

LONG & DiPIETRO, LLP

ATTORNEYS AT LAW

175 Derby Street

Unit 17

Hingham, MA 02043

www.long-law.com

MICHAEL J. LONG
ROSANN DiPIETRO
KELLY T. GONZALEZ
LESLIE C. CAREY

JOSEPH P. LONG
OF COUNSEL

TELEPHONE (781) 749-0021
FACSIMILE (781) 749-1121
email@long-law.com

LEGAL ADVISORY:

Chadwick v. Duxbury Public Schools, 475 Mass. 645 (2016)

In a case with an unusual procedural posture, the Supreme Judicial Court resolved a discovery dispute by determining that there is no statutory or common law privilege protecting union members' communications with union representatives in employment discrimination cases. The case was brought as a civil action in the Superior Court, although the record does reflect allegations that a complaint was filed at MCAD.

BACKGROUND

The plaintiff began working as an English teacher in Duxbury in 2006. She retired in 2015. She was a member of the Duxbury Teachers' Association (DTA) and served as President of the DTA for about 6 years until she retired. Well before she was employed in Duxbury, she was diagnosed with post-traumatic stress disorder, the symptoms of which were managed until about 2009. After 2009, the teacher manifested PTSD symptoms including panic attacks, anxiety, hyper vigilance and sleep problems, which she attributed to work conditions, including allegations that she was bullied and harassed by her direct supervisor. In 2012, the plaintiff's attorney notified Duxbury that she had PTSD and requested that a new supervisor be named for her. In response, the Superintendent identified a new administrator to conduct performance evaluations but refused to change the "subject matter supervisor" for the teacher's English courses.

In December of 2013 an evaluation was completed. The teacher alleged that it contained false and unwarranted criticisms. Thereafter, the parties exchanged communication about other alleged performance concerns and met in May of 2014 to discuss performance issues. The day of the May 2014 meeting, the teacher's attorney issued additional correspondence to the Superintendent reminding him of her PTSD and again requesting the limits on contact between the immediate supervisor and the teacher. A couple of weeks after the main meeting a self-

directed growth plan was issued¹, which would have permitted the teacher's discharge at the end of the 2014-2015 school year. About six months later, in December of 2014, the plaintiff filed suit seeking monetary damages.

As is the course of most civil cases, the discovery process followed. The school district requested the production of various documents and propounded interrogatories, some of which were directed at obtaining the identification of persons with whom the teacher had talked, and copies of any documents that the teacher had provided to or had received from her union, union representatives, and the statewide teachers' association. The document request sought copies of emails, phone text messages or chat messages. The teacher objected, "claiming a union member-union privilege." She did provide, however, a privilege log indicating that 92 email messages were being withheld from disclosure. A privilege log typically identifies the parties to the communication, the date it was sent and a generic description of the subject matter. The discovery dispute resulted in a ruling from a Superior Court judge ordering the teacher to disclose the requested discovery. The judge's order appears, at least in part, to have been based on the conclusion that no such privilege existed in c. 150E.

DISCUSSION

The Supreme Judicial Court identified the case as one of first impression in Massachusetts. The teacher argued that there was either an implied privilege under c. 150E or a common law privilege protecting communications between union members and their representatives. The Supreme Judicial Court rejected the teacher's claim in part because the provisions of c. 150E authorizing employees to act in concert and prohibiting employers from interfering, restraining, or coercing employees in the exercise of any right guaranteed by c. 150E are contextually limited to the world of collective bargaining. See M.G.L. c. 150E, §10(a)(1)(2). Here, because the action apparently arose under the provisions of c. 151B, the state's law prohibiting employment discrimination, the court concluded that the terms of 150E did not apply to a civil action based on a different statute. The specific language of c. 150E, §10(a)(1) references claims "under this chapter." The teacher's claims related to discriminatory actions allegedly taken against her in her capacity as an employee, not with respect to her union activity. The court took pains to identify Massachusetts Labor Relations Commission cases which have held that, in the context of a dispute under c. 150E, there is confidentiality of communications between unions and their members in a labor dispute. This privilege, under cognate provisions of federal labor law, extends to communications between an employee and a union representative during the grievance process. Because the protections in c. 150E for union activity does not extend to independent civil law suits the Supreme Judicial Court determined that there was no basis for inferring from §10(a)(1) that communications between an employee and his or her union were privileged.

After dispatching the argument that there was an implied privilege under c. 150E the court next dismissed the plaintiff's argument that a common law privilege existed for such communications. Common law testimonial privileges to withhold evidence are based only on the constitution, state law, or rules promulgated by the Supreme Court or the common law. The court observed that the legislative and judicial power to create a privilege against production of

¹ The court could have been referring to an improvement plan as a directed growth plan.

information is used sparingly. While there are other jurisdictions which do recognize common law employee/union communication privileges, notably Alaska, the Supreme Judicial Court also observed that courts in New Hampshire and California have refused to recognize such common law privilege. The court concluded that “the question whether to create such a privilege is better left to the legislature” following balancing of public interest in obtaining evidence from every person.

Finally, in addition to the creation of such a privilege being more properly a legislative question, the Supreme Judicial Court observed that it had not created such privileges in the past despite speculation or conjecture as to the adverse consequences of the absence of such a ruling. Given the unusual posture to this case, the ruling may have no application to day-to-day labor relations. Activities conducted pursuant to c. 150E are cloaked in an employee/union privilege. A civil action, not brought under c. 150E, however, is not subject to these rules, and communications between employees and union representatives may be fair game in that context. Even with this decision, we do not believe the holding would run to communications between an employee and a union attorney, where the more commonly encountered attorney-client privilege protects client communications.

This advisory is for informational purposes only and may be considered advertising. It is not intended to and does not constitute legal advice with respect to any specific matter and should not be acted upon without consultation with legal counsel.