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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court correctly applied Sahli v. Bull Information Systems, Inc., 437 Mass. 696 (2002) and other applicable law, in holding that appellants retaliated against Schive, their former employee, in violation of the anti-retaliation provisions of G.L. c. 151B §§ 4(4) and 4(4A), by filing a baseless lawsuit against her in the superior court?

2. Whether the trial court's factual findings regarding the causal link between Schive's actions (pursuing her reasonable discrimination claims) and appellants' actions (filing a lawsuit against her) provided an adequate basis to support its retaliation holding?

3. Whether the trial court correctly determined that appellants abused the process of the court by filing a lawsuit against Schive that they knew or should have known was baseless, for the ulterior purpose of discouraging her from pursuing her reasonable claims of discrimination at the Massachusetts Commission Against Discrimination?

4. Whether, following the retirement of the trial judge and his issuance of Findings of Fact, Rulings of Law, and Order of Judgment, the successor judge properly entered judgment against appellants and awarded Schive emotional distress damages based on the record evidence, and attorneys' fees based on the record evidence supplemented by counsel's petition for fees pursuant to statute?

STATEMENT OF THE CASE

In December 1999, Appellants Psy-Ed Corporation ("Psy-Ed") d/b/a Exceptional Parent Magazine ("EP") and Joseph Valenzano ("Valenzano") brought a complaint in the trial court against Dr. Stanley Klein ("Klein"), a founder of Psy-Ed and former co-publisher

of Exceptional Parent Magazine, KSADD003; A001420, and Kimberly Schive ("Schive" , a former EP employee. KSADD010-11; A001427-1428.[1] The Complaint included counts for violation of G.L. c. 93A § 11, two counts for different types of defamation, and counts for civil conspiracy, tortious interference with contractual relations, and tortious interference with business relations. KSADD001; A001418.

Schive brought counterclaims for retaliation under G.L. c. 151B and for abuse of process. Klein also filed a series of counterclaims. KSADD002; A001419.

On September 15, 2004, all the affirmative claims against Schive were dismissed by the court, with the exception of the claim for defamation per se. A001215, A001219. On June 21, 2005, the trial court allowed Schive's Motion for Judgment on Claim of Defamation Per Se, leaving no affirmative counts

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[1] References to the record are as follows: "A" followed by a number refers to pages in the appendix; "TR." followed by a roman numeral and a number refers to the trial day and page of a transcript reference; and "EX" followed by a number refers to an exhibit by page number in the bound volume of trial exhibits. Finally, "ADD" followed by a number refers to pages in appellants' addendum following their brief, and KSADD refers to documents in Schive's addendum, followed by their page numbers.

against Schive for trial. KSADD002 n.4; A001419 n.4. The trial court also dismissed most of the appellants' affirmative claims against Klein, leaving for trial only a portion of the defamation claim against Klein, Schive's two counterclaims, and a number of Klein's counterclaims. Id., KSADD002 and nn.4, 6 and 7; A001419 and nn. 4, 6 and 7.

The trial court (Houston, J.) conducted a bench trial over six days in June 2006 on the single remaining affirmative claim against Klein, on Klein's surviving counterclaims, and on both of Schive's counterclaims. KSADD001-2; A001418-1419. On August 18, 2006, the trial court issued its Findings of Fact, Rulings of Law and Order of Judgment. KSADD001-027; A001419-1444. Inter alia, the trial court found in favor of Schive on both of her counterclaims. KSADD019, 25-26; A001436, A001442-1443. However, the trial judge had retired in the summer of 2006. A002399. Therefore, as part of his Order, he left the determination of damages to a successor judge. KSADD027; A001444.

The successor judge held two hearings on post-trial matters and damages. KSADD029; A002399. At the second hearing, the superior court heard

argument on the parties' various motions, including Schive's motion for assessment of damages. KSADD028-29; A001474-1687. On March 12, 2009, the superior court (Hamlin, J.) issued Findings of Fact, Rulings of Law and Order on Plaintiff Kimberly Schive's Motion for Assessment and Award of Damages and Fees and For Entry of Judgment. KSADD028-38; A002398-2408.

The superior court awarded Schive $125,000 in emotional distress damages, KSADD033; A002403, and $463,448.60 in attorneys' fees and expenses. KSADD038; A002408. On the same date, that court entered judgment for Schive. KSADD039-40; A002396-2397. Also on March 12, 2009, the court ordered relief and entered judgment for Klein. A002356-2395.

Appellants filed their notice of appeal on April 9, 2009. A002441.

STATEMENT OF FACTS[2]

This case involves a lawsuit filed against two former employees of Psy-Ed Corporation, Schive and

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[2] Schive notes that appellants' brief contains a purported "Introduction," which violates the strictures of M.R.A.P. 16(e), in that it purports to set forth facts about the case without any "appropriate and accurate record reference," indeed, without any record references at all. Schive is confident the court will disregard such statements of purported "fact."

Klein, some years after their employment ended. Schive contends that the lawsuit was filed against her in retaliation for a discrimination claim she filed at the Massachusetts Commission Against Discrimination ("MCAD") in 1997, after her employment ended, and that she pursued thereafter. Although the merits of that case were not before the trial court nor this court, the underlying facts of Schive's Psy-Ed employment and of the processing of Schive's MCAD complaint are set forth briefly below to explain Schive's counterclaims, which are the subject of this appeal.

Psy-Ed hired Schive, who is deaf, as an assistant editor in 1993. She was based in EP's Brookline, Massachusetts office. Schive was promoted to associate editor within a year. KSADD010; A001427. Schive remained an employee of Psy-Ed until her termination in August 1996. KSADD010; A001427; TR. IV: 43; EX 0270.

During the course of her employment, Schive experienced a hostile environment related to her deafness: although Schive needed a sign language interpreter to participate in group meetings in which a large number of individuals took part, on some ten to twelve occasions she was denied an interpreter. At

such times, she perceived that Valenzano became angry and impatient with her when she asked questions in an effort to participate in the meeting. KSADD010; A001427; TR. IV: 32-41.

In the summer of 1996, Psy-Ed restructured its operations and moved certain functions to New Jersey. However, Klein and an assistant remained employed, and the Brookline, Massachusetts office remained open. KSADD006; TR. IV: 165-166. Schive was initially told she would be offered an important continuing "senior editor" role with EP. However, the role she was ultimately offered was a three-month part time consultant's role, with no benefits and no assurance of a continuing relationship beyond the three months. The offer was for a "very, very small role," that did not include her former duties. TR. IV: 43. Schive declined the offer, and her employment ended in August 2006. KSADD011; A001428; TR. IV: 41-43; EX 0269-270.

Schive filed a claim of handicap discrimination at the Massachusetts Commission Against Discrimination ("MCAD") on February 13, 1997. KSADD011; A001428; EX 0267-271. _Inter alia_, she complained of hostile environment discrimination associated with the denial of needed interpreter services, and discriminatory

termination, in that her job was eliminated and she was denied a senior editor role and terminated when Psy-Ed restructured its operations. EX 0271.[3]

Before filing her complaint, in approximately December 1996, Schive, through counsel, sent a demand letter to Psy-Ed and Valenzano, to which the MCAD complaint was attached. TR. IV: 86-87. On January 2, 1997, Valenzano asked Klein by letter to respond to the allegations in the letter and complaint. KSADD010; A001428; TR. IV: 88-89. In the letter, Valenzano candidly admitted an impulse to retaliate by filing a lawsuit against Schive, as follows:

> If she cannot make her charges stick, she opens herself up to a significant slander and libelous [sic] action which I would not hesitate in taking against her, and which I am prepared to do even at this point. EX 0371.

Thereafter, Psy-Ed counsel prepared an affidavit for

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[3] Contrary to appellants' representations, Schive did not allege in her MCAD complaint that Psy-Ed moved its offices to New Jersey as a means of ending her employment. Rather, this formulation of what occurred first appeared in the MCAD's narrative that accompanied its probable cause finding. Compare ADD057 (MCAD narrative) with EX 0268-271. Furthermore, at trial appellants objected to the admission of the MCAD's December 2, 1999 probable cause documents, and they were never entered into evidence. TR. IV: 53, 56. These documents are not properly before the court on appeal, and the statements upon which appellants rely are hearsay and false. These objections are discussed infra.

Klein to sign in support of Psy-Ed's position at the MCAD. In June 1997, Klein signed the affidavit, but had misgivings. Klein communicated his misgivings to Psy-Ed and Valenzano. A001428.

In October 1997, Klein executed a second affidavit, id., which affidavit stated that it clarified the first affidavit. It supported portions of Schive's MCAD Complaint. EX 0272-275.

In September of 1999, Schive and Valenzano participated in a mediation to attempt to resolve Schive's complaint, TR. IV: 46, VI: 93-94, which was pending at the MCAD. TR. IV: 92. During the course of the mediation, Schive gave Valenzano a copy of Klein's second affidavit. TR. IV: 47, 49. Valenzano had not previously seen the second Klein affidavit. A001443. He later stated that he was shocked, surprised and disappointed by it. TR. III: 17-18; TR. IV: 169.

The mediation thereafter failed. TR. IV: 49-50. At a meeting of the Psy-Ed Board of Directors on September 30, 1999, the Board voted to terminate the mediation without making Schive an offer. TR. IV: 97-98; EX 0058-59.

On December 2, 1999, the MCAD issued a probable cause finding on Schive's discrimination case, allowing her case to proceed. A001443; ADD 056-57.

Just two weeks later, Psy-Ed and Valenzano filed their lawsuit against Schive and Klein. A001443. Valenzano admitted in deposition and confirmed at trial that Klein's second affidavit, which supported Schive in her MCAD case, together with allegations Schive had made in her MCAD complaint, led him to file the complaint. TR. IV: 103-104, 114.

Following the filing of the lawsuit against Schive, on February 23, 2000, she filed a claim of retaliation at the MCAD. TR. IV: 54-55; EX 0290-292.[4]

During the course of the litigation, all the

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[4] In December 2000, the MCAD issued a "Lack of Probable Cause" ruling on Schive's retaliation complaint, on the sole basis that she had "failed to demonstrate that she was subjected to an adverse employment action as her employment with Respondent was severed in August of 1996." EX 0386-388 at EX 0387-388. After a preliminary hearing (appeal), the MCAD affirmed this finding. EX 0384. (The MCAD nevertheless found probable cause on Klein's retaliation claim, also brought after his employment ended. TR. IV: 161; A000658.) In any case, relying on the Supreme Judicial Court's decision in Sahli v. Bull Information Systems, 437 Mass. 696 (2002), the trial court reached a contrary conclusion on Schive's retaliation claim, stating that Schive had established that "the lawsuit brought by Psy-Ed is an adverse employment action." A001442 (emphasis supplied). Discussion of the legal merits of the MCAD's holding is found infra in the Argument section of this brief.

affirmative claims against Schive were dismissed.[5] The dismissal took place shortly after a June 9, 2004 hearing on Klein's motions for judgment and for summary judgment on certain claims, in which Psy-Ed and Valenzano admitted they lacked evidence of any money damages. A001219.

Upon hearing this admission, the superior court motion judge expressed strong words of reprimand and disapproval, as follows:

> **THE COURT:** …Then I'm going to get back to the issue of litigation qua litigation because that strikes me as probably the most disturbing part of all this. And I am not the first judge who has been disturbed by the conduct of the litigation in this case.
>
> One of the most striking things that I saw as I was going through the materials - and this was before I read the docket sheet or seen anything about what any other judges had done - was this statement in the response to the argument about motion for judgment, or, in the alternative, to preclude evidence, that, well, you know, "We haven't produced any documents about damages on the defamation claim, so that's moot, so we don't have to talk about it."
>
> This is a '99 case. So for five years there's been a claim out there for defamation, allegations about defamation, and Dr. Klein, who is the defendant and plaintiff in counterclaim, has been trying to get information about the damages. And he doesn't get any documents about that….

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[5] The trial court dismissed the claims after Schive moved that it do so, based on admissions made in the June 9 hearing, A001215-1218, as discussed infra.

• • •

It's unacceptable....

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THE COURT: Counsel, you're not hearing me....

This case began in 1999. The claim for defamation was not Dr. Klein's.

MR. NORTON: That's absolutely right, Judge.

THE COURT: The claim for defamation was there from day one, was it not?

MR. NORTON: Yes, it was, Judge.

THE COURT: And there were documents, allegedly, to support a claim for damages under defamation, because you have to have damages. Otherwise you don't have a defamation claim, do you, Counsel?

MR. NORTON: There are - there is a defamation per say [sic], your Honor, which was always sort of a backup position....

But moreover, we, as counsel, always thought that there were actual special damages. We pursued that with the client. Push came to shove. We don't think we had adequate basis to move forward at this stage. We didn't have the documents to support a claim for damages. I personally -

THE COURT: Counsel, this is five years after you alleged that there were such damages. It seems to me that the requirement for counsel to see whether or not what a client wants to do can be supported. It's long overdue. In fact, it should have been done before it was in the complaint. But even if it got put in the complaint, it most assuredly should have been dropped within, what, six months.... A001192-1195 (emphasis supplied)

• • •

THE COURT: All right. Let's peel out the defamation claim. And I want someone to tell me, on behalf of the plaintiffs, what money damages do you have any proof of that you can present to a jury on ***any*** count? (emphasis supplied)

MR. NORTON: Your Honor, I don't believe we have proof of any money damages.

THE COURT: Okay. Now, in a personal injury case, of course, you don't have to - well, that's not true. Even in a personal injury case you have to have some documents. You have to have some medical bills, you have to show someone ended up having some medical care. Property damage, you need documents showing there was damage to the property. In a contract you have to have some sorts of damages, whether they are recission or - I mean things can't be speculative.

This - I'm just hard-pressed now, given what was not produced. And I do not want counsel for Dr. Klein to tell me what is there. That's your job. And I don't see it. So how are we left with a case here? A001200 (emphasis supplied)

Shortly after the hearing, on June 16, 2004, Schive filed a Motion for Judgment on Counts One, Three, Four, Five, and Six, omitting only Count Two for Defamation Per Se. A001215-1218. In her motion, Schive demonstrated that an essential element of each of the claims in those counts - whether statutory and tort claims - was a showing of damages. A001217 n.3. The superior court granted Schive's motion after hearing and review of the transcript of the June 9, 2004 argument. A001219.

Thereafter, in February 2005, Schive moved for judgment on the remaining count for defamation per se, on the basis that plaintiffs' evidence developed during discovery (which was outlined and attached to the motion) was insufficient to support such a claim. A001220-1273. The superior court granted Schive's motion on June 21, 2005. A001303.

Thus, Psy-Ed and Valenzano had spent five and one half years pursuing claims lacking any merit. Schive was forced to defend herself against those meritless claims for five plus years until she was able to demonstrate the lack of foundation for all the claims that had been made against her.

Schive testified that the lawsuit filed against her caused her initially to be distraught; that for months she could not eat or sleep; that she became worried, embarrassed, and paralyzed in her working life, and that she felt her whole life was ruined. TR. IV: 58-63; A002401-2402. The trial judge found her to be credible. KSADD012; A001429. Psy-Ed and Valenzano chose not to cross-examine Schive on her emotional distress. A002402. Carolyn Hwei Hing Ing, Schive's partner, TR. IV: 76, corroborated Schive's distress, including Schive's crying, sleep problems,

worries and mood changes. TR. IV: 78-82. The trial court accepted Ing's testimony for corroborative purposes, but did not refer to it in its decision. KSADD033 n.6; A002403 n.6, TR. IV: 82-83.

Schive also testified to the fees she had incurred in the years of litigation, and that she was unable to pay her lawyers. KSADD012; A001429. Schive presented an expert on fees, J. Owen Todd, who testified by affidavit regarding Schive's attorneys' bills. See TR. IV: 173-174. Todd opined that Schive's lawyers had handled complex issues in the case competently and efficiently, and saved the court "weeks of testimony in a groundless case," and he therefore recommended a 15-20% fee enhancement. KSADD034-35; A002404.

As discussed supra in the Statement of the Case, after trial the superior court awarded Schive damages for her emotional distress. At the direction of the trial court, and without objection at trial from Psy-Ed and Valenzano, that court had taken testimony from Schive's expert on fees by means of affidavit. TR. IV: 173-174, A001353-1366; A001371. See also TR. I: 13-14. Although Psy-Ed and Valenzano objected to the contents of Todd's submission in a post-trial motion,

A001367-1370, at no time did they object to Todd's testimony being submitted in affidavit form, nor did they seek to cross-examine Todd.[6] As discussed supra, the superior court considered and utilized Todd's affidavit in awarding Schive attorneys' fees, KSADD033-34; A002403-2408, including a 10% enhancement of the lodestar amount "to acknowledge that time, effort, energy and money expended on a case which dragged on unnecessarily for years." KSADD035; A002405.

SUMMARY OF ARGUMENT

The trial court properly found in Schive's favor on her counterclaim for retaliation under G.L. c. 151B. The wording of that statute, authority from other courts interpreting like provisions in other employment statutes, the legislature's mandate that G.L. c. 151B's provisions be liberally construed, and the Supreme Judicial Court's decision in Sahli v. Bull, supra, all support the trial court's holding that a baseless lawsuit brought by an employer against

[6] Indeed, appellants had plenty of advance notice regarding Todd's testimony. On the first trial day, in objecting to Klein's expert, appellants' counsel noted approvingly that Schive had properly named Todd as an expert witness and responded to Psy-Ed's expert interrogatories. TR. I: 14.

a former employee because she brought discrimination claims comprises an "adverse action" cognizable under G.L. c. 151B. Pages 18-32.

The superior court here properly found Psy-Ed and Valenzano's suit against Schive to be baseless, because they lacked any evidence of crucial elements of each of their claims. Based on that finding, and on the trial court's further determination that Psy-Ed and Valenzano brought suit against Schive because of her filing and pursuing claims at the MCAD, the requirements of Schive's retaliation claim were met. Pages 33-49.

Moreover, Schive brought her underlying claim at the MCAD reasonably and in good faith. The trial court found facts showing that her claims were reasonably based. The MCAD's 1999 probable cause determination provides a further indication of reasonableness and good faith. The MCAD's reversal of its probable cause ruling four years later is irrelevant: it comprises and rests on inadmissible hearsay, insofar as Schive's statements are concerned, and cannot serve to negate the finding of Schive's subjective reasonableness and good faith. Pages 49-55.

Appellants' challenge to the trial court's holding that they abused the court's process fails. Appellants failed to show any legitimate basis for pursuing their lawsuit, while the evidence, including Valenzano's admissions, makes clear that appellants brought the court case to force Schive to proceed in two fora on the same claims, and thus to discourage Schive from proceeding at the MCAD. The fact that the MCAD proceeding ended in 2003, but that appellants persisted in their baseless litigation, aggravates rather than negates appellants' abuse of the court's process. Pages 55-58.

The superior court properly awarded damages after the trial judge's retirement, pursuant to Mass. R. Civ. P. 63. None of appellants' and their partisans' authority is to the contrary, since none involves a case where the trial judge issued a decision together with findings of facts and conclusions of law prior to passing the case to a successor. The successor judge's award of damages and attorneys' fees was well-founded in the record and accords with the requirements of the rules of civil procedure. Pages 58-63.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND IN SCHIVE'S FAVOR ON HER CLAIM OF RETALIATION

A. APPELLANTS PSY-ED AND VALENZANO ERR IN SUGGESTING THAT G.L. c. 151B'S ANTI-RETALIATION PROVISIONS APPLY ONLY TO CURRENT EMPLOYEES OF THE EMPLOYER THAT IS ALLEGED TO HAVE RETALIATED

Appellants begin their attack on the lower court's ruling against them by arguing that G.L. c. 151B does not protect Schive from retaliation because at the time Psy-Ed and Valenzano sued her, she was no longer their employee, and could not, therefore, prove that "she suffered an adverse employment action," as is required of an individual asserting a retaliation claim. Appellants reason that the term "adverse employment action" must be interpreted narrowly, to pertain only to adverse changes that take place within the workplace during the existence of the employer-employee relationship. Appellants' Brief at 20-22.

Psy-Ed successfully made this argument at the MCAD in response to Schive's February 2000 retaliation complaint, regarding which the MCAD found "lack of probable cause." The MCAD reasoned that since Schive's employment with Psy-Ed had been severed before the suit was filed, she could not demonstrate that she was subjected to an adverse employment

action. EX 0387-388. However, the MCAD ruling was and is legally erroneous. At the time, both the plain words of G.L. c. 151B, as well as extensive authority under analogous federal law, mandated a broader interpretation of the scope of the statute's coverage, as discussed below.

More to the point, whatever the argument's merits prior to 2002, this suggested interpretation cannot stand in light of Sahli v. Bull Information Systems, Inc., 437 Mass. 696 (2002). In that case, the Supreme Judicial Court opined that the filing of a lawsuit by a corporate employer against one of its former employees could violate the anti-retaliation provisions of G.L. c. 151B, if the lawsuit were baseless in law or fact. Sahli, 437 Mass. at 702. Although the Supreme Judicial Court determined that the lawsuit in Sahli was not baseless, and therefore did not comprise a retaliatory adverse action, the SJC, nonetheless accepted the principle that former employees would, in the proper case, have recourse to G.L. c. 151B relief.

1. **Even Pre-Sahli, the Anti-Retaliation Provisions of G.L. c. 151B Applied to Former Employees**

a. **Federal Interpretations of Remedial Labor Statutes Protect Former Employees Against Retaliation**

In interpreting G.L. c. 151B, Massachusetts courts look to the interpretations of analogous federal anti-discrimination statutes. Wheatley v. American Tel. & Tel. Co., 418 Mass. 394, 397 (1994); see Wheelock College v. Massachusetts Comm'n Against Discrimination, 371 Mass. 130, 137-39 (1976). Section 704(a), the anti-retaliation provision of Title VII, found at 42 USC § 2000-3(a), makes it unlawful "for an employer to discriminate against his employees or applicants for employment" who have availed themselves of Title VII's protection. Finding the term "employees" ambiguous, the U. S. Supreme Court held that former employees are included within § 704(a)'s coverage. Robinson v. Shell Oil Co., 510 U.S. 337, 346 (1997). The Court explained that to hold otherwise would be inconsistent with a primary purpose of the provision - providing unrestricted access to remedial mechanisms - and would allow employers to "retaliate with impunity" against those who had filed a complaint alleging discriminatory discharge. Id. Similarly, the Fifth Circuit has interpreted the term

"employees" in the anti-retaliation provision of the Age Discrimination in Employment Act ("ADEA") to include former employees. EEOC v. Cosmair, 821 F.2d 1085, 1088 (5th Cir. 1987).[7]

[7] See also Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1532 (11th Cir. 1990) (holding that former employee may sue for retaliation under Title VII); Pantchenko v. C. B. Dolge Co. Inc., 581 F.2d 1052, 1055 (2nd Cir. 1978) (holding that the term "employee" in Title VII's anti-retaliation provision includes former employees); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1164-65 (10th Cir. 1977) (finding unlawful retaliation under Title VII when former employer informed prospective employer of employee's discrimination charges); Beckham v. Grand Affair of N.C., Inc., 671 F. Supp. 415, 419 (W.D. N.C. 1987) (finding that former employee has cause of action under Title VII where former employer caused former employee to be arrested in retaliation for filing EEOC charge); Cozzi v. Pepsi-Cola Bottlers, Inc., 1997 U.S. Dist. LEXIS 7755, *9-10 (N.D. Ill. 1997) (finding that filing of post-termination lawsuit may constitute "adverse action" under Title VII and ADEA); Passer v. American Chem. Soc'y, 935 F.2d 322, 330, 331 (D.C. Cir. 1981) (finding that former employees are protected by the ADEA's anti-retaliation provision); Murphy v. Village of Hoffman Estates, 959 F. Supp. 901, 907-08 (N.D. Ill. 1997) (finding post-termination employer conduct actionable under anti-retaliation provision of Americans with Disabilities Act). Additionally, courts have found post-employment retaliation by a former employer to be actionable under the Fair Labor Standards Act of 1938 ("FLSA"), Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 306 (5th Cir. 1972) (noting that there no reason under the FLSA to afford former employees less protection against retaliation than current employees); the National Labor Relations Act ("NLRA"), NLRB v. Whitfield Pickle Co., 374 F.2d 576 582 (5th Cir. 1967)(holding that it is a violation of the NLRA's anti-retaliation provision to refuse to rehire a former employee who has filed an unfair labor

Because G.L. c. 151B, like Title VII, the ADEA, and other federal statutes, is a remedial labor statute and contains an analogous anti-retaliation provision, the MCAD should have adopted a similar position in interpreting the scope of § 4(4), and should have held that § 4(4) protects former employees as well as current employees from retaliation.

b. The Language of G.L. c. 151B § 4(4) Includes Former Employees

G.L. c. 151B § 4 (4) provides that it is unlawful:

> For any person [or] employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint . . . . (emphasis added)

While § 704(a) of Title VII refers to discrimination against "employees," the analogous provision of c. 151B refers to discrimination or retaliation against a "person." A former employee is certainly a "person." Therefore, c. 151B provides even broader protection against retaliation than Title VII. Guided by the legislative directive that "[t]he

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practice charge); and the Employee Retirement Income Security Act ("ERISA"), Heimann v. Int'l Union of Elevator Constructors, 187 F.3d 493 (5th Cir. 1999) (holding that former employee-participants are protected from retaliation by their former employers or employee organizations for exercising their rights under ERISA).

provisions of [c. 151B] should be construed liberally for the accomplishment of the purposes thereof," G.L. c. 151B § 9, there is no reason that the MCAD should have interpreted the word "person" more narrowly than the U. S. Supreme Court interpreted the word "employees" in Title VII. In fact, pre-Sahli, the courts of at least two other states (one of whose anti-retaliation provision tracks G.L. c. 151 § 4(4) almost word-for-word[8]) adopted the reasoning of Robinson and held that, in their respective anti-retaliation provisions, the word "person" includes applicants for employment, Sada v. Robert F. Kennedy Medical Center, 56 Cal. App. 4th 138, 160 (1997), and former employees, DeFlaviis v. Lord & Taylor, Inc., 223 Mich. App. 432, 440 (1997). Ironically, long ago, the MCAD itself had found that former employees are

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[8] The California Fair Employment and Housing Act makes it unlawful "[f]or any employer…to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this [Act] or because the person has filed a complaint, testified, or assisted in any proceeding under this [Act]." Cal. Gov't. Code § 12940 (h). The Michigan Civil Rights Act makes it unlawful to "retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." Mich. Comp. Laws § 37.2701; Mich. Stat. Ann. § 3.548(701).

protected from retaliatory discrimination. See Davis v. City of Chelsea, 3 MDLR 1335, 1366-67 (1981) (finding unlawful retaliation against former employee by former employer where former employer informed prospective employer of former employee's MCAD charge).

Where the language of a statute is unambiguous, the statute "must be interpreted in accordance with the usual and natural meaning of the words." Commissioner of Revenue v. AMIWoodbroke, Inc., 418 Mass. 92, 94 (1994). The legislature could have expressly substituted the words "current employee" (or even "employee") for the word "person," but it did not do so. Additionally, there is no qualifier in § 4(4) or § 4(4A) that would limit the scope of the provision in time to only those persons still employed at the time the retaliation occurred.

Furthermore, a statute must not be interpreted in such a way as to "produce an illogical result." ROPT Ltd. Partnership v. Katin, 431 Mass. 601, 603 (2000). In finding against Schive, it was illogical for the MCAD to interpret the word "person" to mean "current employee." To do so meant that an employer would be prohibited from retaliating against an employee who

filed a discrimination claim while she was still employed, but would be free to retaliate against the same individual once her employment ended. To effectively eliminate discrimination in employment, an employee must be able to initiate a timely complaint without fear of retaliation at any time.

c. Filing a Meritless Lawsuit Constitutes A Retaliatory "Adverse Employment Action"

G.L. c. 151B § 4(4) prohibits "discriminat[ion]" against any person who invokes the statute's protection. By its own terms, therefore, the statute is not limited in scope only to retaliatory acts cast as cognizable employment actions, such as discharge and demotion.[9] Indeed, a wide range of negative post-employment actions have been held to violate analogous federal statutes: persuading the former employee's new employer to fire the employee, Sherman, supra; informing a prospective employer that the former employee brought discrimination charges against the former employer, Rutherford, supra; cancelling an event planned to honor the former employee, Passer, supra; providing a negative employment reference to a prospective employer, Robinson, supra; refusing to

[9] Nor does the statute use the formulation "adverse employment action."

provide employment references, Pantchenko v. C.B. Dolge Co., Inc., supra, stopping promised severance payments, Cosmair, supra; withdrawing a workers' compensation settlement offer, Jones v. Ryder Services Corp., 1997 U.S. Dist. LEXIS 3975, *14 (N.D. Ill. 1997); disclosing confidential information to former co-workers, Murphy supra; refusing to contract with former employee, Carter v. TCI Media Services, 1998 U.S. Dist. LEXIS 15552 (N.D. Tex. 1998).

In fact, ample precedent exists for finding that precisely the actions alleged here - filing a lawsuit, not in good faith and instead motivated by retaliation-can be the basis of a retaliation claim. See, e.g., Pinkett v. Apex Commc'ns Corp., 2009 WL 1097531, *3-4 (E.D. Va. Apr. 21, 2009) (summary judgment denied on employee's claims of post-employment retaliation under Title VII and Equal Pay Act, where employee alleged that employer filed suit against employee with retaliatory motive and proffered evidence contesting employer's claims in suit); Harper v. Realmark Corp., 2004 WL 1795392, *1-55 (S.D. Ind. July 29, 2004) (employee's Title VII retaliation claim would not be "futile," for purposes of motion for leave to supplement pleadings, where employee alleged,

inter alia, that employer's counterclaims were frivolous and brought with a retaliatory purpose); Durham Life Ins. Co. v. Evans, 166 F. 3d 139, 157 (3d Cir. 1999) (dicta indicating that Title VII claim for post-employment retaliation based on employer's suit against employee requires showing that suit "lacked a reasonable basis"); Shafer v. Dallas County Hospital District, 1997 U.S. Dist. LEXIS 23451, **12-13 (N.D. Tex. 1997) (defamation claim undertaken with retaliatory intent is actionable as retaliation under Title VII). See also Cozzi, supra, (filing lawsuit after employee terminated may constitute adverse action under Title VII or ADEA); Harmar v. United Airlines, Inc., 1996 U.S. Dist. LEXIS 5346 (N.D. Ill. 1996) (retaliatory lawsuits actionable under Title VII); Urquoida v. Linen Supermarket, Inc.,1995 U.S. Dist. LEXIS 9902 (M.D. Fla. 1995) (defamation suit filed in retaliation for making EEOC charge violates Title VII); EEOC v. Levi Strauss & Co., 515 F. Supp. 640 (N.D. Ill. 1981) (same); EEOC v. Virginia Carolina Veneer, 495 F. Supp. 775 (W.D. Va. 1980) (same).[10]

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[10] Drawing on Title VII jurisprudence set out in Robinson, supra, inter alia, the Fourth Circuit ruled that a former employee may claim retaliation under the FLSA where the employer brings a lawsuit against the

Where all these courts have broadly interpreted the anti-retaliation provisions of the underlying statutes, where the MCAD itself has previously done so, and where the legislature has decreed that the provisions of G.L. c. 151B should be broadly construed to accomplish its purposes, the MCAD wrongly held that Schive's retaliation complaint lacked probable cause on the sole basis that she was no longer Psy-Ed's employee.

2. In Sahli, the SJC Made Clear That G.L. c. 151B's Anti-Retaliation Provisions Protect Former Employees

In Sahli, the Supreme Judicial Court described its task as to determine:

> whether the filing of a lawsuit by a corporate employer … can constitute an act violative of the retaliation and interference provisions of G.L. c. 151B. To resolve this question, we must balance the constitutional right to seek judicial resolution of disputes… against the statutory right under G.L. c. 151B to seek redress for allegations of discrimination without fear of retaliation…. Sahli, supra, 437 Mass. at 700-701.

The Supreme Judicial Court answered its own question in the affirmative, but only in cases of

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employee "with a retaliatory motive and without a reasonable basis in fact or law." Darveau v. Detecon, Inc., 515 F. 3d 334, 341-344 (4th Cir. 2008). Cf. Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731 (1983) (filing baseless lawsuit for retaliatory reasons actionable under the anti-retaliation provision of the NLRA).

"well-founded" or "reasonably-based" lawsuits. Id. at 702, 704. As the court noted, "'baseless' or 'sham' litigation is not protected by the First Amendment." Id. at 702. In such cases, the rights of a former employee would perforce outweigh the suing employer's rights, since the latter lacks First Amendment protection.

Summarizing its own ruling, the SJC explained: "we conclude in the instant case that, although the interest in remedying discrimination is weighty, it is not so weighty as to justify what amounts to an absolute restriction on an employer's right to petition the courts." Id. (emphasis supplied). Thus, the SJC balanced the employer's constitutional right to petition against the employee's statutory right to challenge discrimination.

If appellants here were correct in their analysis of a former employee's rights, no such balancing would have been necessary. The SJC could simply have stated that G.L. c. 151B does not reach actions an employer takes against former employees. Indeed, the superior court had dismissed Ms. Sahli's claims on just that basis. See Sahli v. Bull Information Systems, Inc., No. 983372, 201 WL 716848 (Mass. Super. Ct. Mar. 16,

2001).[11]

It is a fundamental, well-settled principle of American jurisprudence, long recognized in Massachusetts, that a court will not reach out for a constitutional rationale for its decision if an alternative ground is available. Duro v. Duro, 392 Mass. 574, 575 n.1 (1984). Here, if the SJC had agreed with the superior court that former employees, because of their status as former employees, could not possibly make out a viable claim of retaliation, and that only actions taken by the employer at the workplace or to active employees comprise "adverse employment actions," the high court could have simply affirmed the decision by the superior court, and avoided reaching the constitutional issue.

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[11] Per the superior court decision,

> even if it were true that Bull's action in the Superior Court was an adverse action … it does not constitute an adverse employment consequence.
>
> Sahli has not ever alleged any adverse employment consequence in retaliation for the MCAD complaint. Sahli has no likelihood of success on her retaliation claim, and Bull is entitled to judgment as a matter of law…. (emphasis in original).

It chose not to do so, obviously because it deemed the superior court's statutory analysis insufficient or wrong. The logic of the SJC's decision compels the recognition that in an appropriate case, a former employee will be able to show that her former employer unlawfully retaliated against her, such as by filing and pursuing sham or baseless litigation.[12]

Appellants here seek to evade the logic of the Supreme Judicial Court's reasoning in Sahli. They simultaneously rely on the outcome of the case (namely that there, the employer was held not to have retaliated in filing suit against its former employee, because its lawsuit against the employee was not

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[12] The Massachusetts cases cited by appellants in footnotes 7-8 on pages 21-22 of their brief, and by amici at pages 20-21 of theirs, are not to the contrary. Several of the cited cases pre-date Sahli, but more to the point, none involve former employees alleging that the employer's actions after their employment ceased constituted retaliation. Rather, the cited cases engage very different questions: whether the particular employer actions discussed were sufficiently "adverse" to warrant recognition as unlawful retaliation, as in MacCormack v. Boston Edison Company, 423 Mass. 652, 664 (1996) ("MacCormack simply offered no substantial evidence to show that he suffered any real harm, as opposed to his subjective feelings of disappointment and disillusionment"), or whether the employer's adverse actions were causally related to the employee's earlier discrimination complaint, as in Lewis v. Gillette, 22 F.3d 22, 25 (1st Cir. 1994).

"sham" or "baseless"),[13] while ignoring Sahli's premise, namely that a sham or baseless suit brought against a former employee by an employer that has been accused of discrimination may be shown to constitute unlawful retaliation. Fortunately, the trial court made no such error.[14] Nor should this court be taken in by appellants' attempted sleight-of-hand.

Schive's status as a former employee does not disqualify her from seeking to prove retaliation under the teaching of Sahli. That case makes clear that if she is able to show that Psy-Ed and Valenzano's lawsuit against her was "baseless," "sham," and not "reasonable," and that it was causally related to her protected activity at the MCAD, she can prevail in her retaliation claim under G.L. c. 151B.

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[13] Indeed, appellants overread Sahli, claiming that it holds that employers may properly sue employees to challenge the employees' discrimination claims. Appellants' brief at p. 26. The SJC, of course, said no such thing; it merely said a suit to determine the legal force of a release of claims was not meritless, but did not open the door to a wholesale review of an employee's discrimination claims in a court action.
[14] Contrary to the assertion by amici, the trial court did not ignore precedent to extend the scope of the anti-retaliation provisions of G.L. c. 151B. Rather, the trial court followed the law as interpreted by the SJC in Sahli, as is proper.

B. THE SUPERIOR COURT'S RULINGS MET SAHLI'S REQUIREMENT THAT THE RETALIATORY LAWSUIT BE FOUND "SHAM" OR "BASELESS"

Appellants next attack the ruling below by claiming that, even if a baseless or sham lawsuit brought against a former employee can constitute an "adverse employment action," the trial court's decision was inadequate in that it failed to include specific findings that appellants' lawsuit lacked a basis in law or fact or was otherwise "sham," arguing (brief at 25) that the trial judge "merely observed that, by the time of trial, the claims against Schive had been dismissed 'on the grounds that admissible evidence of damages and actionable defamation was lacking.'" They proceed to argue that "[t]his, however, is not the equivalent of a finding that the claims were 'baseless' or 'sham' claims," or "were objectively 'sham' ab initio."

Appellants err. That is precisely what the superior court found, and correctly so, and castigated appellant's counsel for even bringing, or not quickly dismissing, their claims, as described below and in the Statement of Facts, supra. The trial judge did not need to go back and rehearse the prior proceedings in his opinion; the record adequately preserves them.

Whether Psy-Ed and Valenzano had a legally sufficient claim was addressed by the superior court in the Summer of 2004, five-and-one-half years after they filed their lawsuit. On June 9, 2004 the court held oral argument on, inter alia, Klein's motion for judgment, or, in the alternative, to preclude evidence. A001189; A000711. In his supporting memorandum, Klein had elaborated that, among other things, Psy-Ed and Valenzano had failed to produce any evidence in support of any of their six counts, despite their claims, in each count, to have suffered "serious and substantial loss and damage"[15] as a result of Klein's claimed actions. A000725. Klein included details about claims of loss Psy-Ed and Valenzano had made in discovery, including an assertion that Psy-Ed had suffered damages in excess of one million dollars, including lost subscription and advertising income.

A colloquy ensued with respect, initially, to damages under Count II, but which the court in questioning expanded to all the counts. A001200. At one point, the court asked, point-blank, "… what damages do you have any proof of that you can present

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[15] See First Amended Complaint at ¶¶33, 37, 39, 41, 44 and 46, A000079-83.

to a jury on <u>any</u> count?" (emphasis supplied). The answer from Psy-Ed and Valenzano's counsel was "I don't believe we have proof of any money damages." <u>Id</u>.[16] The court responded, "… And I don't see it, so how are we left with a case here?" <u>Id</u>.

The presiding judge also opined during the hearing that counsel for Psy-Ed and Valenzano should have investigated whether their clients' assertions could be supported before filing suit, "before it was in the complaint," or "even if it got into the complaint, it most certainly should have been dropped within, what, six months." A001195. She then indicated an intention to consider imposing sanctions. A001196.

Thus, contrary to appellants' characterization of their lawsuit as simply a series of merely "unsuccessful claims," <u>see</u> appellants' brief at 25, the superior court indeed found the lawsuit baseless, in no uncertain terms ("so how are we left with a case here?"), and further, described appellants' counsel's failure to follow the requirements of the duty to

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[16] Schive addresses the matter of per se damages with respect to Valenzano's personal claim of slander <u>infra</u>. These were also dismissed, but on different grounds following a separate motion by Schive.

investigate claims prior to filing them sanctionable.

Following the admission by their counsel that Psy-Ed and Valenzano had no proof of any money damages, Schive filed her motion to dismiss all counts of the complaint against her except for the count for slander per se. A001215-1218. In her motion, Schive cited legal authority for the proposition that, with respect to each of the claims in question, proof of damages is an essential element of the claim. A001217 n.3.

Psy-Ed and Valenzano had the opportunity to reply fully, and filed an opposition.[17] That document is devoid of any authority contrary to that put forward by Schive. Instead, the argument amounts to a recitation of prior events in the case, and an attempt to rewrite history and suggest that counsel had not in fact revealed that no damages existed with respect to any count of the complaint. In addition to citing no contrary legal authority, the opposition also failed to proffer any evidence of damages. Given the utter failure to show either legal and factual sufficiency

[17] Psy-Ed and Valenzano's opposition, which was somehow omitted from the Appendix, is included in Schive's Addendum at KSADD 041-43. The court's judgment is at A001219.

of Psy-Ed and Valenzano's claims against Schive, the superior court properly dismissed them all and granted Schive's motion. A001215, 1219.

Even now, appellants have not proposed legal authority suggesting that Schive's authority was wrong. They made no offer of proof at trial and do not suggest that they had proof of damages that was somehow excluded. They have, in short, left the court's reasoning fully intact. The trial court was entitled to rely on the court's earlier judgment.

The final remaining claim, for defamation per se, suffered from a failure of proof. Psy-Ed and Valenzano could not produce any evidence of actionable, nonhearsay statements by Schive during the entire course of discovery. Schive gathered the fruits of that discovery in her motion and explained why they were legally insufficient. A001220-1273.

In their response, Psy-Ed and Valenzano again relied on prior events in the case, but failed to append any evidence of actionable defamation. A001274-1280. The superior court correctly dismissed the one claim remaining against Schive. A001303.

At trial, Valenzano was questioned about his claims that Schive had defamed him. In each case

Valenzano admitted he had no first-hand knowledge of any statements by Schive described in the complaint. See, e.g., TR. IV: 105-107; 115-120. Valenzano did not offer any contrary evidence in rebuttal. Thus, both prior to trial and at trial, the complaint's allegations that Schive had defamed Valenzano, and that he had suffered reputational damages, were shown to be baseless.

Nor do appellants suggest that Schive's legal arguments put forth in her motion with respect to the defamation count were in any way incorrect. Accordingly, the trial court's statement that appellants' lawsuit was 'baseless" and "sham" is well-established in the record. Contrary to appellants' assertion, their claims were indeed devoid of both legal and factual basis ab initio.

C. THE TRIAL COURT CORRECTLY FOUND THAT PSY-ED AND VALENZANO SUED SCHIVE BECAUSE SHE PURSUED HER DISCRIMINATION CLAIM

Appellants next attack the decision below by claiming that in finding that Psy-Ed and Valenzano retaliated against Schive, the trial court applied the wrong legal standard, and reached clearly erroneous factual conclusions. They err in both respects.

1. The Trial Court Utilized The Correct Legal Standard

Appellants claim (brief at p. 28) that, in finding that they retaliated against Schive by suing her, the trial court improperly utilized "only the first step under the three step burden-shifting analysis" used by Title VII courts in summary judgment cases. They argue further that somehow the judge should have required more of Schive to prove that her "protected activity was the 'but for' cause or 'determinative factor' behind the employer's adverse action." Id.

Appellants' objections are misplaced. The trial court followed well-settled principles in finding that Psy-Ed and Valenzano sued Schive because of her pursuit of her MCAD claims, in violation of G.L. c. 151B.

In Mole v. University of Massachusetts, 442 Mass. 588 (2004), the SJC set out the prima facie case for claims of retaliation as follows:

> [the plaintiff] had to show that he engaged in protected conduct, that he suffered some adverse action, and that "a causal connection existed between the protected conduct and the adverse action." Mole, supra at 591-92 (citations omitted).

It is beyond dispute that Schive made out the first step of her prima facie case according to the SJC's formulation. She showed that she had engaged in protected activity by filing and pursing her MCAD complaint. Schive also made out the requisite showing under the second step: although appellants argue that Schive has not shown that she suffered "some adverse action" cognizable at law, Sahli teaches, and the trial court properly held, that she did so suffer, by proving that the lawsuit brought against her was baseless.

In the third step of making out a prima facie case, the plaintiff must establish causation. She can do so through direct or circumstantial evidence. In Mole, the SJC discussed how causation may be proved, and whether "an inference of causation" is permissible in various factual settings. Id. at 592. Under Massachusetts law as articulated by the SJC, a retaliation plaintiff's prima facie case is therefore no different from that articulated by the district court in Maldonades v. Metra, 743 F. Supp. 563 (N.D. Ill. 1990), the trial court's citation to which appellants object.

Appellants' objection that the trial court ignored the second and third steps of the requisite "burden-shifting process" is equally misplaced. The SJC has approved the following articulation of those latter steps:

> Once the Plaintiff has made a prima facie showing, the burden of production shifts to the defendant to articulate a legitimate, non-retaliatory reason for its employment decision. If the defendant does so, the plaintiff must show that the defendant's proffered reason was not, in fact, the real reason for the decisions and that the decision was the result of the defendant's retaliatory animus. McMillan v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 140 F. 3d 288, 309 (1st Cir. 1998), cert. denied, 525 4. S. 1104 (1999), cited approvingly in Mole, supra, at 591.

But if the employer fails to meet its burden of production, the employee can prevail on the basis of her prima facie case. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 117 (2000):

> If the employer fails to meet its burden of production at stage two, the presumption created by the evidence supporting a prima facie case "entitles [the] plaintiff to judgment" (citation omitted, emphasis added by SJC in quoted text).

Here, appellants fail to cite any evidence put forward at trial of any legitimate, nonretaliatory reason for their having sued Schive. Thus, Schive was not required to show that such articulated reason was a pretext. Since Schive had made out her prima facie

case, the trial court was properly entitled to conclude, "based on direct and indirect evidence, that Psy-Ed and Valenzano brought this action against [Schive] because of her reasonable efforts at MCAD." A001443 (emphasis supplied).[18]

In short, the trial court reached its conclusion in an absolutely unobjectionable manner. It found that Schive had made out her prima facie case, and drew inferences from the evidence to find that but for Schive's pursuit of her MCAD claims, appellants would not have sued her.

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[18] To the extent that appellants' objection rests on the trial court's having drawn inferences from facts in evidence, the objection is entirely without merit. The SJC has embraced the inferential method of proof of causation in retaliation cases. See e.g., Mole, supra, at 592 (discussion of drawing inference of retaliation from evidence of causal link). This accords with the SJC's acceptance of the inferential method of proof in discrimination cases generally. See e.g., Lipchitz v. Raytheon Company, 434 Mass. 493, 501, 503 n.15 (2001) (if reason articulated by employer for its action is found to be false, fact-finder may infer discriminatory intent or state of mind; showing of pretext permits, but does not compel, inference that adverse action was "because of" discrimination). Appellants err insofar as they suggest that such inferences are "entitled to no weight." The case upon which they rely, Malone v. Walsh, 315 Mass. 484 (1944), dealt with "inferences" that amounted to legal conclusions, not circumstantial evidence leading to findings of fact.

2. The Trial Court Correctly Found That Appellants Sued Schive Because She Brought and Pursued Her MCAD Claims

Appellants cite three bases for attacking the trial court's finding that Schive's pursuit of her MCAD action caused Psy-Ed and Valenzano to sue her:

a. her MCAD action was filed nearly three years before appellants' suit, too long to give rise to an inference of retaliation;

b. the trial court mischaracterized Valenzano's admission regarding why he brought the suit; and

c. the September-December 1999 events in Schive's MCAD case were inadequate to give rise to an inference of retaliation, because they involved actions by others, not Schive.

None of appellants' objections serve to undercut Schive's evidence that Psy-Ed and Valenzano sued her because she utilized the MCAD's processes.

The first statement appellants seek to exploit is a red herring; it does not even appear in the trial court's discussion of causation. Rather, it appears in the course of the trial court's earlier discussion of the first two prongs of the prima facie case that Schive had to make out under Sahli, namely that she engaged in protected activity, and subsequently suffered a cognizable adverse action. See KSADD025; A001442.

In context, it is clear that the court made the statement that appellants sued Schive "shortly" after she filed at the MCAD to identify the adverse action Schive suffered, i.e., that evidence that she had been sued constituted the second prong of her prima facie case. The court's discussion of causation begins only thereafter. See KSADD025; A001442.[19] Appellants' objection is therefore misplaced.

In the next section of the opinion, the trial court does address causation, finding causation based on two elements: Valenzano's admission about his motivation in filing the lawsuit against Schive (which comprises direct evidence); and an inference drawn from events that "occurred in rapid succession in the fall and winter of 1999." KSADD025-26; A001442-1443. With respect to the trial court's statement that Valenzano testified that "he brought the lawsuit essentially to retry Schive's MCAD claims," appellants

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[19] Although the court's use of "shortly" may unduly telescope the lapsed time between the MCAD filing and the appellants' lawsuit, this was a mere slip of the judicial pen. Elsewhere in the opinion, in the section where the factual findings are set out, the correct timeframe is elaborated. KSADD011; A001428. Since the court made no inference of causation from the two dates appellants cite, any error is harmless, and the cases cited by appellants at pages 29-30 of their brief are irrelevant.

object that no actual trial was ever conducted at MCAD. This objection amounts to a meritless quibble about wording.

In fact, Valenzano testified at trial that one of the reasons he brought the lawsuit against Schive in December 1999 was "I wanted to consolidate all actions into one legal forum and get it out into the open." TR. IV: 110.[20] In its findings of fact, the trial court reported that "[d]uring his testimony, Valenzano stated that he 'expected to bring into one point of justice the unbelievably frivolous charges of the MCAD complaint against me.'" KSADD018; A001435. In other words, Valenzano wanted to force Schive to prove her discrimination claims in court (where he could force her into a defensive posture). Whether Valenzano could have secured his desired end, and whether the MCAD case thereafter proceeded to the hearing stage or not, does not negate Valenzano's admitted volition, to choose his forum, where he could play the role of plaintiff. Appellants' objections to this aspect of the trial court's reasoning are groundless.

[20] Valenzano's counsel did not revisit this matter on cross-examination.

Finally, appellants attack the inference of causation the trial court drew from the proximity of several events in time; namely, the temporal proximity of the September 1999 mediation, which included the revelation of the second Klein affidavit; the September 1999 Psy-Ed Board of Directors vote to stop all efforts to settle Schive's MCAD claims; the December 2, 1999 issuance of a probable cause determination; and the December 17, 1999 filing of the lawsuit against Schive. From the proximity of these events the trial court correctly inferred that Schive's protected activity at the MCAD (the use of Klein's affidavit in her MCAD case, revealed in the mediation) led appellants to file the lawsuit against her. KSADD025-26; A001442-1443.

Appellants object that the inference was unwarranted because the affidavit that displeased Valenzano was Klein's, not Schive's, and the MCAD's probable cause finding did not comprise protected activity by Schive, nor was it legally cognizable as the basis for the inference. These objections do not avail appellants any more than their other objections.

The objection to the significance of the Klein affidavit cannot withstand scrutiny. Klein submitted

the affidavit for Schive's case; Schive disclosed it in mediation about her case, and the purpose of the affidavit was to advance her MCAD case. Psy-Ed and Valenzano soon after its discovery sued both Klein and Schive, making no fine distinctions about who was responsible for the affidavit.[21]

With respect to the MCAD's probable cause finding, appellants omit two important statements by the trial court: first, that "the temporal proximity measurement may flow from actions other than the initial filing of the complaint," and second, that the probable cause finding "allow[ed}" Schive's case to proceed. KSADD026; A001443. As matters stood just prior to the issuance by the MCAD of its probable cause determination, Schive's statute of limitations for filing in court had passed.[22] Therefore, had the MCAD not found probable cause, Schive's case would have been over. However, the probable cause finding

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[21] Valenzano confirmed in trial testimony that the second Klein affidavit, together with Schive's claims in her MCAD complaint, led to his filing of the lawsuit against Schive and Klein. TR. IV: 103-104. Thus, there was direct evidence of causation that reinforces the inference of causation drawn by the court.

[22] See G.L. c. 151B §9, setting out three year statute of limitations for court action. Schive's MCAD Complaint concerned events that took place prior to September 3, 1996. See EX0267.

kept her case alive at the MCAD, where it could have proceeded to a public hearing pursuant to G.L. c. 151B §5. The trial court was entitled to draw an inference that the probable cause finding - which after all reflected the MCAD's conclusion that Schive's case was meritorious - could have contributed to Psy-Ed and Valenzano's decision to sue Schive.[23]

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[23] Clark County School District v. Breeden, 532 U.S. 268 (2001), cited by appellants for the principle that an EEOC right-to-sue letter cannot form the proper basis for a finding of causation, is readily distinguishable on several grounds.

First, Clark County deals with a right-to-sue letter issued by the EEOC, not a probable cause determination by that agency or by the MCAD. A right-to-sue letter can be issued regardless of the outcome of the EEOC's investigation, and may be issued even when no investigation has taken place. See 29 CFR §1601.28(a) (Right-to-sue letter to be issued upon request of complainant any time after 180 days from date of filing of EEOC complaint), KSADD64; 29 CFR §1601.19(a) (Notice to complainant of right to sue to be issued together with letter notifying complainant that EEOC found no probable cause); KSADD62. See also, Mercado v. Ritz-Carlton San Juan Hotel, 410 F. 3d 41, 45 (1st Cir.2005) (EEOC issued right-to-sue letters without reaching merits of parties' claims).

By contrast, an MCAD finding of probable cause is an assessment of a claim's merits, available only where "the Investigating Commissioner determines that there is sufficient evidence to support a finding of Probable Cause to credit the allegations of the complaint." Rules of Procedure - Massachusetts Commission Against Discrimination, 804 CMR 1.15 (7)(a). KSADD68.

Second, Clark County allows that issuance of a right-to-sue letter might properly give rise to an inference of causation, if it provided an employer its first notice of a complainant's charge. Clark County,

But more to the point, at trial neither Psy-Ed or Valenzano produced evidence supporting any alternate explanation for having sued Schive. On appeal, none is suggested (nor would an explanation devoid of record support be proper).

This is not a case where the finder of fact had to choose between competing theories of causation propounded by the parties. Instead, the trial court drew reasonable conclusions from the evidence before it, which included both direct and indirect evidence that Valenzano and Psy-Ed sued Schive precisely because of her pursuit of her claims, with Klein's help, at the MCAD, and with no countervailing explanation.[24]

D. SCHIVE REASONABLY AND IN GOOD FAITH BROUGHT HER MCAD CLAIM OF DISCRIMINATION

In their final attack on Schive's successful retaliation claim, appellants seek to introduce material not in the trial record to demonstrate that Schive did not act reasonably and in good faith in

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supra, 532 U.S. at 273. Here, the MCAD's probable cause determination gave appellants their first notice that the agency would allow the case to proceed, and that they would be forced to defend themselves in ongoing litigation at the MCAD.

[24] Schive also introduced written evidence that Valenzano's first reaction to learning of her MCAD claim was to plan to sue her. TR. IV: 90; EX[illegible].

bringing her MCAD claim of discrimination, so that her retaliation claim would fail. To do so, they rely on a hearsay statement in a 2003 decision by the MCAD reversing its earlier finding of probable cause, which is itself based on a hearsay statement in a document not in evidence. The court should reject appellants' challenge to Schive's good faith and reasonableness.

At the outset, the court should take note that in December 1999, the MCAD found probable cause to credit Schive's complaint. That alone should fatally undermine appellants' objection.[25] If the agency charged with determining whether sufficient evidence exists to credit a complainant's claims makes an affirmative finding, that finding per se shows that the claimant acted reasonably and in good faith in bringing her charge, and should close the matter. See, e.g., Mitchell v. Office of the Los Angeles County Superintendent of Schools, 805 F.2d 844 (9th Cir. 1986) ("A plaintiff receiving a [probable cause finding from the EEOC] would reasonably believe that there was an adequate basis in law and facts to pursue his claim").

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[25] Appellants do not contend - nor could they - that Schive made any statements to the MCAD that were untruthful or that misled the agency.

Furthermore, at trial, in order to demonstrate that she acted reasonably in bringing her MCAD claim, Schive testified extensively about the discriminatory treatment she experienced from Psy-Ed and Valenzano, both while working and in the context of her termination. TR. IV: 32-43. The court allowed the testimony over Psy-Ed and Valenzano's counsel's objection. Psy-Ed and Valenzano chose not to cross-examine Schive about these experiences or about her MCAD filing.

In its Findings of Fact, the court summarized Schive's description of her employment history and termination, and her filing of the MCAD complaint, thus accepting them as accurate. KSADD010-11; A001427-1428. These findings comprise ample basis for the court's determination that Schive acted reasonably and in good faith in bringing her MCAD complaint. KSADD026; A001443.

On appeal, appellants try to achieve by indirection what they eschewed to attempt at trial, relying on totem pole hearsay and on a document not in the record to which they objected at trial. The basis for appellants' claim that Schive acted unreasonably and in bad faith is a statement by MCAD Commissioner

Walter Sullivan ("Sullivan") on the last page of his 2003 Order of the Investigating Commissioner, which granted Psy-Ed's Motion for Reconsideration of Probable Cause nearly four years after the Probable Cause Determination was issued. At the end of that opinion, Sullivan opines that:

> "[i]t strains credulity that Respondent would stage an elaborate ruse involving the closing of an operation and the termination of other employees if Complainant was its target." A000956.[26]

The apparent source for Sullivan's statement caricaturing Schive's claims is in the original MCAD probable cause determination (signed by a different MCAD Commissioner, Charles Walker), which appellants have included in their appendix at ADD056-57. That document is not in the trial record. In fact, when Schive sought to introduce the probable cause determination into evidence at trial, counsel for Psy-Ed and Valenzano objected. TR. IV: 52-53.

Therefore, quite apart from the improper use appellants seek to make of the document's content, its introduction now into the record on appeal would be

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[26] In fact, as discussed supra, the Brookline office did not close until much later, and Klein and an assistant continued working there. The factual underpinnings for Sullivan's dismissive comment were lacking.

improper. The doctrine of judicial estoppel precludes appellants from contradicting the position they took at trial. See Otis v. Arbella Mutual Ins. Co., 443 Mass. 634, 639, 640 (2005) ("Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding") (citations omitted).

Even if the court declines to exercise the doctrine of judicial estoppel and permits consideration of the Walker document, appellants' efforts still fall well short of their objective, since Schive never asserted to the MCAD that Psy-Ed had concocted the "ruse" that Commission Sullivan so disparagingly rejected. Appellants cannot cite any evidence of such a statement by Schive; it amounts to rank hearsay. The Walker statement in the objected-to probable cause determination, to the effect that "Complainant alleges that Respondent's decision to relocate the editorial office was a choreographed effort to remove Complainant from her position," see ADD057, goes well beyond anything Schive actually alleged in her discrimination complaint. Compare the above statement with Schive's actual sworn statement

in her MCAD complaint, that:

> I believe that my employer's decision to restructure its editorial operation in a fashion that eliminated my position… resulted in part from bias against me as an individual with a disability. EX0271.

Schive did not make the disparaged statement in her trial testimony, nor did Psy-Ed and Valenzano even seek her agreement or disagreement with the assertion during cross-examination. Schive's actual statements to the MCAD and about the basis for her MCAD claims are entirely unobjectionable.

Since the statement upon which appellants rely is inadmissible hearsay, Sullivan's comment about the statement amounts to an opinion about a hearsay statement at best, or "totem-pole" hearsay at worst. See Commonwealth v. McDonough, 400 Mass. 639, 643 n.8 (1987) ("Generally, evidence based on a chain of statements is admissible only if each out-of-court assertion falls within an exception to the hearsay rule").

Reliance on hearsay is even less appropriate on appeal than it would have been at trial, where Schive could have had an opportunity to address the distortion of her actual claims. In summary, nothing properly before the court warrants reversing the trial

court's determination that Schive acted reasonably and in good faith in bringing her complaint.

II. APPELLANTS' CHALLENGE TO THE TRIAL COURT'S CONCLUSION THAT THEY ABUSED THE COURT'S PROCESS IN BRINGING A BASELESS LAWSUIT AGAINST SCHIVE FAILS

Appellants consume several pages of their brief in setting out the elements of the tort of abuse of process, but fail in doing so to identify any error in the trial court's own exposition. See KSADD017-18; A001434-1435. They then complain that the trial court's holding was defective because:

a) the trial court's finding of retaliation is based on an error of fact regarding timing;

b) even if the complaint was filed to retaliate against Schive,[27] this is insufficient to satisfy the requirements of the tort, because the court was required to find that Psy-Ed and Valenzano sought "some collateral advantage," where there is no evidence of such intent;

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[27] Appellants also mischaracterize the record in a confusing manner by commenting that Schive's first retaliation claim had been dismissed in the December 2, 1999 probable cause finding. (As noted supra, the document containing that finding is not part of the trial court record.) In any case, as Schive's MCAD complaint shows, she had alleged (in ¶17) that Psy-Ed's reneging on an offer to pay her severance pay was retaliatory. EX0271. This aspect of her first MCAD complaint was dismissed in 1999.

That allegation is quite apart from the allegations of retaliation in Schive's second MCAD complaint, in which she stated that Psy-Ed and Valenzano retaliated against her for pursuing her MCAD claims. EX0290-292. This second complaint forms the basis of the retaliation counterclaim, in which Schive prevailed in the trial court.

c) Psy-Ed and Valenzano are somehow exonerated from any abuse of process arising from having filed their complaint in 1999 by the fact that they persisted in the litigation even after Schive's MCAD case was over; and

d) there is no evidence that Psy-Ed or Valenzano sought concessions in the MCAD action in exchange for agreeing to dismiss the court action.

None of these challenges avail appellants.

The first challenge has been addressed supra. Appellants err in representing that the trial court concluded that they retaliated against Schive based on an improper inference derived from the date she filed her MCAD complaint. The court's inference of causation based on timing related to the events of September-December 1999. The record also contained direct evidence of Valenzano's written expression of retaliatory intent vis-à-vis Schive, and testimonial confirmation that he filed suit in part because she utilized the second Klein affidavit at the MCAD.

Appellants' second and fourth challenges amount to the same thing: a suggestion that the trial court had to find some "collateral benefit" in order for Schive to prevail, either generally or within the MCAD litigation. Although the trial court repeated Schive's articulation of Psy-Ed and Valenzano's

apparent ulterior purpose - to discourage her from pursuing her MCAD claims and so on - appellants suggest that the trial court did not intend to adopt these assertions as a finding. But in context, it is clear the trial court intended to do so, especially in light of its factual findings that Schive had credibly testified about her emotional suffering and about legal fees that she had incurred and was unable to pay. Schive could not support two legal proceedings, just as Psy-Ed and Valenzano hoped. KSADD011-12; A001428-1429.

Appellants' remaining argument - that once Schive's MCAD case was dismissed in 2003, they had no remaining "ulterior motive" to secure an advantage in the MCAD case - makes no sense. The issue is not whether from 2003 through 2006 their tortious behavior continued to be motivated by the same wrongful objective. Rather, the focus should be on their bringing the lawsuit in the first place, at the time the probable cause finding stood. Once Psy-Ed and Valenzano committed themselves to baseless litigation in order to undercut Schive at the MCAD, they may well have decided that pursuing that litigation to the end was the best course. For all the above reasons,

appellants' challenges fail.

III. APPELLANTS' CHALLENGE TO THE SUPERIOR COURT'S DAMAGES AND FEES AWARD TO SCHIVE FAILS

The entirety of appellants' challenge to the superior court's award of fees and costs to Schive consists of a complaint that, because Judge Hamlin did not conduct an evidentiary hearing, they were deprived of an opportunity to cross-examine Schive's expert "especially as to whether Schive's attorneys' fees and costs included fees and costs for her unsuccessful MCAD claims" and as to other unspecified matters; and that the court's assessment of emotional distress damages was made on a "cold record," in violation of Mass. R.Civ. P. 63.[28] Amici add that the emotional distress damages award was excessive. None of these

[28] Appellants also purport to incorporate by reference reasons stated in the briefs of the Psy-Ed directors "insofar as those arguments apply to Schive." However, beyond the alleged "errors" set out explicitly in appellants' brief and listed above, none of the other points in the directors' briefs applies to Schive. Specifically, the directors' objection to the award of emotional distress damages, on the basis that the trial court made no credibility findings regarding Klein's testimony about his emotional distress, does not apply to Schive, since the trial court explicitly found her testimony regarding her distress to be credible. KSADD012; A001429. The other objections the directors make vis-à-vis Klein pertain to his intentional interference claim; Schive made no parallel claim. Schive should not be required to guess at appellants' arguments.

objections is meritorious.

As a preliminary matter, appellants misstate the provisions of Mass. R. Civ. P. 63, which explicitly permits a successor judge to complete the work of a predecessor judge on an adequate record. This court should reject appellants' efforts to rewrite the rule.

The cases appellants rely on, from the Psy-Ed Directors' brief, do not avail them. Emerson Electric Co. v. General Electric Co., 846 F. 2d 1324 (11th Cir. 1988) is inapposite. There, contrary to the representation in the Directors' brief, the trial judge had not ruled on liability and had issued no findings or rulings before recusing himself; even so, the circuit court ruled that a successor judge could in fact make rulings based on the trial transcript.[29]

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[29] Appellants also overreach in relying on Townsend v. Gray Line Bus Co., 767 F.2d 11 (1st Cir. 1985), which is clearly distinguishable from the instant case, in order to argue that it would require retrial of the damages portion of this case. In Townsend, the trial judge died before issuing findings and conclusions, and the defendant failed to request a new trial prior to the successor judge issuing judgment based on the trial record. The First Circuit upheld the judgment, stating that "the district court was entitled to infer ... that Gray Line had acquiesced in the procedure it had adopted and had waived its right to retry the case," 767 F.2d at 18; it had previously noted that a retrial is unnecessary where the parties agree to proceed based on the trial record. Id. at 17. Thus, the case deals only with the issue of retrial vel non

Emerson, supra, 846 F.2d at 1326.

Semaan v. Allied Supermarkets, 774 F.2d 1164 (6th Cir. 1985), actually undercuts appellants' argument. There, in a bifurcated proceeding, the first judge had ruled on liability and scheduled a hearing regarding damages before he was replaced by another judge. The successor judge then reversed the first judge's legal conclusions. The Sixth Circuit reversed and reinstated the first judge's ruling, holding that under the circumstances, the successor judge had acted improperly.[30] Thus, Semaan rejects appellants' contentions about Rule 63. Instead it stands for the proposition that the trial judge's findings and conclusions should govern this case going forward.

Lakengren Property Owners Assn., Inc. v. Stevenson, 1981 Ohio App. Lexis 14515 (1981), the central authority upon which the Directors rest their

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against a backdrop about whether the parties assented to proceed on the record. The decision is silent with respect to how Rule 63 ought to be applied where, as here, the trial judge in fact ruled on liability and made findings of fact, including regarding credibility; Townsend therefore does not advance appellants' point.

[30] In so doing, the Sixth Circuit cited approvingly the principle that "a motion for a new trial under Rule 63 is a matter of discretion but ... the court 'may not properly overrule the decision of the first judge in the absence of special circumstances.'" Id.

argument, is readily distinguishable. There, the first judge had merely rendered a decision on liability but had not filed any decision or findings of fact or conclusions of law concerning liability. [31] 1981 WL 2944 at *2. Moreover, witness credibility had not been addressed by the first judge. Id. Here, the trial judge completed his findings of fact and conclusions of law, and specifically found Schive credible in her testimony as to damages.[32], [33]

Likewise, the record was adequate as to Schive's fees. Schive testified in person as to the fees, and by direction of the trial court and agreement of the parties, her expert submitted his testimony via affidavit. A001353-1366. To address Psy-Ed and Valenzano's objection in their subsequently-filed

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[31] One wonders how the Directors can seriously represent the posture of the case in Lakengren as "this exact situation."

[32] Appellants had an opportunity to cross-examine Schive on her testimony. They chose not to inquire as to her emotional distress, TR. IV: 64-72, and waived cross-examination of her corroborating witness. TR. IV: 83.

[33] Contrary to appellants' assertion, the trial judge did not indicate that his successor should hold an evidentiary hearing. Rather, he directed that damages would be determined after "a hearing." Given the adequacy of the record, the two hearings that were conducted, in which the parties argued their positions and were directed to submit the relevant portions of the record to the court, sufficed. See KSADD029, A002399.

Motion to Strike Todd's affidavit, that it was unclear whether the lodestar figure Todd set forth in his affidavit included changes incurred at the MCAD, see A001368, Todd submitted a Supplemental Affidavit. A001371.

Psy-Ed and Valenzano never sought to cross-examine Todd, and in their Motion to Strike his affidavit testimony, did not object that they had been deprived of the right to do so. That right was consciously waived. See Plaintiff's Motion to Strike Affidavit of J. Owen Todd, A001367-A1370. Schive's counsel also filed a lengthy fees petition following the trial court's judgment, supported with an affidavit of counsel and exhibits. A001474-A001687.

Finally, contrary to the suggestion of amici, the superior court made an appropriate emotional distress damages award. Schive's request for $125,000 in damages is reasonable in light of recent awards to plaintiffs suffering similar emotional distress, albeit in different circumstances.[34]

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[34] See, e.g., Rodriguez-Torres v. Caribbean Forms Mfr, Inc., 399 F.3d 52, 64 (1st Cir. 2005) (affirming $250,000 emotional damage award where plaintiff experienced changes to personal life, financial and marital difficulties, and depression); Koster v. Trans World Airlines, Inc., 181 F.3d 24, 35-36 (1st Cir.

CONCLUSION

For all the reasons set forth herein, the court should dismiss appellants' appeal as to Schive; uphold the trial court's rulings in Schive's favor on liability, and confirm the superior court's award to Schive of damages and attorneys' fees. In addition, the court should award Schive post-judgment interest on her damages and fees at the statutory rate of 12% from the date of entry of judgment. Finally, the court should permit Schive to submit a further fee

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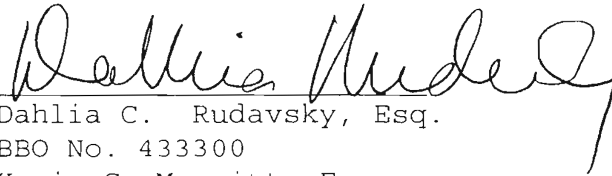
1999) (finding $250,000 in emotional distress damages appropriate where plaintiff had trouble sleeping, was anxious, took antacid pills on a regular basis, and whose family life suffered); Hogan v. Bangor and Arroostook R.R. Co., 61 F.3d 1034, 1307-38 (1st Cir. 1995) (reinstating $200,000 award for emotional distress, inconvenience, mental anguish, and loss of enjoyment of life where plaintiff's "difficult financial situation" caused him to be depressed, withdrawn, and to give up usual activities); Carglia v. Hertz Equip. Rental Corp., 343 F.Supp.2d 50, 56-57 (D.Mass. 2004) (awarding emotional distress damages of $170,000 where plaintiff experienced loss of appetite, sleeplessness, humiliation, isolation from his family, and anxiety over financial situation); Dalrymple v. Town of Winthrop, 50 Mass. App. Ct. 611, 621 (2000) (affirming $200,000 emotional distress award where plaintiff was humiliated, depressed, withdrew from her community, could not sleep, and experienced feelings of anger and bitterness); Westinghouse v. Elec. Supply Corp. v. Massachusetts Comm. Against Discrimination, 9 Mass. L. Rptr. 661, WL 140492, (Mass. Super. 1999) at *10 (finding evidence supported $250,000 emotional distress award where plaintiff and wife testified that he felt humiliated and depressed and experienced physical symptoms such as difficulty eating).

petition for her counsel's work on appeal, and should award her appellate fees and costs.

Respectfully submitted,

KIMBERLY SCHIVE,

By her attorneys,



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