# Supreme Judicial Court

FOR THE COMMONWEALTH
No. SJC-13624

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MATTHEW THEISZ,
Plaintiff-Appellee,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY & another,
Defendant-Appellant.

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On Further Appellate Review of an Appeals Court Decision Affirming a Superior Court Judgment Order Denying the MBTA's Claim of Immunity from Suit

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## AMICUS BRIEF OF THE MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS AND THE AMERICAN ASSOCIATION FOR JUSTICE

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to S.J.C. Rule 1:21, the Massachusetts Academy of Trial Attorneys (the Academy) states that it is a nonprofit, tax-exempt organization. It has no parent corporation, no publicly held corporation has ten percent or greater ownership in the Academy, and the Academy does not issue stock.

Pursuant to S.J.C. Rule 1:21, the American Association for Justice (AAJ) states that it is a nonprofit, tax-exempt organization. It has no parent corporation, no publicly held corporation has ten percent or greater ownership in AAJ, and AAJ does not issue stock.

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The Massachusetts Academy of Trial Attorneys (Academy) and the American Association for Justice (AAJ) offer this *amici curiae* brief in the above-captioned case.

The Academy is a voluntary, non-profit, Commonwealth-wide professional association of lawyers. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of the law in the courts and the Legislature of the Commonwealth since 1975.

AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the

world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

The Academy and AAJ urge this Court to affirm the decision of the Appeals Court.

## RULE 17(c)(5) DECLARATION

Pursuant to Mass. R. App. P. 17(c)(5), *amici* state that no party or party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person or entity, other than *amici*, their members, or their counsel, contributed money that was intended to fund preparation or submission of the brief. Neither *amici* nor counsel of record for *amici* have represented any of the parties to the appeal in any proceedings involving similar issues, nor have they been a party or represented a party in a proceeding or transaction that is at issue in the present appeal.

## SUMMARY OF THE ARGUMENT

Repeal by implication is impermissible unless such prior law is so inconsistent as to be repugnant to that more contemporary. Reading G.L.

c. 258, § 10(j), to impliedly remove liability authoritatively found under §§ 2 and 10(c) is disfavored under this canon of judicial restraint. "Originally caused," as coined by Justice O'Connor, coopted by the legislature in § 10(j), and interpreted by this Court, means to create a situation conducive to harmful consequences. For example, dispatching a violent, lawless employee to drive a city bus around at night makes it inevitable that he beat up a belligerent passenger or two. Finally, and unsurprisingly, courts across the country have held that negligent hiring, training, supervision, and retention are *not* subject to the public duty rule. There is nothing within the Massachusetts Tort Claims Act to conclude differently.

## ARGUMENT

### I. Reading G.L. c. 258, § 10(j) so as to immunize the MBTA would impliedly repeal G.L. c. 258, §§ 2, 10(c).

"Repeal of a statutory enactment by implication is disfavored under our jurisprudence." *Town of Concord* v. *Water Dep't of Littleton*, 487 Mass. 56, 60 (2021). See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts § 55, at 331 (2012). "This strong presumption against implied repeal of a prior law is overcome only when the earlier statute 'is so repugnant to and inconsistent with the later enactment covering the subject

matter that both cannot stand.'" *Town of Dartmouth* v. *Greater New Bedford Regional Vocational Tech. High Sch. Dist.*, 461 Mass. 366, 374-375 (2012), quoting *Doherty* v. *Comm'r of Admin.*, 349 Mass. 687, 690 (1965).

"For over a century, 'the Commonwealth c[ould] not be impleaded in its own courts, except by its own consent' at common law." *Cormier* v. *City of Lynn*, 479 Mass. 35, 37 (2018), quoting *Troy & Greenfield R.R. Co.* v. *Commonwealth*, 127 Mass. 43, 46, 50 (1879), superseded by statute as stated in *Cormier*, 479 Mass. at 37 n.5. "Municipalities were also largely immune from liability in tort." *Cormier*, 479 Mass. at 37-38. In 1977, however, this Court held that such immunity was "'logically indefensible,' and stated [its] intention to abrogate the doctrine of municipal immunity after the conclusion of the 1978 legislative session." *Id.* at 38. In response, the Legislature enacted the Massachusetts Tort Claims Act (Act), G.L. c. 258, added by St. 1978, c. 512, § 15. Section 2 of the Act still provides that

> [p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances.

G.L. c. 258, § 2.

The Legislature has not amended Section 10(c) of the Act since 1978, and it continues to exclude from the Act "any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations." Compare G.L. c. 258, § 10(c) with St. 1978, c. 512. Section 10(c), however, does not immunize a public employer for negligent retention "where the supervisory officials allegedly had, or should have had, knowledge of a public employee's assaultive behavior." *Dobos* v. *Driscoll*, 404 Mass. 634, 653 (1989).

> Subsections (d) through (j) of § 10 were added to the Tort Claims Act by St. 1993, c. 495, § 57, effective January, 1994. That amendment was passed shortly after this court in *Jean W.* v. *Commonwealth*, 414 Mass. 496, 499 (1993), announced its intention to do away with the common-law public duty rule at the next available opportunity after the close of the 1993 legislative session because that rule appeared to be inconsistent with the Tort Claims Act and had proved impossible to apply in a consistent fashion.

*Brum* v. *Town of Dartmouth*, 428 Mass. 684, 694 n.10 (1999).

> Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both

> previously and subsequently enacted law. . . . We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*.

*West Virginia Univ. Hosps.* v. *Casey*, 499 U.S. 83, 100-101 (1991), superseded by statute on other grounds as stated in *Landgraf* v. *USI Film Prods*., 511 U.S. 244, 251 (1994).

"It is not to be lightly supposed that radical changes in the law were intended where not plainly expressed." *Ferullo's Case*, 331 Mass. 635, 637 (1954). Therefore, relevant existing case law presumptively continues to apply absent "explicit language to the contrary." *Bengtson's Case*, 34 Mass. App. Ct. 239, 244 (1993). See Scalia & Garner, *supra* at § 55, at 331 (authoritative judicial construction of statute should not be challenged whenever state or even affiliated statute adopts related though not utterly inconsistent provision; legislative revision of judicial opinion ought to be by express language or unavoidable implication).

This Court has not interpreted either G.L. c. 258, §§ 10(d)-(j) or its common law predecessor, see *Bonnie W.* v. *Commonwealth*, 419 Mass. 122, 126 (1994), to immunize a municipality from liability for negligent hiring,

supervision, or retention of an employee. On the contrary, when reading G.L. c. 258, §§ 2, 10(c), this Court has always answered the question in the negative. See *Dobos*, 404 Mass. at 653, citing *Doe* v. *Blandford*, 402 Mass. 831, 836-838 (1988). So, it follows that G.L. c. 258, § 10(j) did not impliedly change the law.

## II. The policy behind G.L. c. 258, § 10(j) does not support immunizing the MBTA for its negligent retention, supervision, and promotion of a knowingly violent, lawless public employee.

"[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it." 1 William Blackstone, Commentaries 61 (George Sharswood ed., 1893).

> The so-called statutory public duty rule of G.L. c. 258, § 10(j)[] exempts from the Tort Claims Act "any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer."

*Brum*, 428 Mass. at 691.

> To say that § 10(j) presents an interpretive quagmire would be an understatement. The language is convoluted and ambiguous, as evidenced by the difficulty Superior Court judges have had in applying it and the inconsistency of

> outcomes. The particular issue in question in these cases [is] the meaning of the "originally caused" clause in § 10(j).

*Id.*

Despite the original Act in 1978 and its express limitations, "this [C]ourt ventured a further limitation in *Dinsky* v. *Framingham*, 386 Mass. 801 (1982)" by recognizing "the so-called public duty rule." *Jean W.*, 414 Mass. at 500. "The [common law] public duty rule, broadly stated, [wa]s a judicially-created doctrine that protect[ed] governmental units from liability unless an injured person seeking recovery c[ould] show that the duty breached was a duty owed to the individual himself, and not merely to the public at large." *Id.* at 500-501.

In 1993, however, this Court held that "the result [of the common law public duty rule] ha[d] been to resurrect effectively the antiquated and outmoded concepts of sovereign immunity which [this Court] and the Legislature ha[d] sought to shed." *Id.* at 499. Yet here the MBTA suggests the same "antiquated and outmoded" concept, arguing that negligent hiring, supervision, and retention can never be an "original cause" because

each are passive in nature.[1] MBTA Br. 24-25. The MBTA thereby effectively reads the torts, which unequivocally sound in negligence, out of the Act.

"Justice O'Connor's concurrence in *Cyran* v. *Ware*, 413 Mass. 452, 467 (1992), which preceded enactment of [§ 10(j)], uses the words 'originally caused' and is a likely source for the language used in the statute." *Brum*, 428 Mass. at 693. Justice O'Connor was responding to Justice Greaney's conclusion that *Irwin* v. *Ware*, 392 Mass. 745 (1984) (liability for officer's failure to arrest drunk driver who thereafter crashed into plaintiffs) and *A.L.* v. *Commonwealth*, 402 Mass. 234 (1988) (liability for failure to verify place of employment of probationer who molested boys while working in

[1] The MBTA alternatively argues that even if negligent hiring were an affirmative act, its liability ends there because supervision and retention are passive. MBTA Br. 19-20. First, the MBTA cites no authority immunizing employers for negligent hiring or supervision. Further, to read the Act as exposing the MBTA to liability for not running a background check but nonetheless immunizing the MBTA for dispatching an employee with a propensity for violence to drive consumers in a bus at night would so absurd as to warrant rejection even if the Act clearly contemplated such a result; here, however, the Act does not contemplate such a result, clearly or otherwise. *Meyer* v. *Veolia Energy North America*, 482 Mass. 208, 212 (2019) (this Court "will not adopt a literal construction of a statute if the consequences of doing so are absurd or unreasonable, such that it could not be what the Legislature intended"). See Scalia & Garner, *supra* at § 37, at 234 (absurdity doctrine).

school) "'have their place in a plan of evolving law.'" *Cyran*, 413 Mass. at 466.

Even in the absence of special assurances, private employers are duty-bound to ensure their employees do not accost customers. See *Lev* v. *Beverly Enters.-Mass., Inc.*, 457 Mass. 234, 243-244 (2010); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41 (2012) ("Duty to Third Parties Based on Special Relationship with Person Posing Risks"). That duty is not a "general governmental function," like firefighting or arresting an inebriated driver, and the Legislature never intended to apply G.L. c. 258, § 10(j) to negligent hiring, retention, or supervision of employees. *Dinsky*, 386 Mass. at 807. Cf. *Cyran*, 413 Mass. at 467-468.

## III. G.L. c. 258, § 10(j) does not immunize the MBTA for its negligent retention, supervision, and promotion of a knowingly violent employee.

A public employer is immune under G.L. c. 258, § 10(j) for "an act or failure to act to prevent or diminish" certain "harmful consequences," "including the violent or tortious conduct of a third person," except where "a condition or situation" resulting in such "harmful consequences" was "originally caused by the public employer or any other person acting on

behalf of the public employer." See *Kent* v. *Commonwealth*, 437 Mass. 312, 317, n.8 (2002); *Brum*, 428 Mass. at 692-693, 696. The "principal purpose . . . is to confer immunity on public employees for harm that comes about as a result of their 'failure . . . to prevent' the 'violent or tortious conduct of a third person." *Brum*, 428 Mass. at 692. The Appeals Court, however, has interpreted G.L. c. 258, § 10(j) to also immunize the Commonwealth for its failure to prevent a drowning due to dangerous water conditions at the beach. See *Jacome* v. *Commonwealth*, 56 Mass. App. Ct. 486, 487 (2002).

An "original cause" is "an affirmative act (not a failure to act) by a public employer that creates the 'condition or situation' that results in harm inflicted by a third party." *Kent*, 437 Mass. at 318. This Court, to date, has not answered whether negligent supervision or retention or promotion of an employee can constitute an "original cause." The plain language of the Act could reasonably be read in the affirmative. See, e.g., *Ku* v. *Town of Framingham*, 62 Mass. App. Ct. 271, 275-276 (2004) (no immunity for negligent supervision of contractor who caused harm while acting on behalf of public employer). The plain language of the Act thus comports with its purpose. *See* G.L. c. 258, § 2; Scalia & Garner, *supra* at § 4, at 63

("presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered").

This Court in *Kent* considered for the first time "the nature of the relationship between the affirmative act and the 'condition or situation' that would bring it within the ambit of the 'originally caused' language, thereby extinguishing the Commonwealth's immunity from suit." *Kent*, 437 Mass. at 318.

Where governmental employees' actions "set in motion a chain of events that allow[] violent people to harm others[,]" there is no immunity under G.L. c. 258, § 10(j), because no such condition or situation would have existed but for the government's action. *Anderson* v. *City of Gloucester*, 75 Mass. App. Ct. 429, 436 (2009), rev. denied, 455 Mass. 1105 (2009). See *Reid* v. *Boston*, 95 Mass. App. Ct. 591, 599 (2019), rev. denied, 483 Mass. 1102 (2019). The public employer "'owe[s] [the plaintiff] a duty of care . . . because, by taking action that exposed [the plaintiff] to risk, they were bound, as any other person would be, to act reasonably.'" *Jane J.* v. *Commonwealth*, 91 Mass. App. Ct. 325, 336 (Massing, J. dissenting), rev. denied, 478 Mass. 1104 (2017), quoting *Onofrio* v. *Department of Mental Health*, 408 Mass. 605, 610 (1990). By contrast, acts of a public employer

that merely result in individuals living or traveling in society, e.g., releasing a parolee who years later causes harm, "are too remote as a matter of law to be the original causes of specific conditions or situations that may arise years later as a result of their societal interactions." *Kent*, 437 Mass. at 319. There must be some "closer connection" between the affirmative act and the harm. *Id.* at 319-320.

In considering what acts might satisfy the "materially contributed" requirement, this Court in *Kent* provided three examples of situations in which governmental employees set in motion a chain of events that allowed violent people to harm others. *Kent*, 437 Mass. at 319 n.9. See *Anderson*, 75 Mass. App. Ct. at 436 & n.11 (recounting *Kent* examples). See also *Bonnie W.*, 419 Mass. at 126-127 ("affirmative act" of recommending convicted rapist for employment giving access to keys of units of potential victims); *Onofrio*, 408 Mass. at 610 (placing unstable mental patient in rooming house that he subsequently set on fire was "action that exposed [plaintiff's decedent] to risk," creating duty "no different" than for private individuals); *Doe*, 402 Mass. at 836 (hiring guidance counselor who subsequently abused students).

To place an injury-causing actor in a position with an opportunity to harm others materially contributes to creating the condition or situation resulting in harm and *is* an original cause because it is proximate; it is not too remote from the injury. See *Devlin* v. *Commonwealth*, 83 Mass. App. Ct. 530, 535 (2013) (public employer's affirmative decision to allow convicted inmates to work in area where civilly committed individuals were housed and treated was one of "original causes" of harmful consequences within meaning of Act). See also *Baptista* v. *Bristol County Sheriff's Department*, 100 Mass. App. Ct. 841, 857 (2022) (commingling of arrestees with vulnerable, civilly-detained incapacitated person is "essence" of situation created by affirmative act of public employer); *Gennari* v. *Reading Pub. Sch.*, 77 Mass. App. Ct. 762, 764-765 (2010) (principal's decision to hold recess in concrete courtyard was "original cause" of situation leading to student's injury when classmate pushed student and student struck head on concrete).[2]

"The common thread in these cases is that an affirmative decision by a public employer, not just a failure to act, played a significant role in

[2] See also *Cormier* v. *City of Lynn*, 479 Mass. 35, 42 n.13 (2018), citing *Gennari* v. *Reading Pub. Sch.*, 77 Mass. App. Ct. 762, with approval.

placing a vulnerable plaintiff in harm's way." *Jane J.*, 91 Mass. App. Ct. at 335 (J. Massing, dissenting). The *Jane J.* majority held that a hospital's commingling of males and females was not an original cause of a male patient raping a female patient because the rapist had no criminal history of sexual assault and "not every man is a rapist." *Id*. at 327, 330-332. But the situation is very different "where the supervisory officials allegedly had, or should have had, knowledge of a public employee's assaultive behavior." *Dobos*, 404 Mass. at 653.

Here, the MBTA retained and promoted a knowingly violent, lawless driver, assigning him to the night shift where it is more than reasonable that he would encounter difficult, sometimes belligerent ridership. Without these affirmative decisions, the assault would not have occurred.

## IV. The term "original cause" in G.L. c. 258, § 10(j) is unique nationally; this Court should not render Massachusetts an outlier.

Alaska, Arizona, Colorado, and Louisiana have enacted public duty rules after their respective state courts abandoned the doctrine. See Alaska

Stat. § 09.50.250; Colo. Rev. Stat. § 24-10-106.5; La. Rev. Stat. § 9:2798.1;[3] *Riley* v. *Rollison*, U.S. Dist. Ct., Civil Action No. 06–cv–01347–WYD–BNB, 2007 WL 324579, at *4 (D. Colo. Jan. 31, 2007) (no waiver for claims of assault and battery, negligent hiring or supervision of employees without factual basis that act or omission was willful and wanton) (applying Colorado law) (unpublished) (attached); *Lane* v. *City of Juneau*, 421 P.3d 83, 93 (Alaska 2018) (routine supervision of personnel generally falls under "day-by-day" business of government, for which City does not enjoy sovereign immunity); *Aztec Minerals Corp*. v. *Romer*, 940 P.2d 1025, 1031 (Colo. Ct. App. 1996) (prior precedent rejecting public duty rule superseded by subsequent statute); *Smith* v. *Lafayette Parish Sheriff's Dep't*, 874 So. 2d 863, 868 (La. Ct. App. 2004) (hiring and retention policy was discretionary and liability cannot be imposed on governmental entity for application of policy). Of note, Arizona's statute explicitly immunizes "[t]he hiring of personnel." *See* Ariz. Rev. Stat. § 12-820.01(B)(1)(c). *But see*

[3] *See* Kenneth M. Murchison, Local Government Law, 46 La. L. Rev. 491, 526-527 (2004) (Louisiana legislature eliminated liability for policy-making or discretionary acts, most likely in response to Louisiana Supreme Court refusal to embrace public duty doctrine).

Ariz. Rev. Stat. § 12-820.05 (immunizing public entities from liability for losses directly attributable to criminal felonies by public employees "unless the public entity knew of the public employee's propensity for that action"); *Gallagher* v. *Tucson Unified Sch. Dist.*, 237 Ariz. 254, 257-258 (Ariz. Ct. App. 2015) (rejecting constructive knowledge exception).[4]

The Maryland, North Carolina, and Illinois courts have held that claims of negligent hiring, training, supervision, and retention are not subject to the public duty rule. *See Jones* v. *State*, 425 Md. 1, 24-26 (Md. 2012) (public duty doctrine does not foreclose liability on claim of negligent training in unconstitutional arrest procedures); *Leftwich* v. *Gaines*, 134 N.C. App. 502, 514 (N.C. App. 1999) (public duty doctrine not incompatible with negligent supervision), rev. denied, 351 N.C. 357 (1999). Compare *Bates* v. *Doria*, 502 N.E.2d 454, 458 (Ill. App. Ct. 1986) (public duty rule inapplicable

[4] For additional background on the Arizona Actions Against Public Entities or Public Employees Act, see, e.g., A.R.S. §§ 12–820 to –826; 1984 Ariz. Sess. Laws, ch. 285 (2d Reg. Sess.); *Glazer v. State*, 237 Ariz. 160, 163 (2015) (historical overview); *Ryan* v. *State,* 134 Ariz. 308, 310 (1982) (eliminating public duty rule)], superseded by statute as stated in *Clouse ex rel. Clouse* v. *State*, 199 Ariz. 196, 203 (2001); *Stone* v. *Ariz. Highway Comm'n*, 93 Ariz. 384, 392 (1963) (rule is liability and immunity is exception), superseded by statute as recognized in *Backus* v. *State*, 220 Ariz. 101, 104 (2009).

to defendants' negligent employment of officer rather than defendants' failure to prevent commission of crimes) with *Coleman* v. *East Joliet Fire Protection Dist.*, 46 N.E.3d 741, 758 (Ill. 2016) (abolishing common-law public duty rule and special duty exception but inviting legislature to codify same). And the Washington Supreme Court held that the public duty rule could not "provide immunity from liability" where statute provided that a "public entity is liable in tort 'to the same extent as if it were a private person or corporation.'" *Osborn* v. *Mason County*, 157 Wash. 2d 18, 27–28 (Wash. 2006), quoting RCW 4.92.090 (1963).

Courts of last resort in Hawaii and Idaho have also held that claims of negligent hiring, training, supervision, and retention are not barred by the intentional tort exceptions to their state tort claims acts where the government entity knew or should have known an employee would be likely to commit assault and battery. See, e.g., HRS § 662-15(4); *Doe Parents No. 1* v. *State*, 58 P.3d 545, 579 (Haw. 2002) (State subject to negligence analysis for liability of employees in position to take reasonable precautions against anticipated harm); *Kessler* v. *Barowsky*, 931 P.2d 641, 648 (Idaho 1997) (Idaho Tort Claims Act contemplates negligence claim in failing to prevent loss caused by battery); *Doe* v. *Durtschi*, 716 P.2d 1238,

1244-1245 (Idaho 1986) (breach of duty constitutes negligence notwithstanding that foreseeable danger was from intentional or criminal misconduct).

## CONCLUSION

For the foregoing reasons, this Honorable Court should affirm the decision of the Appeals Court.

Respectfully submitted,

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Date: November 13, 2024

## CERTIFICATE OF COMPLIANCE

I, Kevin J. Powers, hereby certify that the forgoing brief complies with the rules of court, including, but not limited to:

Mass. R. App. P. 16(a)(13) (addendum);

Mass. R. App. P. 16(e) (references to the record);

Mass. R. App. P. 17 (brief of an amicus curiae);

Mass. R. App. P. 18 (appendix to the briefs);

Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. App. P. 21 (redaction).

I further certify, pursuant to Mass. R. App. P. 16(k), that the forgoing brief complies with the length limitation in Mass. R. App. P. 20 because it is printed in a proportional spaced font, Book Antiqua, at size 14 point, and contains 3,913 words in Microsoft Word 2007.

/s/ Kevin J. Powers

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Date: November 13, 2024

## CERTIFICATE OF SERVICE

I certify that on the 13th day of November, 2024, I served the foregoing brief on the parties in this matter by electronic delivery via the efileMA system to their attorneys of record or, if such attorneys are not registered with efileMA or if such parties are pro se and not registered with efileMA, via e-mail. The attorneys served are:

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BBO #550193

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Kevin J. Powers, BBO No. 666323

# ADDENDUM

## ADDENDUM
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M.G.L.A. 258 § 2

# § 2. Liability; exclusiveness of remedy; cooperation of public employee; subsequent actions; representation by public attorney

Effective: June 30, 2009
Currentness

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of $100,000; provided, however, that all claims for serious bodily injury against the Massachusetts Bay Transportation Authority shall not be subject to a $100,000 limitation on compensatory damages. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter. Failure to provide such reasonable cooperation on the part of a public employee shall cause the public employee to be jointly liable with the public employer, to the extent that the failure to provide reasonable cooperation prejudiced the defense of the action. Information obtained from the public employee in providing such reasonable cooperation may not be used as evidence in any disciplinary action against the employee. Final judgment in an action brought against a public employer under this chapter shall constitute a complete bar to any action by a party to such judgment against such public employer or public employee by reason of the same subject matter.

Notwithstanding that a public employee shall not be liable for negligent or wrongful acts as described in the preceding paragraph, if a cause of action is improperly commenced against a public employee of the commonwealth alleging injury or loss of property or personal injury or death as the result of the negligent or wrongful act or omission of such employee, said employee may request representation by the public attorney of the commonwealth. The public attorney shall defend the public employee with respect to the cause of action at no cost to the public employee; provided, however, that the public attorney determines that the public employee was acting within the scope of his office or employment at the time of the alleged loss, injury, or death, and, further, that said public employee provides reasonable cooperation to the public employer and public attorney in the defense of any action arising out of the same subject matter. If, in the opinion of the public attorney, representation of the public employee, under this paragraph would result in a conflict of interest, the public attorney shall not be required to represent the public employee. Under said circumstances, the commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the public employee in his defense of the cause of action; provided, however, that the same conditions exist which are required for representation of said employee by the public attorney under this paragraph.



 

**Credits**

Added by St.1978, c. 512, § 15. Amended by St.1984, c. 279, § 1; St.2009, c. 120, § 23, eff. June 30, 2009.

Notes of Decisions (260)

M.G.L.A. 258 § 2, MA ST 258 § 2

Current through Chapter 129 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

**End of Document**

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title IV. Certain Writs and Proceedings in Special Cases (Ch. 246-258e)
Chapter 258. Claims and Indemnity Procedure for the Commonwealth, Its Municipalities, Counties and Districts and the Officers and Employees Thereof (Refs & Annos)

M.G.L.A. 258 § 10

# § 10. Application of Secs. 1 to 8

Currentness

The provisions of sections one to eight, inclusive, shall not apply to:--

(a) any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer, or any municipal ordinance or by-law, whether or not such statute, regulation, ordinance or by-law is valid;

(b) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused;

(c) any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations;

(d) any claim arising in respect of the assessment or collection of any tax, or the lawful detention of any goods or merchandise by any law enforcement officer;

(e) any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;

(f) any claim based upon the failure to inspect, or an inadequate or negligent inspection, of any property, real or personal, to determine whether the property complies with or violates any law, regulation, ordinance or code, or contains a hazard to health or safety, except as otherwise provided in clause (1) of subparagraph (j).

(g) any claim based upon the failure to establish a fire department or a particular fire protection service, or if fire protection service is provided, for failure to prevent, suppress or contain a fire, or for any acts or omissions in the suppression or containment



 

of a fire, but not including claims based upon the negligent operation of motor vehicles or as otherwise provided in clause (1) of subparagraph (j).

(h) any claim based upon the failure to establish a police department or a particular police protection service, or if police protection is provided, for failure to provide adequate police protection, prevent the commission of crimes, investigate, detect or solve crimes, identify or apprehend criminals or suspects, arrest or detain suspects, or enforce any law, but not including claims based upon the negligent operation of motor vehicles, negligent protection, supervision or care of persons in custody, or as otherwise provided in clause (1) of subparagraph (j).

(i) an claim[1] based upon the release, parole, furlough or escape of any person, including but not limited to a prisoner, inmate, detainee, juvenile, patient or client, from the custody of a public employee or employer or their agents, unless gross negligence is shown in allowing such release, parole, furlough or escape.

(j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer. This exclusion shall not apply to:

(1) any claim based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances. A permit, certificate or report of findings of an investigation or inspection shall not constitute such assurances of safety or assistance; and

(2) any claim based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention; and

(3) any claim based on negligent maintenance of public property; (4) any claim by or on behalf of a patient for negligent medical or other therapeutic treatment received by the patient from a public employee.

Nothing in this section shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employers or entities.

**Credits**

Added by St.1978, c. 512, § 15. Amended by St.1993, c. 495, § 57.

Notes of Decisions (453)

Footnotes

1 So in enrolled bill; probably should read “any claim”.

M.G.L.A. 258 § 10, MA ST 258 § 10

Current through Chapter 129 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.



 

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2007 WL 324579
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Christina RILEY and
Jacqueline Overturf, Plaintiff(s),
v.
Russell E. ROLLISON; State of Hawaii Department of Public Safety; Gil Walker, individually and in his Capacity as Chief Executive Officer of GRW Corporation; Steve Hargett, individually and in his Capacity as Vice President of Operations of GRW Corporation; GRW, a corporation; John Does 125; and Jane Does 125, Defendant(s).

Civil Action No. 06–cv–01347–WYD–BNB.
|
Jan. 31, 2007.

**Attorneys and Law Firms**

Myles Steven Breiner, Law Office of Myles S. Breiner, Alc., Honolulu, HI, for Plaintiff.

Tiffaney A. Norton, Senter, Goldfarb & Rice, LLC, Gillian Dale, Hall & Evans, L.L.C., Denver, CO, for Defendants.

**ORDER**

WILEY Y. DANIEL, U.S. District Judge.

I. *INTRODUCTION*

***1** THIS MATTER is before the Court on the following motions: Motion to Dismiss Plaintiffs' Complaint From State of Hawaii Department of Public Safety [# 6], filed August 4, 2006, and Motion to Dismiss Plaintiffs' Complaint From Defendants Gil Walker, Steve Hargett, and GRW [# 14], filed August 10, 2006. By way of background, Plaintiff asserts ten claims for relief against five named Defendants and numerous unnamed Defendants. For each claim, Plaintiff requests compensatory, special, exemplary, and punitive damages as a result of the Defendants' alleged unlawful conduct. (Compl.¶¶ 21–62.) For the reasons set forth below, the Motion to Dismiss Plaintiffs' Complaint From State of Hawaii Department of Public Safety [# 6], filed August 4, 2006, is GRANTED, and the Motion to Dismiss Plaintiffs' Complaint From Defendants Gil Walker, Steve Hargett, and GRW [# 14], filed August 10, 2006, is GRANTED in part and DENIED in part.

II. *FACTUAL BACKGROUND*

Plaintiffs Christina Riley and Jacqueline Overturf seek relief under 42 U.S.C. § 1983, alleging that the Defendants violated their constitutional rights secured by the Fourteenth Amendment. The Plaintiffs also allege claims arising under state law. It should be noted that on August 4, 2006, Defendant State of Hawaii Department of Public Safety filed its Motion to Dismiss Plaintiffs' Complaint [# 6], and on August 10, 2006, Defendants Gil Walker, Steve Hargett, and GRW filed their Motion to Dismiss Plaintiffs' Complaint [# 14]. Plaintiffs have not responded to either motion.

Plaintiffs' claims arise from their incarceration at the Brush Correctional Facility in Brush, Colorado which is a private facility that is owned and operated by GRW, a corporation. According to the pleadings, the State of Hawaii Department of Public Safety entered into a contract with GRW to house female inmates at the facility in Brush, Colorado. In January, 2005 the Plaintiffs were sentenced in Hawaii state courts and transferred to the Brush Correctional Facility. While incarcerated at the Brush facility, the Plaintiffs allege they were sexually assaulted and harassed by Defendant Rollison, a correctional officer. The Plaintiffs further allege that once they reported the assault, the prison staff harassed and retaliated against them.

III. *ANALYSIS*

A. *STANDARD OF REVIEW*

In construing a motion to dismiss, the court " 'must accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff.' " *David v. City and County of Denver,* 101 F.3d 1344, 1352 (10th Cir.1996), *cert. denied,* 522 U.S. 858 (1997) (quoting *Gagan v. Norton,* 35 F.3d 1473, 1474 n. 1 (10th Cir.1994)). "A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only 'if the plaintiff can prove no set of facts to support a claim for relief.' " *Id.* (quoting *Jojola v. Chavez,* 55 F.3d 488, 490 (10th Cir.1995)). "A motion to dismiss under Rule 12(b) 'admits all well-pleaded facts in the complaint as distinguished from conclusory allegations.' " *Smith v. Plati,* 258 F.3d 1167, 1174 (10th Cir.2001)(quoting *Mitchell v. King,* 537 F.2d 385, 386 (10th Cir.1976)).



 

***2** If, accepting all well-pleaded allegations as true and drawing all reasonable references in favor of plaintiff, it appears beyond doubt that no set of facts entitle plaintiff to relief, then the court should grant a motion to dismiss. *See Tri–Crown, Inc. v. Am. Fed. Sav. & Loan Ass'n,* 908 F.2d 578, 582 (10th Cir.1990).

B. *MOTION TO DISMISS PLAINTIFFS' COMPLAINT FROM STATE OF HAWAII DEPARTMENT OF PUBLIC SAFETY*

Plaintiffs have filed two claims against the Defendant State of Hawaii Department of Public Safety including a state law claim of assault and battery and a claim for punitive damages. First, the Defendant moves to dismiss Plaintiffs' claim for assault and battery on the grounds of governmental immunity. Specifically, the Defendant argues that the claim is barred under the Hawaiian State Tort Liability Act ("HSTLA")[1]. I agree.

1 The Court is applying Hawaii tort law for purposes of Defendant State of Hawaii's Motion to Dismiss because of Plaintiffs' reliance on the HSTLA in the Complaint. (Compl.¶ 13.) However, Plaintiffs' assault and battery claim would also be barred under Colorado Law. Colo.Rev.Stat. §§ 24–10–101, 106.

Under Hawaii law, "[t]he State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." HSTLA; Haw.Rev.Stat. § 662–2. "The effect of the [HSTLA] is to waive immunity from traditionally recognized common law causes of action in tort, other than those expressly excluded. It was not intended to visit the sovereign with novel liabilities." *Figueroa v. State,* 604 P.2d 1198, 1207 (Haw.1979). However, claims for assault and battery are expressly excluded from the waiver of immunity. Haw.Rev.Stat. § 662–15 reads in pertinent part: "[t]his chapter shall not apply to ... any claim arising out of assault, battery...." Under the HSTLA, the State of Hawaii's sovereign immunity is not waived for tort claims of assault and battery. Therefore, I find that Plaintiffs' claim for assault and battery against Defendant State of Hawaii Department of Public Safety should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

Second, the Defendant moves to dismiss Plaintiffs' claim for punitive damages. Specifically, the Defendant argues that Plaintiffs' request for punitive damages is not an independent claim and is also barred under the Hawaiian State Tort Liability Act ("HSTLA"). I agree. Plaintiffs assert a claim for punitive damages in claim ten of the Complaint. In *Jackson v. Johns,* 714 F.Supp. 1126, 1131 (D.Colo.1989), this Court held that "[a] request for punitive damages is not a separate claim for relief but rather, is a prayer for damages." Therefore, Plaintiffs' claim for punitive damages set forth in claim ten of the Complaint is dismissed as to all Defendants. In light of my findings, it is unnecessary for me to consider Defendant State of Hawaii Department of Public Safety's other arguments regarding supplemental jurisdiction, and whether the Eleventh Amendment bars this action.

C. *MOTION TO DISMISS PLAINTIFFS' COMPLAINT FROM DEFENDANTS GIL WALKER, STEVE HARGETT, AND GRW, A CORPORATION*

1. *Plaintiffs' Claims Under 42 U.S.C. § 1983*

***3** Plaintiffs allege the following constitutional violations under 42 U.S.C. § 1983 against Defendants Walker, Hargett, and GRW, a corporation: (1) unconstitutional retaliation; (2) failure to monitor, supervise, and discipline; (3) and failure to properly screen and hire. The Defendants move to dismiss Plaintiffs' claims for failure to exhaust administrative remedies. Specifically, the Defendants argue that the Plaintiffs, prison inmates alleging claims arising from prison conditions, are required to comply with the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), before filing suit under 42 U.S.C. § 1983. In light of a recent Supreme Court decision, I disagree.

The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C § 1997e(a). The purpose of this exhaustion requirement is to reduce the quantity and improve the quality of prisoner suits by (1) allowing prison officials the opportunity to address inmates' complaints; (2) filtering out frivolous claims; and (3) creating an administrative record to facilitate the litigation process. *Porter v. Nussle,* 534 U.S. 516, 524–25 (2002). Relevant to the facts of the instant case, the requirements set forth by the PLRA apply both when the prisoner is housed in a privately operated facility and when a prisoner is seeking only money damages. *Jernigan v. Stuchell,* 304 F.3d 1030, 1033 (10th Cir.2002); *Booth v. Churner,* 532 U.S. 731, 734 (2001). Previously, the Tenth Circuit held that


 

in order for a prisoner to comply with the PLRA, she must submit a statement of her claim and "either attach copies of administrative proceedings or describe their disposition with specificity." *Steele v. Federal Bureau of Prisons,* 355 F.3d 1204, 1211 (10th Cir.2003)(reversed by *Jones v. Bock,* No. 05–7058, 2007 (S.Ct. January 22, 2007)). However, in a recent decision, the Supreme Court held that "... failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones v. Bock,* No. 05–7058, 2007 (S.Ct. January 22, 2007).

In the case at hand, the two Plaintiffs were prisoners at the Brush Correctional Facility, a private detention facility, when they asserted their claims against the Defendants. Plaintiffs' claims for damages arise out of alleged Constitutional violations under 42 U.S.C. § 1983 regarding prison conditions. The Plaintiffs neither attach nor mention any information regarding the exhaustion of administrative remedies under the PLRA in their Complaint. Further, Plaintiffs have not responded to Defendants' motion to dismiss. However, in light of the Supreme Court's recent opinion, I find that the Plaintiffs are not required to specifically plead or demonstrate exhaustion in their Complaint. Thus, it would be improper to dismiss these claims under the PLRA.

2. *Plaintiffs' State Law Claims*

***4** Plaintiffs' Complaint alleges the following claims arising under state law: (1) assault and battery; (2) negligent hiring and supervision; and (3) respondeat superior. (Compl.¶¶ 49–54.) In their motion, the Defendants argue that Plaintiffs' state law claims are barred by the Colorado Governmental Immunity Act ("CGIA"). I agree. "A public employee is immune from all claims that lie or could lie in tort, unless the claim falls within one of the six limited areas for which immunity has been waived or unless the act or omission causing the injury was willful and wanton." *Moody v. Ungerer,* 885 P.2d 200, 204 (Colo.1991) (citing Colo.Rev.Stat. § 24–10–118(2)). Colo.Rev.Stat. § 24–10–110(5)(a) provides that in actions "in which allegations are made that an act or omission of a public employee was willful and wanton, the specific factual basis of such allegations shall be stated in the complaint." "Failure to plead the factual basis of an allegation that an act or omission of a public employee was willful and wanton shall result in dismissal of the claim for failure to state a claim upon which relief can be granted." Colo.Rev.Stat. § 24–10–110(5)(b).

Turning to my findings, the CGIA contains no waiver for claims of assault and battery, negligent hiring or supervision of prison employees without a factual basis that an act or omission to act was willful and wanton. I find that in their Complaint, Plaintiffs failed to allege facts on the part of the Defendants that, if accepted as true, adequately assert willful and wanton misconduct. Further, the Plaintiffs failed to respond to Defendants' motion to dismiss. Accordingly, I find that Plaintiffs' claims for assault and battery, negligent hiring or supervision of prison employees against Defendants Walker, Hargett, and GRW should be dismissed under the CGIA for failure to state a claim.

In light of my decision to dismiss Plaintiffs' state claims, it is unnecessary for me to consider the Defendants' remaining arguments regarding failure to state a claim and supplemental jurisdiction.

IV. *CONCLUSION*

Based on the foregoing, it is

ORDERED that the Motion to Dismiss Plaintiffs' Complaint From State of Hawaii Department of Public Safety [# 6], filed August 4, 2006, is **GRANTED.** It is

FURTHER ORDERED that Plaintiffs' claim of assault and battery against the Defendant State of Hawaii Department of Public Safety is **DISMISSED.** It is

FURTHER ORDERED that the Motion to Dismiss Plaintiffs' Complaint From Defendants Gil Walker, Steve Hargett, and GRW [# 14], filed August 10, 2006, is **GRANTED IN PART AND DENIED IN PART.** It is

FURTHER ORDERED that Plaintiffs' state law claims for assault and battery, negligent hiring and supervision, and respondeat superior against Defendants Walker, Hargett, and GRW are **DISMISSED.** It is

FURTHER ORDERED that Plaintiffs' claim for punitive damages improperly set forth in Count Ten of the Complaint is **DISMISSED** as to all Defendants.

**All Citations**

Not Reported in F.Supp.2d, 2007 WL 324579



 

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