the use of more than one recording unit, the end of each recording unit and the beginning of each succeeding recording unit shall be announced on camera by the operator.

(5) **Closing of Deposition.** At the conclusion of the deposition, a statement shall be made for the record that the deposition is concluded. A statement may be made setting forth any stipulation made by counsel concerning the custody of the audiovisual recording and exhibits and other pertinent matters.

(6) **Index.** The depositions shall be timed by a digital clock on camera, which shall show continually each hour, minute and second of each recording unit of the deposition, or otherwise suitably indexed by a time generator. The date(s) on which the deposition is taken shall be shown.

(7) **Objections.** An objection shall be made as in the case of depositions taken solely by stenographic means.

(8) **Interruption of Recording.** No party shall be entitled to cause the operator to interrupt or halt the recording of the audiovisual deposition without the assent of all other parties present.

(9) **Submission to Witness; Changes; Signing.** Unless the parties have stipulated that a simultaneous stenographic record of the deposition not be prepared, the provisions of Rule 30(e) shall apply to the stenographic record of the deposition.

(10) **Certification.** The operator before whom the audiovisual deposition is taken shall attach to the original audiovisual recording a certificate stating that the audiovisual recording is a true record of the testimony given by the witness.

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VIDEO DEPOSITIONS
CONTINUED FROM PAGE 9

Necessary Safety Measures:

Due to the extreme risk of person-to-person transmission caused by the Coronavirus (COVID-19) [and due to the witness' condition, which puts him at a higher risk for severe illness from COVID-19], Plaintiff requires the following safety procedures to protect the witness' health and the health and safety of all persons present in person for the deposition:

- No more than one (1) lawyer for the Plaintiff will be physically present at the deposition;
- If any of the Defendants wish to have a lawyer physically present at the deposition, a total of one lawyer for all Defendants may be physically present;
- Videoconferencing capability will be available so that other lawyers for Plaintiff or Defendants may participate in the deposition by electronic means;
- Every person at the deposition shall remain 6 feet or more from the witness and each other at all times, except as is necessary to place microphones or other necessary recording equipment;
- Every person who is present in person at the deposition must use proper hand-washing practices at all times, including — but not limited to — immediately upon entry to the deposition;
- It shall be the responsibility of deposing counsel to ensure that all surfaces are thoroughly sanitized with antiviral wipes and/or spray prior to and after the deposition;
- All exhibits are to be pre-marked, printed and sanitized prior to commencement of the deposition so that the witness does not have to handle potentially contaminated documents. Exhibits are to be placed as single-sided sheets of paper in front of the witness so that he does not need to handle the exhibits; and
- No person shall attend the deposition in person who has any of the risk factors for exposure to COVID-19, such as symptoms of the disease or known exposure to a person who has been tested and found to have the disease.

Plaintiff
By his attorneys,

_____

Dated: _____

Certificate of Service

I hereby certify that on this ___ day of April, 2020, I served the foregoing by email on all counsel of record.

_____

THE GROWING TIDE OF ADA WEBSITE ACCESSIBILITY LITIGATION IS WASHING ASHORE IN MASSACHUSETTS

BY MIKE PERRY AND SHAUNA TWOHIG

I. DIGITAL ASSETS HAVE BECOME LEGAL LIABILITIES

The last several years have seen an explosion of web accessibility litigation initiated by both individuals and advocacy groups. Plaintiffs in these lawsuits typically allege that a company's website violates Title III of the Americans with Disabilities Act (ADA) because it is not designed to work with assistive technologies — such as screen readers for the visually impaired, or closed-captioning for the hearing-impaired — and is therefore inaccessible to persons with disabilities.

There are three main causes for the recent proliferation of web accessibility litigation: First, because people have become increasingly dependent on the internet to facilitate nearly every aspect of their daily lives, businesses large and small have increased their digital asset portfolios. As a result, the potential for ADA accessibility litigation now extends beyond a company's website to include everything from mobile applications and email correspondence to social media and even video games. Second, despite this ever-growing dependence on the internet as a means of facilitating commerce, the Department of Justice (DOJ) — the federal agency responsible for administering and enforcing Title III of the ADA — has failed to enact regulations establishing accessibility standards for company websites. Third, in the absence of specific direction from the DOJ, courts have been left to decide whether Title III applies to digital assets and, if so, what is required to make those assets ADA compliant. Given the lack of direction from the DOJ, federal circuit courts remain divided on this issue, and the U.S. Supreme Court has declined to settle the debate.

In the wake of this uncertainty, aggressive plaintiffs' attorneys have filed thousands of web accessibility lawsuits. In previous years, New York and Florida were the most prolific jurisdictions for web accessibility lawsuits.[1] However, as plaintiffs' attorneys in those states turn their attention to emerging theories of liability,[2] Massachusetts has witnessed a recent surge of web accessibility litigation.

II. THE DOJ'S FAILURE TO ESTABLISH ACCESSIBILITY STANDARDS FOR WEBSITE COMPLIANCE

Title III of the ADA was designed to prevent discrimination against persons with disabilities at "public accommodations" — a broad term that encompasses everything from retail businesses and restaurants to service establishments and transportation terminals. The ADA was enacted in 1990 — long before the use of the internet to conduct business transactions became commonplace. As a result, the ADA does not expressly address whether, and to what extent, websites qualify as places of "public accommodation," much less provide guidelines for website compliance.

Although the ADA does not address this issue directly, the DOJ has long concluded that websites are places of public accommodation, and therefore, company websites subject to the ADA must provide "effective communication to individuals with disabilities."[3] In 2010, the DOJ announced its consideration of regulations designed to establish website accessibility requirements. The proposed rulemaking notice signaled that the DOJ might adopt a set of Web Content Accessibility Guidelines (WCAG) developed by the World Wide Web Consortium (W3C). In particular, WCAG 2.0 sets forth 12 guidelines, each containing objectively verifiable criteria for determining if web content satisfies the relevant guidelines. In order for a website to conform to WCAG 2.0, the entire website needed to satisfy all 12 guidelines under one of three conformance levels: A, AA or AAA.[4] The DOJ's 2010 proposed rulemaking notice pronounced W3C's WCAG 2.0 AA as "well-established industry guidelines" to render web content accessible.

In 2017, the DOJ withdrew this proposed rulemaking notice.[5] The withdrawal was unwelcome news to businesses — many of which had delayed making expensive changes to their websites pending the DOJ's anticipated promulgation of specific guidelines. Moreover, the withdrawal of these proposed guidelines served as an impetus for creative plaintiffs' attorneys who used this opportunity to file ADA accessibility lawsuits against vulnerable businesses.

In the face of this onslaught of litigation, members of both houses of Congress wrote letters to the DOJ requesting guidance with respect to website accessibility under the ADA.[6] In response, on Sept. 25, 2018, then-Assistant Attorney General Stephen E. Boyd issued a letter confirming the DOJ's earlier position that the ADA applies to the websites of public accommodations. AAG Boyd's letter also called for "flexibility" in assessing website compliance with Title III of the ADA, and stated that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."[7]

III. THE CIRCUIT COURTS REMAIN SPLIT, AND THE U.S. SUPREME COURT HAS DECLINED TO WEIGH IN

In the face of the DOJ's lack of regulation on this issue, significant differences have emerged among federal circuit courts as to whether the ADA limits places of public accommodation to physical spaces, thereby excluding websites from the ambit of Title III. Courts in the First, Second and Seventh Circuits have found that the ADA can apply to a website independent of any connection between the website and a physical location.[8] Conversely, courts in the Third, Sixth, Ninth and Eleventh Circuits have concluded that places of public accommodation must be physical places, but that the goods and services provided by a place of public accommodation (including through its website) may be covered by the ADA if they have a sufficient nexus to a physical location.[9]

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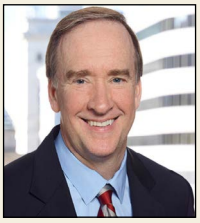

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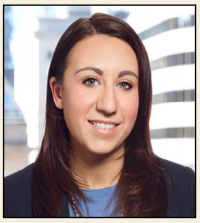

ADA WEBSITE ACCESSIBILITY CONTINUED FROM PAGE 11

The U.S. Supreme Court recently had an opportunity to resolve this split in the case of *Robles v. Domino's Pizza LLC*, 913 F.3d 898 (9th Cir. Jan. 15, 2019), *cert. denied*, 140 S. Ct. 122 (Oct. 7, 2019). In *Robles*, the Ninth Circuit affirmed the district court's ruling that the ADA encompassed both the defendant's website and mobile application, explaining that Title III of the ADA "applies to the services of a place of public accommodation, not services in a place of public accommodation."[10] Domino's subsequently sought *certiori* review of the Ninth Circuit's decision; however, on Oct. 7, 2019, the Supreme Court declined to accept the case.

IV. THE FIRST CIRCUIT'S VIEW ON WEB ACCESSIBILITY LAWSUITS

As noted above, the First Circuit has held that imposition of liability under Title III of the ADA does not depend on any nexus to a physical location. For example, in *Carparts Distribution Center Inc. v. Automotive Wholesaler's Association of New England Inc.,* 37 F.3d 12 (1st Cir. 1994), the First Circuit ruled that the ADA's prohibition on discrimination in a place of public accommodation applied to medical reimbursement plans. In so ruling, the court noted that the "plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter."[11]

Since then, Massachusetts federal courts have consistently interpreted *Carparts* to mean that Title III of the ADA applies to websites and other digital assets. For example, in *Nat'l Ass'n of the Deaf v. Netflix Inc.,* 869 F. Supp. 2d 196 (D. Mass. 2012), the District Court (Ponsor, D.J.) ruled that the ADA applied to the defendant's video streaming service, stating that "[u]nder the *Carparts* decision, the Watch Instantly website is a place of public accommodation and Defendant may not discriminate in the provision of the services of that public accommodation — streaming video — even if those services are accessed exclusively in the home."[12] Following *Netflix*, federal judges in Massachusetts have routinely declined to dispose of website liability lawsuits at the motion to dismiss stage.[13]

More recently, in *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49 (D. Mass. 2019), the U.S. District Court for the District of Massachusetts (Robertson, M.J.) ruled that Title III of the ADA applies not only to content contained on a company's own website, but also to content hosted on third-party websites and platforms. In that case, the plaintiff brought a putative class action against Harvard University under Title III of the ADA, seeking declaratory and injunctive relief requiring Harvard to provide timely, accurate captioning of the audio and audiovisual content that Harvard makes available online to the general public for free. Harvard moved to dismiss, asserting, *inter alia*, that it could not be held responsible under Title III for content posted on third-party websites such as YouTube, iTunes U or SoundCloud. The District Court rejected Harvard's argument, reasoning that the "[i]mplementing regulations applicable to Title III … prohibit disability discrimination by a public accommodation or a federal fund recipient 'directly or through contractual, licensing, or other arrangements.'"[14]

V. MASSACHUSETTS BUSINESSES SHOULD PREPARE FOR ADA WEBSITE ACCESSIBILITY LITIGATION

Perhaps encouraged by the success of plaintiffs in jurisdictions such as New York and Florida, the increase in lawsuits filed over the past year suggests that Massachusetts is now poised to be the next hotspot for website accessibility litigation. The sudden increase in website accessibility cases in Massachusetts, coupled with a seeming reluctance by District Court judges to dispose of these cases at the motion to dismiss stage, suggests that Massachusetts companies with public-facing websites — including retailers, service providers, entertainment venues, restaurants and professional service firms — should assume that those websites (and any other accompanying digital assets) are subject to Title III of the ADA, and therefore, these companies must take steps necessary to ensure that their websites are compliant with commonly accepted standards of accessibility. Otherwise, they may find themselves on the wrong end of an ADA accessibility lawsuit. ■

1. *See* "Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018," *supra*, available at: www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/.
2. *See* Ryan P. Phair, M. Brett Burns & Torsten M. Kracht, "The Next Wave of Accessibility Litigation in the Retail Industry: Braille Gift Cards" (Nov. 5, 2019), available at: www.huntonretailindustryblog.com/2019/11/articles/advertising-marketing/the-next-wave-of-accessibility-litigation-in-the-retail-industry-braille-gift-cards/.
3. Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996), available at: www.justice.gov/crt/foia/file/666366/download.
4. *See* WCAG 2.0 Guidelines, available at: www.w3.org/TR/WCAG20/.
5. "Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions," 28 C.F.R. Parts 35 and 36 (2017), available at: www.govinfo.gov/content/pkg/FR-2017-12-26/pdf/2017-27510.pdf.
6. *See* Letter from Hon. Ted Budd, Member of Congress, et al, to Hon. Jeff Sessions, U.S. Attorney General (June 20, 2018), available at: www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf; Letter from Hon. Chuck Grassley, U.S. Senator, et al, to Hon. Jeff Sessions, U.S. Attorney General (Sept. 4, 2018), available at: www.judiciary.senate.gov/imo/media/doc/2018-10-04%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf.
7. Letter from Stephen E. Boyd, U.S. Assistant Attorney General, to Hon. Ted Budd, Member of Congress, et al (Sept. 25, 2018), available at: www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf.
8. *See, e.g., Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n of New England Inc.*, 37 F.3d 12, 19 (1st Cir. 1994); *Nat'l Ass'n of the Deaf v. Netflix Inc.,* 869 F. Supp. 2d 196, 200 (D. Mass. 2012); *Nat'l Fed'n of the Blind v. Scribd Inc.,* 97 F. Supp. 3d 565, 576 (D. Vt. 2015); *Andrews v. Blick Art Materials LLC,* 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed'n of Grain Millers,* AFL-CIO CLC, 268 F.3d 456, 459 (7th Cir. 2001); *Doe v. Mut. of Omaha Ins. Co.,* 179 F.3d 557, 558 (7th Cir. 1999).
9. *See, e.g., Gil v. Winn-Dixie Stores Inc.*, 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017); *Haynes v. Dunkin' Donuts LLC*, 2018 WL 3634720, at *2 (11th Cir. July 31, 2018); *Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104, 1114 (9th Cir. 2000); *Earll v. eBay Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015); *Ford v. Schering-Plough Corp.,* 145 F.3d 601, 614 (3d Cir. 1998); *Peoples v. Discover Fin. Servs. Inc.,* 387 F. App'x 179, 183 (3d Cir. 2010); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997); *Brintley v. Aeroquip Credit Union,* 321 F. Supp. 3d 785 (E.D. Mich. 2018).
10. 913 F.3d at 905 (emphasis in original).
11. *Id.* at 19.
12. 869 F. Supp. 2d at 202.
13. *See, e.g., Gathers v. 1-800-Flowers.com Inc.*, No. 17-CV-10273-IT, 2018 WL 839381 (D. Mass. Feb. 12, 2018); *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, C.A. No. 3:15-30024-KAR, 2019 WL 1409301, at *1 (D. Mass. Mar. 28, 2019).
14. 377 F. Supp. 3d at 63.

DISPUTE RESOLUTION

TELE-MEDIATION: A GAME CHANGER FOR DIVORCING COUPLES — PART 1

BY VICKI L. SHEMIN, J.D., LICSW, ACSW

While courts remain closed, is there a silver lining for divorcing couples during the pandemic? Absolutely! Alternative dispute resolution (ADR) offers a variety of options and opportunities. In fact, for most couples, there are unexpected benefits. And that goes for their lawyers, too.

It has not been easy to absorb the news that the trajectory of their divorce has been indefinitely derailed. In the old normal, trying as it was to go through the process, at least the promise of having had an end in sight engendered more than a small measure of hope.

For clients who have successfully negotiated and signed their divorce agreements, until they can have the judge's blessing that their agreement passes muster and they are officially divorced, they are left with a pervasive sense that finality is outside their grasp. And, on the opposite end of the spectrum, for those clients who are well into the heart of the process but still far from settlement, the fact that the courts will be unavailable — and then certainly backlogged — brings on a different host of far-reaching concerns.

Fortunately, those of us who are trained mediators have been able to offer clients an efficient and effective alternative: tele-mediation. In short, tele-mediation is the distribution of mediation services and information through various telecommunication technologies. Most notable of these have been Zoom and Microsoft Teams, modalities that offer document-sharing capabilities and private breakout rooms.

ADR advocates have long sung the praises of this option because it empowers couples to do exactly what they yearn to do now more than ever: take matters into their own hands to the greatest degree possible and fashion their own resolutions without resorting to a court. (*Note:* For those of us who are ADR practitioners, we generally eschew the word "alternative," as we believe that it should be the first option that couples turn to, and not a measure of latter resort.)

Despite its name, tele-mediation is a shorthand for all other telecommunication options for divorced or divorcing couples, as it easily encompasses parent coordination matters, collaborative law, arbitration, conciliation, and efforts to settle even the most highly contentious litigation matters.

In the brief time I have been relying more heavily on tele-mediation as an adjunct to my practice, these are the distinct advantages I have noted:

A LITTLE DISTANCE GOES A LONG WAY

While mediation is a process that is considered by many to be far superior to any of the other divorce resolution options, it is admittedly not easy to be next to, or across the table from, your soon-to-be ex-spouse. As much as we emphasize the need for a "level playing field" as being the *sine qua non* of mediation, it is unquestionably challenging to make some of the most difficult financial and personal decisions of your lifetime within the confines of a mediation room. Tele-mediation, with its feel of being one step removed, and on your own more comfortable and personal turf, adds that measure of comfort that may well better enable you to get down to the challenges at hand.

Many clients report that their feelings of intimidation, anger, hurt and disappointment can be better managed if they are not within the same physical confines as their spouse. In the same vein, clients report that they tend to be less reactive: there is something about the remote process that enables them to be more reflective and thereby better able to gather their thoughts before responding.

Clients have also shared that they are more willing to say things that would have been more difficult for them to utter in the mediation office (for better or worse). That said, the well-trained mediator recognizes that the art and science of mediation is not just to find common ground; it is also to understand wherein the differences lie, all in the service of working toward resolution.

While being in a mediation conference room is artificial, speaking through various technological mediums with one's spouse has been an innate and familiar part of the relationship (even if it has not been via Zoom or Microsoft Teams, it may well have been through the not-too-dissimilar FaceTime).

ACTUAL OR PERCEIVED IPV

For those matters in which a client would not otherwise feel safe or comfortable in office meetings (even in separate conference rooms within the office), there is something about the feeling of being removed from the same physical space that enables some clients to be more willing to participate via tele-mediation. When intimate partner violence is at issue, gone is the need to plan ahead with couples regarding who will be arriving first and leaving last. The worry about what if the other person is early or late, resulting in an unwelcome physical encounter, is eliminated. A cautionary note: for those matters in which there is a restraining order, the meditator, counsel and the parties must take scrupulous care to ascertain whether tele-mediation would violate a restraining order since amending orders to allow telecommunication conferences cannot occur until the courts reopen. [More about this in Part 2.]

VICKI L. SHEMIN, J.D., LICSW, ACSW, is a domestic relations attorney specializing in alternative dispute resolution (mediation, parenting coordination and collaborative law) and a clinical social worker. She is a partner at Fields and Dennis LLP in Wellesley. Contact Shemin at (781) 489-6776 or VShemin@FieldsDennis.com.

EFFICIENCIES

Any mediation process involving clients coming into a mediator's office has many inherent inefficiencies. For example, as to time management, clients are now freed up from having to tack on driving to and from the office, saving up to an hour at the beginning and end of the mediation. This may also be more economical in terms of any child-care arrangements they may have to make (although child-care arrangements of a different sort may well arise with everyone under the same roof, e.g., one client with older children goes to her car for the tele-mediation conference to be out of the children's earshot).

I have found that tele-mediations are more goal-oriented. Since people are more comfortable and used to sitting in what this process resembles most — business meetings with agendas and with expectations that business will be conducted cordially, with the plan to have reached certain goals by the end of the meeting — the nature of the process it-

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TELE-MEDIATION
CONTINUED FROM PAGE 13

self has been a model of efficiency. I have also found that there is more attention to preparation: since documents can be shared, the mediator, along with each party, pays attention to what he or she wants up on the screen and what agenda items will be tackled, for how long, and in what order.

PRIVATE CHAT ROOMS

So often in mediation, an individual needs a break. A "cooling-off" period in private can help the participant regain composure, organize thoughts and press their personal reset button. Or, the mediator may believe it would benefit the process to spend some time with one and then the other participant in the service of shuttle diplomacy — a technique frequently used by some mediators to have sequential private conversations with each participant, all with the aim of finding common ground to advance settlement. Tele-mediation offers these options without compromise to the participants or the process.

As a seasoned mediator, I am left to wonder whether tele-mediation will become a more popular option even when life returns to the old normal.

WHAT'S THE SILVER LINING?

Unexpectedly, in these challenging times of remotely sheltering-in-place, tele-mediation is a proven successful modality for "reaching out and touching someone." ■

FAMILY LAW

THE RIGHT TO TRASH TALK: NAVIGATING THE JARRING ROADS OF SOCIAL MEDIA, FAMILY LAW AND THE FIRST AMENDMENT

BY KEELEY E. CLANCY

The Massachusetts Supreme Judicial Court (SJC) proceeded with caution when it found itself smack dab in the middle of the precarious intersection of family law and the First Amendment. In its May 7 decision in *Shak v. Shak*, 484 Mass. 658, 658 (2020), the SJC struck down a non-disparagement order issued by a Probate and Family Court judge as an unconstitutional, impermissible prior restraint on speech. While the court made it clear that the order could not stand, given the specific facts of the case, the court stopped short of declaring all non-disparagement orders facially unconstitutional and seemed to simply treat this as an as-applied challenge.

BACKGROUND

After Mother filed for divorce from Father, Mother filed an emergency motion to remove the father from the marital home based on the father's aggressive behavior, temper, threats and substance abuse. A judge issued the order to vacate and entered a temporary order granting the mother sole custody of the parties' 1-year-old child. Before the next scheduled hearing, the mother filed a motion for temporary orders, which included a request that the judge prohibit the father from posting disparaging remarks about her and the ongoing litigation on social media. After a hearing, the judge issued temporary orders, which included provisions that "[n]either party shall disparage the other — nor permit any third party to do so — especially when within hearing range of the child[,] and "[n]either party shall post any comments, solicitations, references or other information regarding this litigation on social media." Following entry of the court's order, Father continued to make such posts on social media platforms and shared them with mutual friends, including members of Mother's religious community. Mother subsequently filed a complaint for civil contempt. In his answer to Mother's complaint, Father raised his First Amendment right to free speech as a defense.

A second Probate and Family Court judge presided over the contempt hearing. After hearing, the second judge did not find the Father in contempt of the non-disparagement order, further finding that the temporary order was an unlawful prior restraint on speech. The second judge sought to cure the deficiencies in the language of the previous order by more narrowly tailoring the provisions. The new order prohibited the parties, until their child turned 14, from posting any online disparaging comments about the other's morality or parenting ability, and included a list of derogatory terms that were forbidden. It also prohibited the parties from saying, writing or gesturing any disparagement to each other if the child was within 100 feet of the communicating party or was otherwise able to hear, read or see the disparagement. The second judge then stayed an order with the revised provisions and reported the constitutional question for review.

ACKNOWLEDGES COMPELLING STATE INTEREST

In Massachusetts, prior restraints on speech pass constitutional muster only if they serve a compelling state interest to protect against a serious threat of harm, and if they are "no greater than is necessary" to protect said interest. The SJC, in agreement with the Probate and Family Court judge, acknowledged that "the State has a compelling interest in protecting children from being exposed to disparagement between their parents." However, the court went on to say, "merely reciting that interest is not enough to satisfy the heavy burden of justifying a prior restraint."

REQUIRES AN 'EXTREME CIRCUMSTANCE' AND A SHOWING OF A GRAVE IMMINENT HARM

Confirming that the above standard simply is not a one-size-fits-all issue, the court remarked, "[a]ssuming for the sake of discussion that the Commonwealth's interest in protecting a child from such harm is sufficiently weighted to justify a prior restraint in some extreme circumstances, those circumstances do not exist here." The court found that there was no such interest in this case because there was no evidence that the minor child had the ability to access, read or understand any potential social media posts at his young age. The court also found that any potential harm from reading the disparaging speech in the future was "too speculative." There were no showings that this particular child's physical, mental or emotional state would make him vulnerable to harm at any point if he were exposed to the disparaging words from one parent to another.

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EFFECT ON FUTURE CASES

While the non-disparagement order in this case was ultimately found unconstitutional, the court nonetheless imparts a clear message: tread lightly. Parents should be mindful about what they say and/or write about each other. Even though a Probate and Family Court judge cannot prohibit you from posting on Facebook, your decision to post could still come with serious consequences for you and/or your child(ren). "[C]ertainly judges, who are guided by determining the best interests of the child, can make clear to the parties that their behavior, including any disparaging language, will be factored into any subsequent custody determinations."

The court surely understood that its ruling could, and likely would, lead to the challenge of many custody orders. Therefore, it deliberately suggested alternate means of discouraging disparaging speech, such as entering into a non-disparagement agreement voluntarily, and other civil remedies. The court noted, "[d]epending upon the nature and severity of the speech, parents who are the target of disparaging speech may have the option of seeking a harassment prevention order pursuant to M.G.L. ch. 258E, or filing an action seeking damages for intentional infliction of emotional distress or defamation."

Even with its application narrowed, given the *Shak* decision, judges are likely to issue these orders sparingly, if at all. Historically, Probate and Family Court judges,

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acting in *loco parentis*, have been able to use their authority to calm down tumultuous situations between parents. After *Shak*, these courts now have one less tool in their toolbox. The mother in *Shak* argued in her brief, "when a child's best interests and a parent's fundamental, constitutionally protected rights are in conflict, the child's best interests must come first." Courts in the past have acknowledged that fundamental rights, such as the right to see one's child or the freedom of religion, may be judicially altered to protect the best interests of the child. The takeaway from *Shak* is that freedom of speech is a right we have decided to give a higher value to than others, higher in fact than the best interest of a child. Sadly, the *Shak* decision may now empower litigants to simply refuse to agree to voluntary non-disparagement agreements, knowing that a judge cannot mandate such an agreement.

The decision in *Shak* does not provide any clear guidance as to what kind of evidence would be required to meet this heightened standard. It is unclear if an opinion from a mental health professional regarding this specific child or perhaps a guardian ad litem report would suffice. A practitioner seeking such an order should provide the judge with a factual basis for why the order will serve the compelling state interest of preventing grave and imminent physical, mental and/or emotional harm to the subject child.

Publicly and harshly criticizing the other parent is best avoided for obvious reasons. However, *Shak* serves as a shrewd reminder that the right to publicly disparage your co-parent may nonetheless be part of our freedom of speech.

Post *Shak*, practitioners still must consider what are the requirements for a non-disparagement clause in a custody order to pass constitutional standards. Perhaps the court would have ruled differently if, for example, the child was 12 years old and had access to social media and a history of mental and emotional health issues. While *Shak* gets us a small step closer to understanding the constitutional concerns of court-ordered non-disparagement orders, we can expect that this will not be last time the court will be presented with this issue. ■

LABOR & EMPLOYMENT LAW

ALL RELEVANT RESPECTS: THE IMPOSSIBLE STANDARD FOR COMPARATOR EVIDENCE IN DISCRIMINATION CASES

BY ROBERT S. MANTELL

In civil rights litigation, comparator evidence faces greater barriers to admissibility than any other type of circumstantial evidence. Discrimination plaintiffs introducing comparator evidence are often required to prove that they are similarly situated in "all relevant respects" to the suggested comparator. However, the Supreme Court has rejected this difficult type of standard, as it makes the anti-discrimination laws "inoperable." *Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005). Rather, the Supreme Court has welcomed circumstantial evidence using reasonable comparisons that preserve the purpose of civil rights laws.

The "all relevant respects" test is the type of categorical rule that the Supreme Court rejected in *Sprint/United Mgmt. Co. v. Mendelsohn,* 552 U.S. 379, 387-388 (2008) (employees supervised by different managers in different departments may be similarly situated). The Supreme Court has clarified that proof of discrimination does not "require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways." *Young v. United Parcel Service,* 575 U.S. 206, 228 (2015).

The "all relevant respects" standard is illogical in that it may require the plaintiff to be comparable on factors that the employer did not rely on to distinguish the plaintiff against comparators. In recent years, some courts have moderated their approach to comparator evidence. This article will demonstrate that the "all relevant respects" standard is improper, and will suggest an alternative based on ordinary benchmarks for admissibility: "The plaintiff must show herself to be similar to one or more comparators in enough respects such that her situation can reasonably be compared to theirs."

INTRODUCTION

One type of evidence used to prove employment discrimination is that the plaintiff-employee was treated differently than other similarly situated employees who are outside the plaintiff's protected class. For example, a Black employee may demonstrate bias by showing that similarly situated white employees (aka "comparators") were treated better. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973); *Smith College v. Massachusetts Comm'n Against Discrimination,* 376 Mass. 221, 228 (1978).

Although such evidence is not required to prove discrimination, comparator evidence can be important and probative. *Trustees of Health & Hosps. of Boston Inc. v. Massachusetts Comm'n Against Discrimination*, 449 Mass. 675, 682-683 (2007); *Che v. Mass. Bay Transp. Auth.,* 342 F.3d 31, 38 (1st Cir. 2003).[1] Comparator evidence may be used as an element of the plaintiff's *prima facie* case (*Trustees of Health*, 449 Mass. at 682), or to demonstrate that the employer's articulated reason for discharge is pretextual. *Matthews v. Ocean Spray Cranberries Inc.,* 426 Mass. 122, 130 (1997).

Where statutes fail to define the standard, courts have struggled to identify a clear benchmark for comparator evidence.[2] On the one hand, courts have recognized that, "[m]embership in the protected class aside, a comparator's circumstances need not be identical to those of the complainant." *Trustees of Health,* 449 Mass. at 682. "The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated . . . . Exact correlation is neither likely nor necessary, but the cases must be fair congeners." *Id.; Velez v. Thermo King de Puerto Rico,* 585 F.3d 441, 451 (1st Cir. 2009). Notions of fairness and reasonableness appropriately control this analysis. *See Conward v. Cambridge Sch. Comm.,* 171 F.3d 12, 20 (1st Cir. 1999) ("reasonableness is the touchstone").

On the other hand, the Supreme Judicial Court of Massachusetts has adopted other features of the federal standard, without analysis, requiring that the plaintiff "identify and relate specific instances where persons similarly situated 'in all relevant aspects' were treated differently." *Matthews,* 426 Mass. at 130, *quoting Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989) (applying 42 U.S.C. § 1981), *quoting Smith v. Monsanto Chem. Co.*, 770 F.2d 719, 723 (8th Cir. 1985), cert. denied, 475 U.S. 1050 (1986); *see also Ayala-Sepulveda v. Municipality of San German,* 671 F.3d 24, 32 (1st Cir. 2012) (Equal Protection standard).

Cases also refer to this requirement as "all relevant respects," which is an equivalent standard. *Acevedo-Parrilla v. Novartis Ex-Lax Inc.,* 696 F.3d 128, 144 (1st Cir. 2012).[3] Under this "all relevant respects" test, the plaintiff must identify other employees to whom she is similarly situated in terms of performance, qualifications and conduct, without differentiating or mitigating circumstances that would distinguish their situations. *Matthews*, 426 Mass. at 130; *Rodriguez-Cuervos v. Wal-Mart Stores Inc.,* 181 F.3d 15, 21 (1st Cir. 1999). As will be shown, the standards contained in this paragraph should be rejected. In 2015, the Supreme Court rejected the argument that comparators must be similar in all ways. *Young*, 575 U.S. at 228. As this article will demonstrate, the "all relevant respects" burden is absurdly high, inconsistent with other holdings, contradicts basic notions of evidence, and is incompatible with fundamental laws guaranteeing equality and civil rights.

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'ALL RELEVANT RESPECTS' IS TOO BROAD

A requirement for a comparator to share circumstances in **all** relevant respects with the plaintiff creates a higher test for admissibility than is applied to other types of proof of bias. In no other context is circumstantial evidence considered through such a strict test as comparator evidence.

Certainly, a comparator should be similar to the plaintiff in some material respects. However, there is no basis in the rules of evidence or Supreme Court precedent to demand that the comparator be similar in the entire universe of relevant factors. Fed. R. Evid. 401 (fact is relevant if it is of consequence in the action and "has any tendency to make [the] fact more or less probable"). In an area of the law where the totality of circumstances controls, establishing alignment in every single

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relevant respect is unrealistic. Moreover, a categorical rule permits employers to avoid comparator evidence by "fishing" for a distinguishing factor, or combination of factors, at the time of the adverse action. *See Tennial v. United Parcel Serv. Inc*., 840 F.3d 292, 304 (6th Cir. 2016) (explaining that "[d]ifferences in experience and disciplinary history" can disqualify a plaintiff's proffered comparators). Such a standard risks making the discrimination laws "inoperable." *Miller-El,* 545 U.S. at 247 n.6.

Perfection — a perfect fit between evidence and the fact sought to be proven — has never been required for any type of circumstantial evidence, which, by its nature, generates an inference through indirect methods. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 714 n. 3 (1983) ("The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves"). Intent is demonstrated from "all the attending circumstances." *Gallotti v. United States Trust Co.,* 335 Mass. 496, 501 (1957) (action for fraud). The admissibility of circumstantial evidence is considered in the light of the entire case and whether it forms the basis for reasonable inferences. *Cummings v. Std. Register Co.,* 265 F.3d 56, 63 (1st Cir. 2001).

Circumstantial evidence of discrimination is routinely admissible, despite a lack of correlation on all fours with the claim at issue. Evidence of a discriminatory atmosphere at work is admissible even if it can merely add "color" and context to an employment controversy. *Conway v. Electro Switch Corp.,* 825 F.2d 593, 597 (1st Cir. 1987); *Bulwer v. Mount Auburn Hosp.,* 473 Mass. 672, 686 (2016). "[E]vidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific claim that generated a claim of discriminatory treatment." *Cummings v. Std. Register Co.,* 265 F.3d 56, 63 (1st Cir. 2001).

For example, discriminatory remarks are considered, even if they are not linked to the decision to terminate the plaintiff. *Reeves*, 530 U.S. at 152.[4] A jury may consider the fact that an employer condoned the distribution of racist literature, having nothing to do with the plaintiff. *Bulwer*, 473 Mass. at 686. An employer's conduct occurring years after the event, which is not directed at the plaintiff, may assist the plaintiff in proving discrimination. *Brown v. Trustees of Boston Univ.,* 891 F.2d 337, 350 (1st Cir. 1989). An employer's "general practices" with respect to its treatment of minorities are considered, even if there is no specific connection to the plaintiff's situation. *Abramian v. Pres. & Fellows of Harv. Coll.*, 432 Mass. 107, 112, 114 (2000) (where the plaintiff was harassed because of his Russian background, evidence that others were harassed based on Portuguese, Spanish and Italian heritage was considered); *see also International Bhd. of Teamsters v. United States,* 431 U.S. 324, 334-338 (1977) (pattern and practice case involving company-wide practices across a range of employment practices). It is difficult to square a demanding standard for comparator evidence with the broad scope of other evidence that is often permitted.

Use of the "all relevant respects" standard at summary judgment is problematic, as it gives weight to factors that a jury could later find did not motivate the disparate treatment. *Reeves*, 530 U.S. at 151 (evidence favoring the employer is disregarded at summary judgment, including the testimony of witnesses with an interest in the litigation); *see, e.g., Carter v. Pulaski Cty. Special Sch. Dist.*, 2020 U.S. App. LEXIS 13199 (8th Cir.), at 5-6 (accepting employer's asserted reasons for disparate treatment — that cheer team supervised by plaintiff had low attendance and engaged in misconduct, despite the fact that employer renewed plaintiff's contract after such problems emerged). For example, if two employees are caught stealing, but one is fired while the other is suspended, a jury might well conclude that notionally relevant distinctions, such as differing levels of seniority or responsibility, do not explain the different job actions. The Court should not accept, at the Rule 56 stage, the employer's self-serving declarations that a certain factor was relevant. *Reeves*, 530 U.S. at 151.

Moreover, use of the "all relevant respects" standard at trial may be seriously misleading to jurors, as it could lead them to focus inappropriately on factors that did not actually have effect.[5]

It is unclear why corporate atmosphere evidence is admissible to add color and context, but comparator evidence must be related in all factors. There is simply no evidentiary analogue that validates the notion that circumstantial evidence is appropriate only where the context mirrors the claim in "all relevant respects." Furthermore, there is no reason why comparator evidence should be treated differently than other kinds of circumstantial evidence.

'ALL RELEVANT RESPECTS' IS A CATEGORICAL RULE THAT IMPROPERLY REPLACES NORMAL EVIDENTIARY STANDARDS

Normal rules of evidence should govern the acceptance of comparator evidence, and categorical rules limiting its use ought to be rejected. The requirement for commonality in "all relevant respects" is the type of per se rule that the Supreme Court has expressly rejected.

In *Sprint/United Mgmt. Co. v. Mendelsohn,* 552 U.S. 379 (2008), the plaintiff sought to prove age discrimination, in part, by showing that other older employees who worked in different departments and under different managers were also subjected to age discrimination. The District Court rejected the evidence, on the grounds that the other victims of discrimination were not similarly situated to the plaintiff, based on the fact that different decision-makers were involved. *Id.,* at 382. The District Court was unclear in explaining whether it excluded the evidence based on a balancing approach, or whether it had applied a categorical rule that those reporting to different supervisors could never be compared. *Id.,* at 386.

The Supreme Court held that the questions of admissibility are governed by the familiar principles contained in Federal Rules of Evidence 401 and 403, and that such determinations are generally not amenable to broad per se rules. *Sprint*, 552 U.S. at 384, 387. Evidence is relevant if it "has any tendency to make a fact more or less probable." Fed. R. Evid. 401(a). Assessing evidence under that broad standard requires a weighing of factors through use of sound judgment. *Sprint*, 552 U.S., at 384. To the extent that the District Court utilized a categorical rule that employees under different supervisors are never similarly situated, the Supreme Court found that the District Court abused its discretion when excluding the evidence." *Id.* at 387.

The Supreme Court concluded that "the question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Sprint*, 552 U.S. at 388. In other words, discrimination by other

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decision-makers, in different departments and under different chains of command, may be admissible, and all the victims of discrimination in the various departments may be similarly situated. *Id*. However, if that is true, then comparators need not be similarly situated in "all relevant respects," as having the same supervisor is certainly a relevant factor in comparing different employees facing termination. Thus, the Supreme Court has rejected categorical rules such as the "all relevant respects" test.

Sprint is controlling. However, many cases embracing strict limits to comparator evidence do so without validating those limits in light of the *Sprint* decision. *E.g.*, *Lewis v. City of Union City*, 918 F.3d 1213, 1231 (11th Cir. 2019) (adopting "all material respects" test, without considering the *Sprint* ban of categorical standards).

A NUMBER OF FEDERAL DECISIONS HAVE REJECTED THE 'ALL RELEVANT RESPECTS' TEST

A number of courts have rejected the "all relevant respects" test, and others have distanced themselves from it.

The Supreme Court rejected a similar standard in a 2015 case involving an employer's refusal to accommodate pregnant women the same as it accommodated workers who had suffered on-the-job injuries. *Young*, 575 U.S. at 228-30 (Pregnancy Discrimination Act). In that case, the Court stated that a *prima facie* case of discrimination need not include proof "that those whom the employer favored and those whom the employer disfavored were similar **in all** but the protected **ways**." *Id*. at 228 [emphasis added]. The Supreme Court rejected the "all." In more practical terms, the Supreme Court held that a genuine issue of material fact existed as to whether pregnant employees could be reasonably considered similar to other employees who needed accommodations, including those who experienced on-the-job injuries, those who were injured off the job, those for whom it was unclear where they were injured, and those who sought reasonable accommodations under the Americans with Disabilities Act. *Id.,* at 216-17, 230-31. Young was permitted to compare herself to groups of people who were objectively in different categories based on relevant factors. *Id.*

Moreover, the Supreme Court has rejected the "in all respects" standard in *Miller-El v. Dretke*, 545 U.S. at 247 n.6, in a case applying the Equal Protection Clause of the United States Constitution. *Miller-El* considered the validity of comparator evidence to determine whether Black jurors were subject to preemptory challenge based on their race.

> **None of our cases announces a rule** that no comparison is probative unless the situation of the individuals compared is identical **in all respects**, and **there is no reason to accept one.** [emphasis added].

Id. The majority in *Miller-El* expressly rejected the view of the dissent, which would have required that the white and Black jurors be similar with respect to every reason for striking raised by the prosecution (in other words, every relevant reason articulated by the prosecutor for challenge). *Miller-El,* 545 U.S. at 247 n.6 & 291. The Supreme Court held that the adoption of such a rule requiring that comparisons be based on "all" criteria relied upon by the prosecution would make the law against discrimination "inoperable." *Id*. The white and Black jurors were held to be comparable, despite a variety of differences. *Id.,* at 247. Thus, while *Miller-El* rejects an "all respects" test as opposed to the "all relevant respects" test, it clearly is addressing the "all relevant respects" test by implication. *Id.*, at 247 n.6.

Significantly, the United States Supreme Court has never adopted the "all relevant respects" test, despite the fact that it has issued a number of cases considering comparator evidence. The Court in *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 283-85 & n.11 (1976), stated, "precise equivalence . . . between employees is not the ultimate question." The touchstone of the similarly situated inquiry is simply whether the employees are "comparable." *McDonnell Douglas*, 411 U.S. at 804 (comparisons of employees whose misconduct was "of comparable seriousness"); *see also Young,* 575 U.S. at 228, 230; *Sprint*, 552 U.S., at 387-388.

The stringent language in Massachusetts case law (first adopted in *Matthews*, 426 Mass. at 130) was borrowed from the First Circuit decision of *Dartmouth Review v. Dartmouth Coll.,* 889 F.2d 13, 19 (1st Cir. 1989), overruled on other grounds by *Educadores Puertoriquenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004). *Dartmouth Review* addressed a discrimination case arising between organizations under 42 U.S.C. § 1981, and did not address employment discrimination under M.G.L. ch. 151B. The First Circuit adopted the "all relevant respects" language to "put flesh" on the bones of the notion that evidence of past treatment toward others similarly situated can be used to demonstrate intent in a race discrimination suit. *Id.*

Some decisions have moved on from the strict language in *Dartmouth Review*. For example, the First Circuit sometimes describes the plaintiff's burden as showing that a "proposed analogue is similarly situated in material respects." *Velez*, 585 F.3d at 451; *Tsai v. McDonald*, 2017 U.S. Dist. LEXIS 130280 (D. Mass.), at 19-20. This is a much more reasonable burden, as it focuses on the need for comparable circumstances, without implying that the circumstances must be the same for every single relevant factor. Therefore, even if a state court were inclined to follow federal precedent, not all federal courts have embraced the "all relevant respects" test.

The case of *Humphries v. CBOCS West Inc.,* 474 F.3d 387 (7th Cir. 2007), aff'd 553 U.S. 442 (2008), likewise moved away from the strict burden, which considers, but does not require identity with, all relevant factors:

> we have emphasized that the similarly situated inquiry is a flexible one that considers all relevant factors, the number of which depends on the context of the case. . . .
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> . . . . .
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> . . . courts should apply a "common-sense" factual inquiry — essentially, are there enough common features between the individuals to allow a meaningful comparison? . . .
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> . . . . .
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> . . . the fundamental issue remains whether such distinctions are so significant that they render the comparison effectively useless. In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other *prima facie* evidence, would allow a jury to reach an inference of discrimination or retaliation.

Id., at 405. [internal quotes removed]. There is a difference between the requirement to identify "persons similarly situated in all relevant respects" and the *Humphries* flexible version that merely considers "all relevant factors." *Humphries* requires similarity, not for all relevant factors, but simply "enough common

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features" and "sufficient commonalities" as to be useful and to support reasonable inferences. This is a logically tenable description of the standard, as anything more removes reliable information from consideration and constitutes an improper per se rule.

In *Alexander v. Fulton County*, 207 F.3d 1303, 1333 (11th Cir. 2000), the Court upheld a jury instruction that permitted the jury to find discrimination where "another similarly situated employee, who is not a member of the protected group, was not treated in a similar manner." The Court found that the phrase "similarly situated" is the correct term of art to use with the jury, and rejected the employer's demand for a more confining gloss on the standard. *Id*., at 1333-34.

Massachusetts has also moved away from "all relevant respects," as the Supreme Judicial Court has failed to invoke it since 2007, despite having considered comparator evidence on numerous occasions. *See Yee v. Massachusetts State Police,* 481 Mass. 290, 294, 301 (2019); *Verdrager v. Mintz, Levin*, 474 Mass. 382, 398 (2016); *Bulwer*, 473 Mass. at 685-86; *Haddad v. Wal-Mart Stores Inc*., 455 Mass. 91, 99 (2009); *Monteiro v. City of Cambridge*, 2011 Mass. App. Unpub. LEXIS 965, at 7-8.

Many thoughtful courts are moving away from the standard, and it is time to expressly reject it.

CASES IDENTIFY SOME MATERIAL FACTS, BUT DO NOT PRETEND TO HAVE LISTED ALL

One method for showing the unworkability of the stringent standard is to examine the ways in which the courts actually treat questions of comparability. Courts never purport to identify "all" relevant characteristics and then compare them. Rather, courts tend to examine just a few criteria and determine whether the various employees are comparable.

Furthermore, many cases have accepted the use of comparator evidence, despite differences in relevant respects between those compared. Employees have been compared despite being:

1. in different applicant pools;[6]
2. in different departments;[7]
3. under different supervisors;[8]
4. responsible for different job duties;[9]
5. accused of different types of misconduct;[10]
6. charged with having different levels of culpability;[11]
7. charged with a different combination of wrongdoing;[12]
8. charged with wrongdoing supported by different kinds of evidence;[13] and
9. affected during different periods of time.[14]

Given the wide range of evidence found admissible, the "all relevant respects" requirement, in practice, is sometimes not applied as written. Had courts applied the standard to the letter, many of these cases would likely have not survived.

One could fairly question the harm caused by the "all relevant respects" standard, where it sometimes seems to be ignored, or it is applied in a moderate manner. The answer is two-fold. First, the standard is seriously misleading if given as a jury instruction. Second, the standard continues to be used as a mechanism to dismiss cases at summary judgment, by judges who exuberantly adhere to the letter of the requirement.

THE REQUIREMENT STANDS AS AN ARTIFICIAL BARRIER TO JUSTICE UNDER OUR MOST FUNDAMENTAL LAWS

Chapter 151B represents Massachusetts' fundamental public policy. The "all relevant respects" standard is nowhere to be found within the statutory text. *See* M.G.L. ch. 151B, § 4(1). Nevertheless, the state's voluntary adoption of the standard threatens to render the statute inoperable in cases relying on comparator evidence.

Chapter 151B requires that it be liberally interpreted to effectuate its purpose of eliminating and remedying discrimination. M.G.L. ch. 151B, § 9. This requirement for liberal construction promotes the notion that a broad range of evidence may be considered to support a plaintiff's claim, including comparator evidence. *Sivieri v. Commonwealth*, 2006 Mass. Super. LEXIS 297, at 22-23 (gender discrimination claim is supportable, even in the absence of comparator evidence). Where the Legislature could have adopted a confining definition of comparators, but failed to do so, it would be contrary to its intent to import a restrictive test that is both illogical and contradicts usual tests of admissibility. The "all relevant respects" hurdle is an artificial one, not found in the statute, and should not be applied to a set of laws designed to be broad in scope.

A review of cases suggests that sometimes comparator evidence is restricted in a manner that is inconsistent with the full and fair functioning of the civil rights laws. For example, in *Theidon v. Harvard Univ.,* 948 F.3d 477, 500-501 (1st Cir. 2020), a female professor was denied tenure in the Anthropology Department, and she brought a gender discrimination claim. Theidon sought to prove her case, in part, based on the fact that the university sent incomplete materials to the individuals reviewing her candidacy, while it sent more complete materials with respect to the tenure application of a male candidate in the same department. After citing the "all relevant respects" test, the First Circuit found that Theidon could not compare her situation against that of the male candidate in the same department, because her subfields were social and medical anthropology, while the male's subfields were visual and sensory anthropology, even though both candidates' tenure processes were governed by the same set of written procedures. *Id.* When professors within the same department going through the same process cannot be compared on a matter of departmental procedure applying to both, it is overdue to revisit the standard applied.

There are numerous other examples of a strict application of the standard.[15]

THE STANDARD IMPOSES AN IMPOSSIBLE INITIAL BURDEN OF PRODUCTION ON PLAINTIFFS

For plaintiffs seeking to use comparator evidence, the burden rests on them to establish competent evidence. *Matthews*, 426 Mass. at 130. The "all relevant respects" burden requires the plaintiff to speculate and foresee all the factors that a defendant could use to try to distinguish a comparator. *Id*. The "all relevant respects" requirement demands an unrealistic type of clairvoyance, and proof of a negative, to even try to introduce the evidence.

The standard seems to require plaintiffs, as part of their initial proffer, to establish themselves as comparable to others in terms of performance, qualifications and conduct. *Matthews*, 426 Mass. at 130. However, such factors might not be applicable in a given case, such as when comparator evidence is being used with respect to implementation of a layoff, and where performance is not the issue. As stated above, it is unfair to require a plaintiff to adhere to elements of similarity that a jury could later find to be non-determinative, and did not actually motivate the

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difference in treatment.[16] Thus, it is illogical to place the burden on the plaintiff to foresee factors, and present evidence based upon them.

Sometimes, plaintiffs will use comparator evidence as part of their *prima facie* case, and an exacting standard is inconsistent with the fact that the *prima facie* burden is intended to be a light burden. The *prima facie* case is an initial burden of production designed to raise an inference of discrimination. It is not meant to be an onerous burden. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981); *Trustees*, 449 Mass. at 683. It is meant to be a small showing, easily made. *Trustees*, 449 Mass. at 683.[17]

One possible version of the fourth element of the *prima facie* case — but not the only version — is to show that the plaintiff was treated differently than a similarly situated employee who was outside the protected class. *Rivera-Rivers v. Medina & Medina Inc.,* 898 F.3d 77 (1st Cir. 2018); *Trustees*, 449 Mass. at 682. It is simply inconsistent for the courts to inject an exacting standard into a *prima facie* burden that is supposed to be easily satisfied. *See Trustees,* 449 Mass. at 682-83; *Humphries*, 474 F.3d at 405-6.[18] Also important, the "all relevant respects" requirement, when considered at the *prima facie* stage, imports consideration of the defendant's proof at the *prima facie* stage, which is improper. *Acevedo-Parrilla*, 696 F.3d at 139.[19]

Another way to satisfy the fourth element of the p*rima facie* case is to show that the employer retained or hired a replacement outside of the plaintiff's protected class to perform the plaintiff's job functions. *O'Connor v. Consl. Coin Caterers Corp*., 116 S. Ct. 1307, 1310 (1996); S*ullivan v. Liberty Mutual Ins. Co.*, 444 Mass. 34, 44 & n.14 (2005). However, in the many cases that have articulated this burden, none have identified any obligation to show that the replacement is similarly situated in all relevant respects.

Replacement evidence, properly understood, is merely a type of comparator evidence, in that it shows that another person was treated better after the plaintiff was rejected or terminated. Replacement evidence illustrates that comparator evidence remains useful and probative, even if there are areas of difference with the comparator, and without establishing congruence of circumstances in all relevant respects. *Young*, 575 U.S. at 228 (replacement evidence in *prima facie* case may be considered, even where the replacement does not share all characteristics with the plaintiff apart from protected status).

The fact that comparator evidence may be considered part of the *prima facie* case, which is a light burden, demonstrates that it is unfair to erect high barriers to admissibility for that evidence. More generally, the burden on the plaintiff to support her comparator evidence is overly strict, and stifling to otherwise persuasive, competent evidence.

AN ALTERNATIVE PROPOSAL

As an alternative standard, the author suggests the following: "The plaintiff must show herself to be similar to one or more employees in enough respects such that her situation can be reasonably compared to theirs."

The proposed standard is consistent with well-established principles, as well as the formulations in the *Humphries* and *Velez* cases. *Humphries*, 474 F.3d at 405; *Velez*, 585 F.3d at 451. First, circumstantial evidence is admissible if it can help a jury to form reasonable inferences. Fed. R. Evid. 401. Second, evidence that merely adds color to an employment decision may be introduced, even if it goes beyond the specific misconduct for which the plaintiff seeks recovery. *Conway*, 825 F.2d at 597. Third, categorical rules raising barriers to similarly situated evidence are forbidden. *Sprint*, 552 U.S. at 387-88. Fourth, it should be up to the jury to weigh the strength of indirect evidence, and this stricture assumes that circumstantial evidence sometimes does not represent a perfect fit. *Aikens*, 460 U.S. at 714 n. 3. There is no reason why these well-established principles should not apply to comparator evidence.

CONCLUSION

All the cases agree that the similarly situated standard does not require a clone. *Chaney v. Plainfield Healthcare Ctr.,* 612 F.3d 908, 916 (7th Cir. 2010). However, the requirement to show similarity in "all relevant respects" is unrealistic, and is associated with decisions that seem contrary to the full, intended operation of the civil rights laws. It is a burden much more stringent than established for any other type of circumstantial evidence of discrimination, and violates the Supreme Court's prohibition of categorical rules of relevance. Its use prior to trial requires consideration of factors that a jury could find to be relevant but non-determinative. It is time to get rid of the aberrant and unreasonable standard, which is not based on the statutes or ordinary evidentiary principles. ■

1. Comparator evidence is not required in every case to prove discriminatory intent. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 146 (2000) (Court of Appeals erred in assuming that preferential treatment of younger people is required to prove age discrimination); *Franchina v. City of Providence*, 881 F.3d 32, 52-53 (1st Cir. 2018); *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005); *Avci v. Brennan,* 285 F. Supp. 3d 437, 441-42 (D. Mass. 2018) (discussing the absurdity of requiring comparator evidence where the plaintiff is in a class by herself). It is legal error to instruct a jury that comparator evidence is required in a discrimination case. *Dumeus v. Newton-Wellesley Hospital,* 2017 Mass. App. Unpub. LEXIS 798, at 2 ("To the extent, therefore, that this instruction prohibited the plaintiff from prevailing without comparator evidence, it was erroneous.").

2. Sometimes, the statute defines the universe of possible comparators. For example, the Pregnancy Discrimination Act provides that pregnant individuals must be given the same treatment as provided for "other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k); *see also* 149, § 105A(a) (defining "comparable work" in Equal Pay Act). The employer may not further limit the range of comparators to whom the plaintiff compares herself. *Ensley-Gaines v. Runyon,* 100 F.3d 1220, 1226 (6th Cir. 1996).

3. Sometimes, courts describe this burden as "all material respects" (*Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012)), which carries with it the same errors as "all relevant respects." Other formulations are equally problematic, such as the requirement that comparators "must closely resemble one another," as opposed to using the more liberal phrase, "similarly situated." Compare *Ray v. Ropes & Gray LLP*, 799 F.3d 99, 114 (1st Cir. 2015), with *Burdine*, 450 U.S. at 258 ("it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally").

4. "[S]tray remarks may properly constitute evidence of discriminatory intent for the jury to consider in combination with other evidence." *McMillan v. MSPCA*, 140 F.3d 288, 300-01 (1st Cir. 1998).

5. Social scientists refer to a concept called "the focusing illusion," where people erroneously accord outsized significance to a factor that has been emphasized. R. Cialdini, *Pre-suasion: A Revolutionary Way to Influence and Persuade*, Simon & Schuster Paperbacks, 2016, at 33. "The tendency to presume that what is focal is causal holds sway too deeply, too automatically, and over too many types of human judgment." *Id.*, at 54. The overbroad "all relevant respects" test increases the danger that jurors and judges will be wrongly persuaded that a difference explains the biased result.

6. *MCAD & McSweeney v. Trial Court of Mass.*, 2016 Mass. Comm. Discrim. LEXIS 9, at 13-15 (applicants were similarly situated, despite the fact that they were in different applicant pools and considered by different interview panels. While DCAM input was in one process but not the other, that was remedied by the fact that the DCAM ok'd the selection of the other process).

7. *Sprint*, 552 U.S. at 387-88 (employees supervised by different managers in different departments may be similarly

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situated); *Ray v. Ropes & Gray LLP,* 799 F.3d 99, 114 (1st Cir. 2015) (legal associates in different practice groups may be compared); *Olson v. Chao,* 2019 U.S. Dist. Lexis 167937 (D. Mass.), at 39-40 (employee in a different department under a different manager was similarly situated); *Hawley v. Dresser Indus.*, 958 F.2d 720, 724 (6th Cir. 1992) (where the employer failed to transfer the plaintiff, the 62-year-old vice president of planning for a corporate division, but transferred his assistant and a planner in another division following a corporate reorganization, a jury could conclude that the employer was motivated by age bias); *MCAD & Dilorio v. Willowbend Country Club Inc.,* 2011 Mass. Comm. Discrim. LEXIS 29, at 8-10 (Full commission affirmed comparator evidence considering layoffs in departments outside the one where the complainant worked).

8. *Sprint*, 552 U.S. at 387-88 (employees supervised by different managers in different departments may be similarly situated); *Olson v. Chao,* 2019 U.S. Dist. LEXIS 167937 (D. Mass.), at 39-40 (employee in a different department under a different manager was similarly situated); *Anderson v. Brennan,* 219 F. Supp. 3d 252, 258 (D. Mass. 2016) ("this [c]ourt declines to adopt the Postal Service's position that another employee disciplined by a different supervisor cannot, as a categorical rule, be a comparator"), 2017 U.S. Dist. LEXIS 38750 (D. Mass.), at 31, affirmed 2018 U.S. App. LEXIS 35213 (1st Cir.), at 24-25.

9. *Trustees of Health*, 449 Mass. at 681, 684-85 (part-time employee who worked from home and who was not a supervisor may be compared to full-time office workers, some of whom were supervisors); *Anderson v. Brennan*, 254 F. Supp. 3d 253, 259 (D. Mass. 2017), affirmed 911 F.3d 1 (1st Cir. 2018) (comparators need not have the same work duties); *Boston v. Massachusetts Comm'n Against Discrimination,* 47 Mass. App. Ct. 816, 822-23 (1999) (permanent employee was compared with provisional employees despite employer's argument that the permanent employee bore greater responsibility, where the personnel handbook failed to identify any difference in the standard of conduct among employees. Differing job titles and classifications are not controlling); *Rodgers v. White*, 657 F.3d 511, 517-18 (7th Cir. 2011) (non-supervisor may be compared to supervisor); *Hawley*, 958 F.2d at 724 (where the employer failed to transfer the plaintiff, the 62-year-old vice president of planning for a corporate division, but transferred his assistant and a planner in another division following a corporate reorganization, a jury could conclude that the employer was motivated by age bias); *Ezell v. Potter*, 400 F.3d 1041, 1049-50 (7th Cir. 2005) (plaintiff is properly compared to his supervisor, who engaged in similar misconduct).

10. *Haddad*, 455 Mass. at 99 (female pharmacist was terminated for leaving the bench briefly unattended, while male pharmacists were not questioned or terminated for engaging in more serious transgressions); *Acevedo-Parrilla v. Novartis Ex-Lax Inc.*, 696 F.3d 128, 145-46 (1st Cir. 2012) (employees engaging in different types of misconduct may be considered by the jury to be similar, even though the company explains that a rodent infestation occurring under the tenure of the comparator was caused by a construction project beyond his control); *McDonnell Douglas Corp.*, 411 U.S. at 804 (employees are similarly situated where they engaged in different types of misconduct of "comparable seriousness"); *McAleer v. Starbucks Corp.,* 2014 U.S. Dist. LEXIS 11961 (D. Mass.), at 11-12 & n.7 (jury could find store managers to be similarly situated, even when the employer describes the plaintiff as "categorically deficient," and the other managers are described as "episodically deficient"); *Chase v. United States Postal Service,* 2013 U.S Dist. LEXIS 157592 (D. Mass.), at 40 (where employer terminated an employee allegedly due to a drug arrest, which was publicized, the employee was similarly situated with others who were arrested, even though two of those arrests were unpublicized and the other employee admitted wrongdoing and begged for forgiveness).

11. *Bulwer*, 473 Mass. at 688-89 (analysis of harsh criticisms of plaintiff must embrace and take into account the plaintiff's ability to impugn the credibility of the reviewers); *McDonald*, 427 U.S. at 283 & n.11 (the "precise equivalence in culpability between employees is not the ultimate question" in an employment case); *Velez*, 585 F.3d at 451 (where a number of employees were accused of stealing from the employer, there is no distinction that the employee profited from it monetarily, and the other employees did not sell the property for a profit).

12. *Jean v. Brennan*, 2016 U.S. Dist. LEXIS 124941 (D. Mass.), at 14-15 (rejecting employer's argument that comparators did not engage in the specific type of wrongdoing, and the specific combination of wrongdoing, that the plaintiff was alleged to have perpetrated, including loss of mail, errors in scanning, and refusal to listen to supervisor).

13. *Travers v. Flight Services & Systems Inc.*, 737 F.3d 144, 149 (1st Cir. 2013) (considering comparator evidence where complaint against the plaintiff was firsthand, while a complaint against the comparator was secondhand).

14. *Bulwer*, 473 Mass. at 686 (comparator Caucasian medical professionals were not disciplined until months or years after incidents, while plaintiff was disciplined immediately); *Acevedo-Parrilla,* 696 F.3d at 145-46 (the plaintiff's replacement is considered a valid comparator); *Haddad*, 455 Mass. at 96, 99 (plaintiff's replacement is considered a comparator); *Anderson*, 254 F. Supp. 3d at 259, affirmed 911 F.3d 1 (1st Cir. 2018) (employee discipline may be compared, despite passage of time between incidents).

15. *See also Perez v. Horizon Lines Inc.*, 804 F.3d 1, 4, 8 (1st Cir. 2015) (where female human resources manager put male employee's car keys in her pants and told him that he could get them back only if he took her home, forced the male to dance with her, lured him to her house on the pretext of a work assignment, only to repeatedly touch his hands and arms, and made him bring her "hot" pastries on a weekly basis, despite inconvenience with respect to his other work duties, court found that the female's misconduct is not comparable to a male yard manager who was fired for having taken one nude photo on the work site, more than a year before); *David v. City & County of Denver*, 101 F.3d 1344, 1359-60 (10th Cir. 1996) (where a female employee complained of sexual harassment, and was suspended a few days thereafter for 20 days for being one minute late to roll call, evidence that several male officers with as many or more tardiness violations received less discipline was rejected, because it was held that non-discriminatory differences in treatment of employees in the workplace is to be expected due to random unfairness. Furthermore, the court held that since the employer exhibited a lack of consistency in its record-keeping, it could not meaningfully compare officers — a holding that insulates employers' discrimination through its own lack of effort to ensure fairness); *Knox v. Roper Pump Co.,* 2020 U.S. App. LEXIS 13921 (11th Cir.), at 23 (white worker who slapped co-worker on the job and who was rehired could not be compared to Black worker who slapped a co-worker off-site and was not rehired).

16. The distinguishing characteristics that preclude use of comparator evidence must actually motivate the employer. *See Trustees*, 449 Mass. at 683-84 (employer's layoff policy and procedure treated different levels of employees equally, and thus, employees with different job titles and levels of responsibility were considered comparators despite argument from employer that they were not similarly situated); *Boston v. Massachusetts Comm'n Against Discrimination,* 47 Mass. App. Ct. 816, 822-23 (1999) (permanent employee was compared with provisional employees despite employer's argument that the permanent employee bore greater responsibility, where the personnel handbook failed to identify any difference in the standard of conduct among employees — differing job titles and classifications are not controlling); *Lee v. Kan. City S. Ry.*, 574 F.3d 253, 260 (5th Cir. 2009) (difference between comparators must account for the difference in treatment in order to preclude comparator evidence).

17. The reader is assumed to be generally familiar with the *McDonnell Douglas* rubric for proving discrimination, which may be established with a *prima facie* case along with proof that the employer's reason for the adverse action is not the real reason. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993); *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 501 (2001).

18. Proof of the fourth element of the *prima facie* case is apparently now voluntary in Massachusetts, as the SJC has moved to a three-step approach. *Verdrager*, 474 Mass. at 396-397.

19. The *prima facie* burden is a burden of production meant to be a collection of the plaintiff's evidence that generates an inference of discrimination if the employer's position is "unexplained." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978). Use of the "all relevant respects" test at the *prima facie* stage either allows the employer to inject its evidence and argument into this stage, or requires the plaintiff to navigate factors that the employer has yet to assert or rely on. Either way, use of the "all relevant respects" standard is inconsistent with the *prima facie* rubric. It is suggested that the universe of factors to be considered only is established at the pretext stage, after the plaintiff has had a chance to challenge the employer's assertion of distinguishing characteristics. To the extent that the plaintiff raises a reasonable inference that a factor was not relied on by the employer, she should not be compelled to compare herself with others on that basis.

FEDERAL COURT CHALLENGE TO MASSACHUSETTS EVICTION MORATORIUM ACT FILED BY SMALL HOUSING PROVIDERS

BY JORDANA ROUBICEK GREENMAN

The Eviction Moratorium Act is slated to expire on Oct. 17, 2020, at 11:59 p.m., after Gov. Charlie Baker extended the limitations on eviction proceedings by 60 days on July 21. United States District Court for the District of Boston Judge Mark Wolf is scheduled to hear a request for an injunction sometime in August in a lawsuit challenging the moratorium's constitutionality.

Marie Baptiste, lead plaintiff in the federal court action, owns a rental property in Randolph. Baptiste, a nurse, allegedly is owed roughly $19,000 in back rent by her tenants, who have not communicated with her about the arrearage.

The eviction moratorium precludes Baptiste from sending the tenants a notice to quit or initiating eviction proceedings. Potentially compounding Baptiste's woes, the Massachusetts Legislative Committee on Housing is expected to be referred two bills, SD. 2992, sponsored by Sen. Pat Jehlen (D-Somerville), and HD. 5166, sponsored by Rep. Mike Conolly (D-Cambridge) and Housing Committee Chair Kevin Honan (D-Brighton), both of which would further lengthen the eviction moratorium for 12 months from the date Gov. Baker lifts the state of emergency that he initially invoked on March 10.

Baptiste and co-plaintiff Mitchell Matorin are among thousands of small rental housing providers facing similar hardship in their struggle to remain solvent during the COVID-19 crisis.

The federal lawsuit, filed by the author and co-counsel Richard D. Vetstein, seeks to overturn and enjoin the moratorium as unconstitutional. Principally, counsel contend that the moratorium abridges plaintiffs' constitutional rights to:

1. petition the judiciary;
2. free speech under the First Amendment;
3. just compensation for an unlawful property taking under the Fifth Amendment; and
4. the benefits of their leases under the Contracts Clause.

The moratorium eviscerates the right to evict, which is the core remedy for nonpayment of rent in residential leases. In his letter to the Legislature enlarging the moratorium by 60 days, Gov. Baker acknowledged that small landlords who depend on rent to pay their mortgages, real estate taxes and other expenses would be impacted by the eviction moratorium extension and "strongly encourage(d) tenants to continue to pay rent." Unfortunately, although many renters have received government relief during the pandemic, property owners have largely been ignored.

An earlier lawsuit filed by the plaintiffs in Suffolk Superior Court is still pending, with a hearing scheduled for July 30. ■

JORDANA ROUBICEK GREENMAN is a well-respected landlord-tenant lawyer, well known in the various Massachusetts housing courts. She is also a writer for Massachusetts Bar Association publications and hosts seminars for landlords and small property owners through the Metropolitan Boston Housing Partnership.

TAXATION LAW

COVID-19 AND STATE EMERGENCY ORDERS

BY NATASHA VARYANI

In the past few months, the COVID-19 pandemic has caused a seismic shift in almost every aspect of the way our government, commercial and social systems operate. At the same time, the justice system and its relationship with race are subject to an unprecedented level of scrutiny. Counterintuitive though it may seem, an examination of the history and role of property tax in our collective conduct may be just the right lens through which we should seek to understand some current shifts. Through this same lens, we can watch for developing trends to determine how the proverbial dust will settle when we pass through these crises.

PROPERTY TAX OVERVIEW

An examination of the relationship of local property values and taxes can reveal a great deal about the way that race and class are written into American history. As local property tax is derived by taking a percentage of the property value, whether focusing on a set of neighborhoods over time or aggregating data from across the country, a story about access to desirable property emerges. Basic principles of supply and demand are in operation and reflect the larger values that have been collectively agreed on in various times and places. More desirable property is assessed at a greater value, and layering data regarding the movement of racial groups in and among neighborhoods paints an uncomfortable picture about the relationship between race and property values that Americans have historically lived with. The additional layer of the government's role in access to capital (discussed below) makes the larger picture even more uncomfortable.

IT ALL COMES BACK AROUND: NEIGHBORHOOD DESIRABILITY AND MUNICIPAL SERVICES

There is a circular relationship between the desirability and value of property, and residential property in particular. As property tax is a portion of the assessed value of property, high property values result in greater tax revenue for the locality. Cities and towns with high levels of income can provide high-quality services to the residents who live there. These services may include things like maintenance and garbage collection, road repairs, emergency support services, libraries and, perhaps most important, schools. When property values and local tax revenues decrease, those services simply cannot be as robust, neighborhoods become less attractive, and the individuals who reside there generally have a lower likelihood of economic success. In many of these neighborhoods, that results in more consolidated living, which means more people who need local services and the same or even lower amounts of property tax revenue. This pattern of spiraling is one that is not only supported by data, but also resonates with the intuition of many.

The same concept works in the other direction as well. The more common pattern is that a formerly undeveloped space with little to no property tax revenue has housing built that attracts high-income individuals, historically mostly white neighborhoods, and relatively high tax revenues allow for robust local services, which make a community more attractive and more valuable.

A HISTORY OF COLORED LINES

Another element to add to these patterns in property tax revenues is the way that the state has been involved in these issues. The practice of "redlining" in the mid-20th century resulted in a systematic denial of certain services, most notably access to credit and insurance sufficient to allow for property ownership in neighborhoods that were explicitly identified as having high percentages of Black residents. Denying access to credit and insurance and other services to support homeownership and protection of property values only exacerbated the downward spirals described above. In the early 21st century, private banks (backed by government agencies) used the same red lines when finding loans to collateralize, resulting in a disproportionate negative impact on communities of color during the 2008 financial mortgage crisis.

THE NEW ORDER: POST-PANDEMIC PROPERTY

Though many historians and scholars have taken lessons and cues from the viral pandemic that occurred roughly a century ago (the Spanish Flu), an important distinction exists: the internet. The ability to take professional, academic and personal lives online through a host of creative solutions and internet tools makes the current health crisis unprecedented in many ways. Though many of these tools were available prior to the pandemic, their widespread use since the spring of 2020 by a critical mass of individuals may have some impact on the attributes of residential property that people prioritize and value. In the past, through a system of covenants, government programs and financial institutions, treatment of minority communities has made access to high-paying jobs difficult from some blighted communities. These dynamics served only to exacerbate existing inequities, but these novel times and circumstances may have an unpredictable impact, particularly as issues relating to racial justice are simultaneously experiencing a changing cultural tide.

REDISTRIBUTION: ACCESS TO HIGH-PAYING JOBS AND THE NEXT PHASE IN OUR HISTORY

Though it may seem as though time has stopped in some respects in response to the pandemic and related emergency orders, the undercurrents of some large systemic issues are shifting. With physical access to high-paying jobs no longer a relevant factor, a revolution in race relations potentially on the horizon, and desperation for local services in a very high number of local jurisdictions, it may be true that a seismic shift is underway. During a time in which predictions are rendered useless, continuing to monitor what happens to property values and tax revenues for localities may provide some early hints about a new world order. ■

NATASHA VARYANI is an associate professor of law at New England Law | Boston, where she teaches courses in property, tax, eCommerce and critical race theory. She was a tax practitioner in large firms in Boston for roughly a decade before coming to academia.

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