Will the third time be the charm for challenge to public-sector union fees?

It is settled law that public employees who do not belong to the union that represents them cannot be required to pay fees that the union would use for political activity like union organizing. But in 1977, the Supreme Court ruled that public employees who do not belong to a union can be required to pay a fee—often known as a “fair share” or “agency” fee—to cover the union’s costs to negotiate a contract that applies to all public employees, including those who are not union members. That decision, in *Abood v. Detroit Board of Education*, turned 40 last month. But if an Illinois state employee, Mark Janus, has his way, *Abood* may not survive to see 41. Yesterday Janus asked the Supreme Court to overrule that decision and hold that requiring an unwilling employee to pay even this more limited fee violates the First Amendment. If the court agrees to weigh in, as it is likely to do, its ruling could affect not only the financial health of public-employee unions, but possibly even politics more broadly. And its decision could also be one of the first tangible and significant signs of the impact of the 2016 presidential election on the Supreme Court.

For eight of the nine justices, the issue is a familiar one. It first came before them three years ago, in another case from Illinois. But the court didn’t rule on the question then; instead, it concluded that the employees in that case—home health aides, who usually take care of family members and were compensated by the state—were not actually public employees. However, five justices—Justice Samuel Alito, whose opinion for the court was joined by Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas—suggested that they might be willing to reconsider *Abood*.

Two years later, the issue was back, this time in a challenge filed by a group of California public-school teachers who objected to having to pay agency fees. The court heard oral argument in the case on January 11, 2016, but had not yet announced its decision before Scalia died just over a month later. On March 29 of last year, the remaining eight justices revealed that they were deadlocked, issuing a one-sentence order that left the lower court’s ruling in favor of the union in place. The teachers asked the court to reconsider that ruling, but—after repeatedly putting off action on the request—it declined to do so.

With Justice Neil Gorsuch now on the bench, however, Janus hopes that the Supreme Court will seize its third opportunity to reverse *Abood*. The U.S. Court of Appeals for the 7th Circuit rejected Janus’ argument that requiring him to pay an agency fee violated his rights under the First Amendment, explaining that it did not have the power to overrule *Abood*. But the Supreme Court does have that power, and yesterday Janus asked the justices to step in. He argues that, because issues like salaries, pensions and benefits for government employees are inherently political, agency fees—even if characterized as the costs of contract negotiations—are supporting “speech designed to influence governmental policies.” Therefore, he maintains, requiring him to pay an agency fee isn’t actually any different from forcing him to subsidize a group that lobbies the government. Indeed, he observes, an agency fee may require state employees to “subsidize advocacy that they oppose and that may harm their interests. This is perverse, akin to requiring kidnapping victims to pay their captors for room and board.”

The stakes in this case are high, not only for the parties but also for any other union that represents public employees who must pay agency fees. If employees are not required to pay the fees, many of them probably won’t, which would have a direct effect on the financial health of public-employee unions. And although the fees now at issue before the court cannot be used for politics and lobbying, that could in turn lead to a reduced role on the political stage for organized labor, which by one estimate spent $1.7 billion during the 2012 election cycle.

The respondents in the case, the state of Illinois and the union that represents Janus, have 30 days to file their response to Janus’ petition for review. The justices will almost certainly not consider the petition until late September, when they return from their summer recess. If they were to grant review then, the case would likely be argued in early 2018, with a decision before the end of next June.

Janus v. American Federation of State, County, and Municipal Employees, Council 31

Docket No. 16-1466

7th Cir. TBD

Argument TBD

Opinion TBD

Vote TBD

Author TBD

Term OT 2017

**Issue:** Whether *Abbood v. Detroit Board of Education* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

**SCOTUSblog Coverage**

- Justices issue orders from "long conference" (UPDATED) (Amy Howe)
- Will the third time be the charm for challenge to public-sector union fees? (Amy Howe)

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<td>Sep 28 2017</td>
<td>Petition GRANTED.</td>
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In the
Supreme Court of the United States

MARK JANUS,
PETITIONER,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS
LISA MADIGAN AND MICHAEL HOFFMAN

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QUESTION PRESENTED

Whether there is a special justification for this Court to overrule Abood v. Detroit Board of Education, 431 U.S. 209 (1977), and undo the balance it struck between a State’s interests as an employer in bargaining with an exclusive representative and public employees’ interests in refraining from supporting the political speech of others.
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STATEMENT

1. Illinois, like many other States, has chosen to manage labor relations between public employers and employees through a collective bargaining framework in which a union chosen by the majority of employees takes on the obligation to serve as the exclusive bargaining representative for union members and non-members alike. The Illinois Public Labor Relations Act (Act), 5 ILCS 315/1 et seq., which sets out this framework, is designed to establish peaceful and orderly procedures to prevent labor strife and protect public health and safety while protecting public employees' freedom to associate, self-organize, and designate the labor representatives of their choice. 5 ILCS 315/2. To achieve its purposes, the Act confers rights and imposes correlative duties on employers and employees. See 5 ILCS 315/4 (employer management rights); 5 ILCS 315/6 (right to organize and bargain collectively); 5 ILCS 315/7 (duty to bargain); 5 ILCS 315/10 (unfair labor practices).

The Act protects a public employee's freedom to associate in two general ways. First, the Act ensures that an employee may form, join, or assist a labor organization, or engage in other concerted activities for the purposes of collective bargaining, free from interference, restraint, and coercion. 5 ILCS 315/6(a). Second, the Act protects an employee's right to refrain from participating in such activities. Ibid.

1 A "labor organization" need not be a pre-established labor union, as it is defined as "any organization in which public employees participate and that exists for the purpose, in whole or in part, of dealing with a public employer concerning wages, hours, and other terms and conditions of employment." 5 ILCS 315/3(a).
Employees are not required to form units or select representatives. Rather, the Act permits a group of employees whose collective interests may suitably be represented by a single entity, see 5 ILCS 315/3(s)(1) (defining "unit"), to choose an exclusive representative by establishing that a majority of the employees in that unit want to be represented by a particular labor organization, 5 ILCS 315/9. Neither the employer nor any labor organization may interfere with an employee’s freedom to support or oppose representation, 5 ILCS 315/10, and employees in the unit may later change representatives or forego representation altogether by majority vote, 5 ILCS 315/9.

The organization chosen by a unit’s employees is designated as the unit’s exclusive representative for purposes of collective bargaining over hours, wages, and other terms and conditions of employment. 5 ILCS 315/6(c). The Act imposes obligations on the exclusive representative to bargain in good faith, 5 ILCS 315/7, and to fairly represent the interests of all employees in the unit, regardless of whether they are members of the organization, 5 ILCS 315/6(d). To support these obligations, the Act allows the representative to collect a “fair-share fee” from employees equal to their proportionate share of the costs of collective bargaining, contract administration, and related activities. 5 ILCS 315/6(e). Despite the exclusivity of the organization’s representation, all employees remain free to present grievances directly to their employers, 5 ILCS 315/6(b), and an employee with a religious objection to paying the fair-share fee may instead donate the fee to a nonreligious charity, 5 ILCS 315/6(g).

2. Petitioner Mark Janus is a state employee whose

3. Shortly after taking office, Illinois Governor Bruce Rauner launched this case by filing a complaint in federal district court against various labor organizations that represented bargaining units of state employees. Dist. Ct. Doc. 1. The Governor sought declarations that the parts of the Act allowing for the collection of fair-share fees violated the First Amendment and that he did not exceed his powers under the Illinois Constitution by issuing an executive order barring the collection of such fees. Id. at 20–21. The court allowed respondent Illinois Attorney General Lisa Madigan to intervene as a defendant on behalf of the People of the State of Illinois. Dist. Ct. Doc. 53.

Defendants moved to dismiss, contending that the district court lacked subject matter jurisdiction over the complaint, that Governor Rauner did not have Article III standing to bring his claims, and that the complaint failed to state a claim. Dist. Ct. Docs. 40, 54. Shortly thereafter, Petitioner, along with state employees Brian Trygg and Marie Quigley, moved to intervene as plaintiffs. Dist. Ct. Doc. 91. Governor Rauner then filed an amended complaint adding them as plaintiffs, Dist. Ct. Doc. 96, and a motion to confirm the amendment as a matter of right, Dist. Ct. Doc. 97. The court ordered supplemental briefing on the jurisdictional issues raised by the motions to intervene and to amend the complaint. Dist. Ct. Doc. 106.

The court dismissed Governor Rauner's complaint
and denied his motion to confirm the amendment of that complaint, holding that it lacked subject matter jurisdiction over his claims and that he lacked Article III standing to challenge the constitutionality of the Act. Dist. Ct. Doc. 116. As to the motion to intervene, the court recognized that a court generally may not allow intervention when it lacks jurisdiction over the underlying action, citing *Hofheimer v. McIntee*, 179 F.2d 789, 792 (7th Cir. 1950), but applied what it viewed as an exception to that rule for when a court has an independent basis to exercise jurisdiction over a separate claim brought by an intervening party. *Id.* at 7–9 (citing *Vill. of Oakwood v. State Bank & Tr. Co.*, 481 F.3d 364, 367 (6th Cir. 2007)). The court granted the motion to intervene and ordered that the intervenors’ complaint would be treated as the operative complaint in the action. Ibid.

Petitioner and Trygg, but not Quigley, later filed a second amended complaint against AFSCME, Attorney General Madigan, and Michael Hoffman, the Acting Director of the Illinois Department of Central Management Services, alleging that the parts of the Act that allow for the collection of fair-share fees violated their First Amendment rights. Pet. App. 8a–27a. They attached four exhibits to the complaint: the collective bargaining agreements that covered their units and notices from their exclusive representatives that explained how fair-share fees would be used. Pet. App. 28a–42a; Dist. Ct. Doc. 145-1.

Defendants moved to dismiss, contending that the collection of fair-share fees was constitutional under *Abbood v. Detroit Board of Education*, 431 U.S. 209 (1977), and that Trygg’s claim was barred by claim preclusion because he had already pursued his fair-share-fee challenge in state court and obtained the
relief he sought, i.e., the ability as a religious objector to donate the amount of the fee to the charity of his choice. Dist. Ct. Doc. 147. Petitioner and Trygg agreed that the court should dismiss their complaint pursuant to Abood but argued that claim preclusion did not apply. Dist. Ct. Doc. 148. The court dismissed the complaint based on Abood. Pet. App. 6a–7a.

Petitioner and Trygg asked the Seventh Circuit to summarily affirm the district court on appeal. 7th Cir. Doc. 14. The Seventh Circuit affirmed the district court’s dismissal under Abood, while also holding that Trygg’s claim was barred by claim preclusion. Pet. App. 1a–5a.
REASONS FOR DENYING THE PETITION

This Court held in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that a State may allow the exclusive representative of a public employee bargaining unit to collect a fee from employees to pay their share of the costs of collective bargaining, contract administration, and grievance resolution, but not to fund political or ideological activities unrelated to bargaining. The Court’s holding took into consideration both the State’s interest as an employer in bargaining with an exclusive representative and the associational freedoms of public employees to self-organize and to refrain from supporting political speech with which they disagree. *Ibid.* Petitioner now invites this Court to undo the balance struck in *Abood* and unravel the collective bargaining systems that have grown up around it over four decades by not merely overruling that precedent but also declaring unconstitutional all fair-share fees in the public sector.

The Court should decline the invitation. In addition to the jurisdictional concern raised by respondent AFSCME, see AFSCME Opp. Br. at 13–17, the absence of a factual record in this case makes it a particularly poor vehicle with which to reconsider, much less undo, the balance struck by *Abood*. Moreover, although *stare decisis* is unnecessary to sustain *Abood* because it was correctly decided, see *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (“correct judgments have no need for [stare decisis] to prop them up”), Petitioner’s justifications for departing from *stare decisis* fall short for three reasons. First, *Abood* does not stand in need of reconsideration, because its analysis is consistent with this Court’s established First Amendment standard for reviewing a State’s management of its internal operations as an employer.
Second, Petitioner is wrong to assert that Abod’s well-settled distinction between chargeable and nonchargeable expenditures has proven unworkable. And third, exceptionally strong reliance interests counsel in favor of adhering to stare decisis here. The petition should be denied.

I. This case is an especially poor vehicle to reconsider Abod’s holding because it has no factual record.

Petitioner, as the party asking this Court to overrule Abod, bears the burden of providing special justifications for departing from stare decisis. See Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014) (overturning longstanding precedent requires a special justification, “not just an argument that the precedent was wrongly decided”). Carrying that burden entails making evidentiary showings on a wide range of factual issues. Yet the evidentiary record in this case is virtually barren, consisting solely of the collective bargaining agreement between AFSCME and Petitioner’s employer and a notice explaining how fair-share fees would be used, which were attached to the complaint. Pet. App. 28a–42a; Dist. Ct. Doc. 145-1.

Although Petitioner argues that Abod incorrectly evaluated the parties’ interests, Pet. 22–29, the record is devoid of evidence to cast doubt on that decision’s findings. This Court would thus be ill-equipped to resolve the myriad factual questions that reconsideration of Abod would entail. To list just a few: What proportion of employees would continue to pay non-mandatory fair-share fees if they knew the union was obligated to represent them regardless of the fee? Without fair-share fees, would representatives be able to continue to provide the same range of
services, or would they have to compromise one function, such as grievance resolution, for another, such as bargaining? Would representatives be available less often to negotiate with the employer or participate in grievance proceedings? Would unions need to withdraw from some States altogether, leaving those employees with few, if any, options for representation? Would resentment between those employees who pay fees and those who do not grow to such a degree that it disrupted the quality of the services provided by the State? All these issues and more are relevant to the question whether to overrule Abbood. Petitioner's unsupported assertion that exclusive representation is not dependent upon fair-share fees, Pet. 22–25, falls far short of filling these many evidentiary gaps.

The lack of evidence is particularly problematic because if this Court were to overrule Abbood, it would be faced with the task of replacing it with a new standard that took into account the relative strength of state and employee interests in order to determine the new scope, if any, of chargeable fees. See Abbood, 431 U.S. at 262–63 (Powell, J., concurring) (rejecting Abbood majority's analysis while concluding that state interests may justify collecting fees for some bargaining activities but not others). It would be imprudent for this Court to take up that fact-intensive task on a barren record.

The difficulty of that task became apparent the last time this Court was asked to reconsider Abbood, in Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016). In that case, too, the record was undeveloped, as the petitioners there had obtained judgment on the pleadings against themselves. See Friedrichs v. Cal. Teachers Ass'n, No. SACV 13-676-JLS CWX, 2013 WL
9825479, at *1 (C.D. Cal. Dec. 5, 2013), aff’d, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014). In an attempt to fill the evidentiary vacuum, the parties and their amici joined issue on a wide range of key factual matters.\footnote{See, e.g., Brief of Amici Social Scientists in Support of Respondents, Friedrichs v. Cal. Teachers Ass’n, 136 S. Ct. 1083 (2016), 2015 WL 7252638 (arguing that, in the absence of fair-share fees, free-ridership would be a far more significant problem than petitioners’ amici suggested).} In the end, however, not only was this Court unable to reach a precedential disposition as an eight-member body, see 136 S. Ct. 1083 (2016) (judgment affirmed by an equally divided Court), but it subsequently denied a petition for the case to be reheard before a nine-member Court, see 136 S. Ct. 2545 (2016). One sensible lesson to be drawn from Friedrichs is that the question whether to overrule Abbood is one that is better answered with the benefit of a fully developed record.

More broadly, Petitioner never explains why it is urgent to revisit Abbood now, after 40 years and in the face of such empirical uncertainty. There is no such urgency. If this Court is inclined to reconsider Abbood, it should wait for a case in which the factual issues have been explored with the benefit of a full record. In Yohn v. California Teachers Ass’n, No. 8:17-cv-202-JLS-DFMx (C.D. Cal.), for example, the plaintiffs raised a First Amendment challenge to California’s fair-share-fee law and the district court denied their motion on the pleadings for judgment against themselves, allowing instead for discovery and the development of a factual record. Yohn v. Cal. Teachers Ass’n, 2017 WL 2628946 (June 1, 2017). As the court in that case explained, “[i]f the Supreme Court decides that [Abbood] must be modified in some way, the Court
will be aided in making its modification in light of the realities of how public-sector unions work in practice rather than factual allegations that are merely assumed to be true." *Id.* at *9. The presence of a factual record makes *Yohn* far superior to this case as a vehicle for reconsidering *Abood*.

II. *Abood* does not conflict with this Court's other First Amendment precedents because it conducted the usual two-step analysis for reviewing the state's actions as an employer.

In *Abood*, this Court considered whether a state law violated the First Amendment by allowing an exclusive representative to collect a fee from the public employees it represented equal to the amount of their membership dues. 431 U.S. at 214–17. To answer that question the Court first turned to *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), which held that a similar agency-shop provision in the federal Railway Labor Act did not violate the First Amendment where fees could be used only to pay for the costs of bargaining and related activities. *Abood*, 431 U.S. at 217–23. The Court explained that *Hanson* and *Street* were founded on the judgment that any interference with employees' freedom of association was justified by the fees' value in fairly distributing the costs of exclusive representation and protecting against free-riding. *Id.* at 221–22. The Court emphasized the crucial role played by exclusive representation in structuring labor relations by avoiding the confusion that would result from negotiating and enforcing multiple agreements with different representatives while preventing inter-union rivalries and dissension within the workforce.
Id. at 220–21.

The Court then asked whether it should depart from Hanson and Street because, unlike the Railway Labor Act, the law at issue in Abood applied to public employees. Id. at 223–32.\(^3\) While the Court noted the differences between bargaining in the public and private sectors and recognized that public-sector bargaining could be described as political, it concluded that those differences were not sufficient to upset the constitutional balance reached by Hanson and Street. Ibid. In particular, the Court found that public and private employers shared the same interests in labor peace and preventing free-riding, and that the difference between public and private employees' interests in withholding support for bargaining activities was not so great as to require a different result. Id. at 224.

Having concluded that the First Amendment permitted the collection of fees to pay for bargaining and related activities, the Court specified that such fees could not be used to support political or ideological activities that were not germane to collective bargaining and held the law at issue unconstitutional to the extent it allowed fees to be used for those prohibited purposes. Id. at 232–36. Finally, the Court noted that the line between chargeable and

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\(^3\) The Court considered the constitutionality of the Railway Labor Act under the First Amendment in Hanson and Street even though that statute governed labor relations in the private sector because it preempted state laws prohibiting union-shop agreements and thus sanctioned contracts that were otherwise unenforceable. See Hanson, 351 U.S. at 232 (“The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.”).
nonchargeable expenditures would need to be more clearly drawn in future cases because the evidentiary record before it was insufficient to make that distinction in that case. *Id.* at 236–37.

Petitioner argues that this Court should grant certiorari and overrule *Aboud* because it applied the wrong constitutional standard. Pet. 13–16. Petitioner asserts that fair-share fees must be reviewed under a heightened standard of First Amendment scrutiny and claims that *Aboud* conflicts with this Court's other precedents in not applying such a standard. *Ibid.* But Petitioner overlooks the deference accorded to a State's actions taken as an employer as opposed to those taken as a sovereign. Once that distinction is considered, it becomes apparent that *Aboud* is fully consistent with this Court's established First Amendment jurisprudence.

This Court has long held that a state government has far broader powers when it acts to manage its internal operations as an employer than when it exercises its power to regulate as a sovereign. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008). In *Pickering v. Board of Education of Township High School Dist.* 205, 391 U.S. 563 (1968), this Court developed a two-step framework for analyzing the constitutionality of government restrictions on public employee speech. *Lane v. Franks*, 134 S.Ct. 2369, 2378 (2014). The court first asks whether the restriction affects an employee's ability to speak as a citizen on a matter of public concern. If the answer to that question is yes, it then asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). The sufficiency of the state's
justification will vary depending on the nature of the employee’s speech. *Connick v. Myers*, 461 U.S. 138, 150 (1983). The objective is to protect the employee’s interests to comment as a citizen on matters of public concern while accommodating the state’s interests as an employer in promoting the efficiency of the services it provides through its employees. *Pickering*, 391 U.S. at 568.

This Court followed that same two-step framework in *Abbood*. At step one, the Court found that the law impaired an employee’s free speech interests to some degree because it required the employee to pay fees that would be used to fund expressive activities aimed at affecting public policy. *Abbood*, 431 U.S. at 228–31. The Court then struck a balance between the state’s interests in maintaining labor peace and preventing free-riding and public employees’ freedom of expressive association by holding that an employee could be charged a fee to fund bargaining-related activities but not to fund unrelated political or ideological speech. *Id.* at 229–36. Although the Court did not expressly rely on *Pickering*, it applied the same constitutional standard.

Petitioner is thus mistaken in asserting that *Abbood* conflicts with this Court’s other precedents because it used the wrong First Amendment test. To the extent Petitioner argues that *Abbood* did not accord enough weight to employees’ interests when balancing them with those of the State, Pet. 16–17, that argument goes not to whether the *Abbood* Court applied the correct standard but to how it did so. Yet this petition does not present the latter issue and, as explained *supra* Section I, this case is an especially poor vehicle for addressing that issue because it lacks a factual record.

Nor have subsequent developments eroded *Abbood*’s
constitutional foundations. Quite the opposite: this Court has applied the Abood framework to a wide array of First Amendment issues outside the fair-share-fee context, including state bar fees, Keller v. State Bar of Cal., 496 U.S. 1 (1990), student activity fees, Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000), and agricultural marketing programs, Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457 (1997); Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550 (2005). And twice in the last four Terms, this Court has declined the opportunity to overrule Abood. See Harris v. Quinn, 134 S. Ct. 2618, 2638 n.19 (2014); Friedrichs v. Cal. Teachers Ass’n, 136 S. Ct. 1083 (2016) (judgment affirmed by an equally divided Court). Abood is thus hardly “the kind of doctrinal dinosaur or legal last-man-standing for which [this Court] sometimes depart[s] from stare decisis.” Kimble, 135 S. Ct. at 2411. “To the contrary, the decision’s close relation to a whole web of precedents means that reversing it could threaten others.” Ibid.

III. This Court has developed a workable test for implementing Abood’s constitutional standard.

Abood declared the general constitutional principle that an exclusive representative may collect fees to pay for the costs of bargaining and contract administration but declined to strictly define the dividing line between chargeable and nonchargeable expenditures. 431 U.S. at 236. This Court later drew that dividing line in the context of the Railway Labor Act when it held that “the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.” Ellis v. Bhd. of Ry., Airline &
S.S. Clerks, 466 U.S. 435, 448 (1984). In Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991), this Court refined Ellis's holding into a three-part test requiring that an expense must "(1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."

This Court demonstrated the utility of that test in Locke v. Karass, 555 U.S. 207, 218 (2009), by applying it to litigation expenses of a representative's national organization, as opposed to a local chapter, and holding that a fee could be used to pay an employee's share of those expenses if the litigation was related to collective bargaining and the national's services may inure to the benefit of the employees represented by the local. In addition to adopting a substantive dividing line between chargeable and nonchargeable expenditures, this Court has developed procedural requirements that an exclusive representative must follow to protect the rights of objecting employees. Chi. Teachers Union, Local No. 1. v. Hudson, 475 U.S. 292, 302–09 (1986).

Despite these decisions crystallizing the contours of Abood's constitutional standard, Petitioner argues that Abood must be overruled because it has proven unworkable. Pet. 18–20. But Petitioner's argument is based on the flawed conclusion that this Court's decisions in Lehnert and Locke demonstrate an inability to distinguish between chargeable and nonchargeable expenditures. To the contrary, Lehnert refined a test that had been used in the context of the Railway Labor Act to differentiate between bargaining activities and ideological speech, and Locke applied it to the facts of that case. If anything, those decisions
establish that Abood struck a sensible balance that reflects the inherent differences between two separate types of union activity. Moreover, even if Petitioner could establish that the existing test for identifying chargeable expenditures was somehow inadequate, the appropriate solution would be to refine the test, not to overrule Abood altogether. The asserted difficulty in applying Abood is illusory and provides no special justification for overcoming stare decisis.⁴

IV. Adherence to stare decisis is particularly appropriate here due to the significant reliance interests that Abood has engendered.

Stare decisis is a pillar of the rule of law. It promotes the evenhanded, predictable, and consistent development of legal rules and ensures that those rules develop in a principled and intelligible fashion. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014). To overcome stare decisis and overrule established precedent, this Court requires a “special justification” beyond the petitioner’s—or the justices’—belief that the prior case was wrongly decided. Kimble, 135 S. Ct. at 2409. The doctrine of stare decisis carries such persuasive force that a special justification to depart from precedent is necessary even

⁴ The few cases cited by Petitioner dealing with the chargeability of “lobbying expenses,” Pet. 18 nn.7–8, fall far short of showing the kind of unworkability that would license a departure from stare decisis. Contrast, for instance, the blizzard of irreconcilable cases, all decided in a six-year span, that this Court cited to illustrate the unmanageability of the “traditional governmental functions” test under the Tenth Amendment. See Garcia v. San Antonio Metro. Transit Auth., 459 U.S. 528, 538–39 (1985) (citing cases to justify overruling Nat’l League of Cities v. Usuby, 426 U.S. 833 (1976)).

Reliance is perhaps the weightiest consideration when deciding whether to depart from *stare decisis*, particularly where contract rights are involved. *Paine v. Tennessee*, 501 U.S. 808, 828 (1991). As Petitioner recognizes, more than 20 states have enacted statutes permitting the collection of fair-share fees. Pet. 9. An untold number of employment contracts have been negotiated pursuant to those laws. Those contracts, in turn, cover millions of public employees represented by unions that agreed to represent them in return for a guarantee that they would be adequately compensated for the services they were obligated by law to provide to members and non-members alike throughout the duration of the agreement. Petitioner asks this Court to undermine all of those contracts by overruling *Abood* and declaring all fair-share fees unconstitutional. It is difficult to imagine a more striking or widespread judicial violation of reliance interests.

Petitioner sets those interests at nought because he believes *Abood* was wrongly decided. But that is a non sequitur. The reliance interests that counsel adherence to a judicial precedent cannot be made to depend on the correctness of the precedent, for *stare decisis* exists to protect decisions with which judges have come to disagree. *See Kimble*, 135 S. Ct. at 2409. The significant reliance interests that have grown up around *Abood* thus strongly support adhering to *stare decisis* in this case.
CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 11, 2017
The authority of courts to review an arbitral award is statutorily prescribed and is limited in nature.

Cases that cite this headnote

[2] Alternative Dispute Resolution
⇒ Presumptions and Burden of Proof
Public policy favors the finality of arbitration awards, and such awards enjoy a presumption of validity.

2 Cases that cite this headnote

[3] Alternative Dispute Resolution
⇒ Actions exceeding arbitrator's authority
Alternative Dispute Resolution
⇒ Consistency and reasonableness; lack of evidence
As long as an arbitrator's award draws its essence from the contract and is based upon a passably plausible interpretation of the contract, it is within the arbitrator's authority and court's review must end.

Cases that cite this headnote

[4] Alternative Dispute Resolution
⇒ Questions of law or fact
An arbitrator may make rulings concerning the applicable law and interpret the law according to the facts before him.

Cases that cite this headnote

[5] Alternative Dispute Resolution
⇒ Questions of law or fact
Like a judge sitting without a jury, an arbitrator is called upon not only to make findings of fact but also to apply the law to the facts.

Cases that cite this headnote

[6] Alternative Dispute Resolution
⇒ Error of judgment or mistake of law
Not only may an arbitrator make rulings on the applicable law, but an arbitrator's award will be upheld even if he makes a mistake or error in interpreting the law.

Cases that cite this headnote

[7] Labor and Employment
⇔ Authority of Arbitrators
Arbitrators may and should decide questions of relevant state law and the interpretation thereof in resolving a grievance brought pursuant to a collective-bargaining agreement.

Cases that cite this headnote

[8] Alternative Dispute Resolution
⇔ Consistency and reasonableness; Lack of evidence

Alternative Dispute Resolution
⇔ Error of judgment or mistake of law
Court will overturn an arbitration award only if the award was irrational or if the arbitrator manifestly disregarded the law.

2 Cases that cite this headnote

[9] Alternative Dispute Resolution
⇔ Error of judgment or mistake of law
For purposes of overturning an arbitration award, a manifest disregard of the law requires something beyond and different from a mere error in the law or failure on the part of the arbitrator to understand or apply the law.

2 Cases that cite this headnote

[10] Alternative Dispute Resolution
⇔ Error of judgment or mistake of law
For purposes of overturning an arbitration award, a "manifest disregard of the law" occurs when an arbitrator understands and correctly articulates the law, but then proceeds to disregard it.

3 Cases that cite this headnote

[11] Labor and Employment
⇔ Pensions and other benefits
In resolving dispute between city and firefighter stricken with cancer as to whether firefighter was entitled to injured on-duty benefits, arbitrator was within his authority to review and interpret the relevant state law and construe the Cancer Benefits for Fire Fighters statute to be an amendment to the in-line-of-duty illness statute incorporated in collective bargaining agreement; application of relevant state law was essential in resolving the parties' dispute. Gen.Laws 1956, §§ 45–19–1, 45–19.1–3.

Cases that cite this headnote

[12] Labor and Employment
⇔ Pensions and other benefits
Arbitrator's award for firefighter who, after undergoing treatment for cancer, requested that his sick leave be converted to injured on-duty (IOD) time, was not irrational on basis that conferring IOD benefits on firefighters diagnosed with cancer would cause the city irreparable fiscal harm; Cancer Benefits for Fire Fighters statute specifically provided benefits under the IOD statute to cancer-stricken firefighters, the parties collectively bargained for the benefits of the IOD statute, and parties could not waive the benefits under the IOD statute in the collective-bargaining process. Gen.Laws 1956, §§ 45–19–1, 45–19.1–3.

Cases that cite this headnote

⇔ Pay and other compensation

Public Employment
⇔ Medical leave and sick time
Cancer Benefits for Fire Fighters statute provided injured on-duty benefits to firefighter diagnosed with cancer, and thus firefighter was entitled to have 44 days of sick leave, during which he underwent surgery and
City of East Providence v. International Ass'n of Firefighters..., 982 A.2d 1281 (2009)


Cases that cite this headnote

[14] Statutes
⇐ Plain language; plain, ordinary, common, or literal meaning

When the language of a statute is clear and unambiguous, Supreme Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.

Cases that cite this headnote

[15] Statutes
⇐ Plain Language; Plain, Ordinary, or Common Meaning

The plain meaning of a statute is the best indication of the General Assembly's intent.

Cases that cite this headnote

[16] Statutes
⇐ Purpose and intent; unambiguously expressed intent

When a statute is unambiguous on its face courts do not search behind the language to determine legislative intent.

Cases that cite this headnote

[17] Statutes
⇐ Purpose and intent; determination thereof

Statutes
⇐ Statute as a Whole; Relation of Parts to Whole and to One Another

Only when a statute is ambiguous and susceptible to more than one interpretation does Supreme Court have the responsibility to glean the intent and purpose of the Legislature from a consideration of the entire statute, keeping in mind the nature, object, language, and arrangement of the provision to be construed.

Cases that cite this headnote

[18] Municipal Corporations
⇐ Disability pension or compensation

Public Employment
⇐ Particular Conditions or Impairments

Firefighters diagnosed with cancer are entitled to receive injured on-duty (IOD) benefits in accordance with IOD statute, regardless of whether they participate in optional retirement plan for police officers and firefighters. Gen.Laws 1956, §§ 45–19–1, 45–19.1–3.

Cases that cite this headnote

Attorneys and Law Firms

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Present: SUTTELL, C.J., GOLDBERG, FLAHERTY, ROBINSON, JJ., and WILLIAMS, C.J., (ret.).

*1283 OPINION

Chief Justice WILLIAMS (ret.), for the Court.

After successfully undergoing treatment for prostate cancer, East Providence Fire Department Battalion Chief, James Moniz (Chief Moniz), requested that his sick leave be restored and that he be given the full benefits pursuant to G.L. 1956 chapter 19.1 of title 45, entitled “Cancer Benefits for Fire Fighters.” After his request was denied by the City of East Providence (the city), the International Association of Firefighters, Local 850 (Local 850), filed a grievance on his behalf alleging that the denial of the request to restore Chief Moniz’s sick time violated the parties’ collective-bargaining agreement. The parties submitted to arbitration, and the arbitrator issued a decision granting the restoration of Chief Moniz’s forty-four days of sick time. The Superior Court confirmed the award, and the city timely appealed. In this case we are called upon to determine whether the arbitrator exceeded his authority in determining that East
Providence firefighters are entitled to injured on-duty benefits through the application of the "Cancer Benefits for Fire Fighters" statute. For the reasons set forth in this opinion, we conclude that the "Cancer Benefits for Fire Fighters" statute does indeed provide injured on-duty benefits to East Providence firefighters.

I

Facts and Travel

The facts in this case are largely undisputed. Chief Moniz, a thirty-year veteran of the East Providence Fire Department, was diagnosed with prostate cancer in August 2002. As a result of his diagnosis, Chief Moniz underwent surgery and treatment while on sick leave from August 22, 2002, until November 18, 2002, after which he returned to active duty. Upon returning to active duty, Chief Moniz wrote to the chief of the East Providence Fire Department requesting that the forty-four days of which he was absent receiving cancer treatment be converted to "injured on duty" time. By requesting that his sick leave be converted to injured on-duty time, Chief Moniz sought to have the forty-four days of sick leave credited back to his sick leave reserve. Under Article X, Section 10.02 of the collective-bargaining agreement between the City of East Providence and Local 850, "In-line-of-duty illness" time shall be in conformity with G.L. 1956 § 45-19-1 (IOD statute). The relevant provisions of the parties' collective-bargaining agreement are as follows:

"10.03 IN-LINE-OF-DUTY INJURY

"(A) Members of the fire department, covered by this contract who are injured in the line of duty including non-civic details to which they are assigned, shall receive full salary while their incapacity exists or until they are placed on a disability retirement (This section is in conformance with General Laws of Rhode Island, 1956, as amended, Section 45-19-1)."

In his request letter to the chief of the department, Chief Moniz referenced two other firefighters who had also been diagnosed with cancer and "had their sick leave time converted to injured on-duty time prior to their retirement from active duty." Those two firefighters, however, did not return to active duty following their cancer diagnoses, and both retired from the East Providence Fire Department while on sick leave. The department chief denied Chief Moniz's request, and the union filed a grievance pursuant to the collective-bargaining agreement. The human resources director denied Chief Moniz's grievance, in part because he was able to return to active duty, whereas other firefighters' cancer diagnoses resulted in their disability retirements. In his letter denying Chief Moniz's request, the human resources director acknowledged that:

"It is the City's policy to evaluate each request that cancer be presumed to be work related on a case-by-case basis. In the past, the City has ruled in two cases, based on the type of cancer and the fact that the cancer led directly to disability retirements, that the sick leave taken immediately prior to the disability pension should be converted to injury on duty leave. In your case, based on the type of cancer and the fact that you have recovered sufficiently to return to active duty, it is the City's position that your sick leave not be converted to injured on duty status."

After the city denied Chief Moniz's grievance, Local 850 submitted the grievance to arbitration on Chief Moniz's behalf pursuant to Article XVI of the parties' collective-bargaining agreement. At the arbitration hearing, the city argued that its firefighters were not entitled to benefits under the "Cancer Benefits for Fire Fighters" statute because it applied only to municipalities participating in the optional retirement plan under G.L. 1956 chapter 21 of title 45. Local 850 argued that the "Cancer Benefits for Fire Fighters" statute was incorporated into the parties' collective-bargaining agreement through the adoption of § 45-19-1. Local 850 argues, in the alternative, that the city's previous grant of the cancer benefit to two of its firefighters constituted a past practice, entitling Chief Moniz to benefits under the "Cancer Benefits for Fire Fighters" statute.

On December 9, 2004, the arbitrator issued a decision in favor of Local 850, and awarded Chief Moniz forty-four days of sick leave back to his reserve. In his decision, the arbitrator concluded that the parties had incorporated the IOD statute into the collective-bargaining agreement. He further found that, by enacting the "Cancer Benefits for Fire Fighters" statute, the General Assembly amended the IOD statute to include cancer as an occupational injury for Rhode Island firefighters. In the alternative,
the arbitrator found that any ambiguity regarding the applicability of the “Cancer Benefits for Fire Fighters” statute to the collective-bargaining agreement should be resolved by looking at the parties’ prior application of the contract language. In doing so, the arbitrator found that the city had provided benefits through the “Cancer Benefits for Fire Fighters” statute to two other firefighters. *1285 The arbitrator used these two prior applications to determine that the parties had intended to incorporate the “Cancer Benefits for Fire Fighters” statute into the agreement.

After the arbitrator filed his award, the city filed a motion to vacate the award in Superior Court. The hearing justice determined that the arbitrator had “appropriately assessed the collective-bargaining agreement and state statutes and made appropriate findings of fact and conclusions of law.” Accordingly, on May 12, 2006, the hearing justice denied the City’s motion to vacate, from which it timely appealed.

II

Analysis

On appeal, the city argues that the arbitrator exceeded his authority by finding that the “Cancer Benefits for Fire Fighters” statute applied to its firefighters because (1) the city had established its own retirement system pursuant to P.L. 1925, ch. 715, and therefore was exempt from the provisions of the “Cancer Benefits for Fire Fighters” statute; (2) that implementation of the arbitrator’s award would cause irreparable harm because the city had not contemplated nor funded the conferral of benefits under the “Cancer Benefits for Fire Fighters” statute to its firefighters; and (3) the application of the “Cancer Benefits for Fire Fighters” statute to East Providence created new injured-on-duty and pension benefits that were not the result of collective-bargaining. In response, Local 850 avers that the parties incorporated the IOD statute into their collective-bargaining agreement, that the “Cancer Benefits for Fire Fighters” statute amended the IOD statute, and that the plain language of the “Cancer Benefits for Fire Fighters” statute applies to all Rhode Island firefighters.

A

Standard of Review


[4] [5] [6] [7] It is well settled that an arbitrator may “make rulings concerning the applicable law and * * * interpret the law according to the facts before him or her.” Vose v. Rhode Island Brotherhood of Correctional Officers, 587 A.2d 913, 914 (R.I.1991). “[L]ike a judge sitting without a jury, an arbitrator is called upon not only to make findings of fact but also to apply the law to the facts.” Id. Not only may an arbitrator make rulings on the applicable law, but an arbitrator’s award will be upheld even if he or she makes a mistake or error in interpreting the law. Pier House Inn, Inc. v. 421 Corporation, Inc., 812 A.2d 799, 803 (R.I.2002). “[A]rbitrators may and should decide questions of relevant state law and the interpretation thereof in resolving a grievance brought pursuant to a collective-bargaining agreement.” Rhode Island Brotherhood of Correctional Officers v. State, 643 A.2d 817, 821 (R.I.1994).

*1286 [8] [9] [10] This Court will overturn an arbitration award only “if the award was irrational or if the arbitrator manifestly disregarded the law.” Purvis Systems, Inc. v. American Systems Corp., 788 A.2d 1112, 1115 (R.I.2002). “[A] manifest disregard of the law requires ‘something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.’” North Providence School Committee, 945 A.2d at 344 (quoting Westminster Construction Corp. v. PPG Industries, Inc.,
119 R.I. 205, 211, 376 A.2d 708, 711 (1977)). Rather, “[a] manifest disregard of the law occurs when an arbitrator understands and correctly articulates the law, but then proceeds to disregard it.” Id. (citing Purvis Systems, Inc., 788 A.2d at 1115).

[11] The city contends that the arbitrator exceeded his authority by construing the “Cancer Benefits for Fire Fighters” statute to be an amendment to the IOD statute. This argument ignores this Court’s precedent that, in resolving grievances among parties to a collective-bargaining agreement, an arbitrator should decide questions of state law. Rhode Island Brotherhood of Correctional Officers, 643 A.2d at 821. First, it would be impossible for the arbitrator to resolve the dispute without looking to the “Cancer Benefits for Fire Fighters” statute because its application to East Providence firefighters is the central issue. Additionally, the parties’ dispute also was based on whether Chief Moniz was entitled to injured on-duty sick time under the IOD statute, incorporated in Article X, Section 10.02 of the parties’ collective-bargaining agreement. Thus, the arbitrator clearly was within his authority to review and interpret the relevant state law because the application of it was essential in resolving the parties’ dispute.

[12] Next, the city argues that the arbitrator’s award was irrational because conferring IOD benefits on firefighters diagnosed with cancer would cause the city irreparable fiscal harm. This argument is not persuasive. First, the “Cancer Benefits for Fire Fighters” statute specifically provides benefits under the IOD statute to cancer-stricken firefighters. Next, the parties collectively bargained for the benefits of the IOD statute. Finally, this Court has held that parties cannot waive the benefits under the IOD statute in the collective-bargaining process. See Town of Burrillville v. Rhode Island State Labor Relations Board, 921 A.2d 113, 121 n. 6 (R.I.2007) (citing Vose, 587 A.2d at 915). Therefore, the city’s assertion that providing IOD benefits for cancer-stricken firefighters would cause irreparable harm is implausible, considering that the city not only was contractually, but statutorily, obligated to provide benefits to its firefighters who suffer on-duty injuries. Cancer, under the “Cancer Benefits for Fire Fighters” statute, is simply a type of on-duty injury for which firefighters are to be paid IOD benefits, along with the many other on-duty injuries that firefighters can suffer in the performance of their jobs. Thus, any argument that providing IOD benefits would cause the city irreparable fiscal harm is not persuasive.

B

Application of G.L. 1956 Chapter 19.1 of Title 45

[13] The city argues that the language of the “Cancer Benefits for Fire Fighters” statute limits its application to “a municipality that participates in the optional retirement plan for police officers and fire fighters provided in [45-21.2]” and that, because the city does not participate in the optional retirement program, its firefighters are not entitled to benefits under the provisions of the “Cancer Benefits for Fire Fighters” statute. Local 850 contends *1287 that the language, “any fire fighter” within the “Cancer Benefits for Fire Fighters” statute should be construed to include any firefighter in any city or town regardless of whether that city or town participates in the optional retirement program. Section 45-19.1-1, entitled “Legislative findings,” provides:

“(a) The general assembly finds and declares that by reason of their employment:

“(1) Fire fighters are required to work in the midst of, and are subject to, smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances;

“(2) Fire fighters are continually exposed to a vast and expanding field of hazardous substances through hazardous waste sites and the transportation of those substances;

“(3) Fire fighters are constantly entering uncontrolled environments to save lives and reduce property damage and are frequently not aware of potential toxic and carcinogenic substances that they may be exposed to;

“(4) Fire fighters, unlike other workers, are often exposed simultaneously to multiple carcinogens, and the rise in occupational cancer among fire fighters can be related to the rapid proliferation of thousands of toxic substances in our every day environment; and

“(5) The onset of cancers in fire fighters can develop very slowly, usually manifesting themselves from five (5) years to forty (40) years after exposure to the cancer-causing agent.
“(b) The general assembly further finds and declares that all of the previously stated conditions exist and arise out of or in the course of that employment.”

Section 45–19.1–2 entitled, “Definitions,” provides:

“The following terms when used in this chapter have the following meanings:

“(a) ‘Disability’ means a condition of physical incapacity to perform any assigned duty or duties in the fire department.

“(b) ‘Fire department’ means service groups (paid or volunteer) that are organized and trained for the prevention and control of loss of life and property from any fire or disaster.

“(c) ‘Fire fighter’ means an individual, paid or volunteer, who is assigned to a fire department and is required to respond to alarms and performs emergency action.

“(d) ‘Occupational cancer’ means a cancer arising out of his or her employment as a fire fighter, due to injury from exposures to smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances while in the performance of active duty in the fire department.”

Section 45–19.1–3 entitled, “Occupational cancer disability for fire fighters,” provides:

“(a) Any fire fighter, including one employed by the state, or a municipal fire fighter employed by a municipality that participates in the optional retirement for police officers and fire fighters, as provided in chapter 21.2 of this title, who is unable to perform his or her duties in the fire department by reason of a disabling occupational cancer which develops or manifests itself during a period while the fire fighter is in the service of the department, and any retired member of the fire department of any city or town who develops occupational cancer, is entitled to receive an occupational cancer disability, and he or she is entitled to all of the benefits provided for in chapters 19, 21 and 21.2 of this title and chapter 10 of title 36 if the fire fighter is employed by the state.

“(b) The provisions of this section apply retroactively in the case of any retired *1288 member of the fire department of any city or town.”

[14] [15] [16] [17] “It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I.1996); see also State v. Greenberg, 951 A.2d 481, 489 (R.I.2008). “The plain meaning of the statute is the best indication of the General Assembly’s intent.” Park v. Rizzo Ford, Inc., 893 A.2d 216, 221 (R.I.2006). Therefore, “when a statute is unambiguous on its face we do not search behind the language to determine legislative intent.” Angell v. Union Fire District of South Kingstown, 935 A.2d 943, 946 (R.I.2007). It is only when a statute is ambiguous and susceptible to more than one interpretation does this Court have the responsibility to “glean the intent and purpose of the Legislature ‘from a consideration of the entire statute, keeping in mind [the] nature, object, language, and arrangement’ of the provision to be construed.” Algieri v. Fox, 122 R.I. 55, 58, 404 A.2d 72, 74 (1979).

[18] Upon a reading of the statute, it is evident that the General Assembly intended to ensure that firefighters diagnosed with cancer receive injured on-duty benefits in accordance with the IOD statute, § 45–19–1, the Retirement of Municipal Employees statute, chapter 21 of title 45, the Optional Retirement for Members of Police Force and Fire Fighters statute, G.L. 1956 chapter 21.2 of title 45, and the Retirement System—Contributions and Benefits statute, G.L. 1956 chapter 10 of title 36. The enactment of the “Cancer Benefits for Fire Fighters” statute specifically designated cancer among firefighters as an on-duty illness, based on the General Assembly’s findings that firefighters are exposed to “a vast and expanding field of hazardous substances” and that the “rise in occupational cancer among fire fighters can be related to the rapid proliferation of thousands of toxic substances.” Section 45–19.1–1(a)(3)–(4). Simply put, the “Cancer Benefits for Fire Fighters” statute acknowledges the unfortunate fact that in the performance of their duties, firefighters develop cancer at a disproportionate rate, and provides a partial remedy by entitling them to “all of the benefits provided for in chapters 19, 21 and 21.2 of this title and chapter 10 of title 36.” Section 45–19.1–3(a).

The city’s argument that the General Assembly intended to restrict the “Cancer Benefits for Fire Fighters” statute...
to firefighters participating in the municipal retirement system is inconsistent with the express language of the statute. Nothing in § 45–19.1–3 restricts the statute's application to firefighters participating in the optional retirement plan. Indeed, the statute uses the all inclusive phrase, "any fire fighter." We find no merit in the city's contention that the statutory language, "including [a firefighter] employed by the state, or a municipal fire fighter employed by a municipality that participates in the optional retirement for police officers and fire fighters," limits its application. The word, "any," followed by the term, "including," is all encompassing. This language does not indicate any intent on the part of the General Assembly to restrict these cancer benefits to only certain firefighters. Had the General Assembly intended to limit the statute's application to municipal firefighters participating in the optional retirement program, it could have done so. See Brown & Sharpe Manufacturing Co. v. Dean, 89 R.I. 108, 116–17, 151 A.2d 354, 358 (1959) ("if the language of a statute is free from ambiguity and expresses a definite and sensible meaning, that meaning is conclusively presumed to be the one which the legislature intended"). Thus, we conclude that the language of the "Cancer Benefits for Fire Fighters" statute expressly provides injured on-duty benefits provided by chapters 19, 21, and 21.2 of title 45, and chapter 10 of title 36.

In light of our reading of the "Cancer Benefits for Fire Fighters" statute, we conclude that the arbitrator did not exceed his authority in finding that the city is obligated to provide injured on-duty benefits to Chief Moniz. The "Cancer Benefits for Fire Fighters" statute explicitly provides injured on-duty benefits as governed by § 45–19–1 to firefighters who are diagnosed with cancer. Because of Chief Moniz's cancer diagnosis, he is entitled to have the forty-four days of sick leave at issue restored to him in accordance with § 45–19–1.

III

Conclusion

For the reasons stated in this opinion, we affirm the judgment of the Superior Court and remand the file thereto.

All Citations

982 A.2d 1281

Footnotes

1 Chief Moniz did not seek compensation from the city because he was paid his usual salary while on leave pursuant to the sick leave provision, Article X, Section 10.02 of the collective-bargaining agreement between the city and Local 850. Therefore, the only issue before this Court is whether Chief Moniz's leave for treatment of his prostate cancer should have been deducted from his sick leave reserve or whether that time should have been restored because his leave fell within the ambit of G.L. 1956 § 45–19–1.3.

2 We commend Chief Moniz for returning to active duty after battling cancer, and for his continuing service to the East Providence community, when he could have retired. In effect, in so doing, he saved the city from incurring expenses related to the chief's retirement, as well as hiring a replacement for him.

3 Section 45–19–1(a) reads in relevant part:

"Whenever any *** fire fighter *** of any city, town, fire district, or the state of Rhode Island is wholly or partially incapacitated by reason of injuries received or sickness contracted in the performance of his or her duties *** the respective city, town, fire district, state of Rhode Island or Rhode Island Airport Corporation by which the *** fire fighter *** is employed, shall during the period of the incapacity, pay the *** fire fighter *** the salary or wage and benefits to which the *** fire fighter *** would be entitled had he or she not been incapacitated ***."
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS’ COMPENSATION COURT

APPELLATE DIVISION

KEVIN LANG ) W.C.C. 2015-04163

) )

VS. )

) EMPLOYEES’ RETIREMENT

SYSTEM OF RHODE ISLAND )

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This case is before the Appellate Division on the appeal of the Municipal Employees’ Retirement System of Rhode Island1 (“MERS”) from the decision of the trial judge awarding accidental disability retirement benefits for occupational cancer to Kevin Lang, the employee (“Lang”). After a review of the record and a thorough consideration of the arguments of both parties, we deny MERS’ appeal.

Lang began working as a firefighter for the City of Cranston in 1996 and served for over seventeen (17) years. Sadly, his career was abruptly cut short when he was diagnosed with colon cancer on September 4, 2012. Unfortunately, after a brave battle with cancer, Mr. Lang passed away on June 15, 2017.

The litigation before us can be traced to September 21, 2012, when the fire department placed Lang on Injured on Duty status under R.I. Gen. Laws § 45-19-1, (hereinafter § 45-19-1 or

1 The employee’s notice of appeal filed with the Workers’ Compensation Court incorrectly designated MERS as the “Employees’ Retirement System of Rhode Island” instead of the “Municipal Employees’ Retirement System of Rhode Island.”
the “IOD” statute), and he began receiving salary benefits while incapacitated from work. In January 2014, Lang applied for accidental disability retirement benefits under R.I. Gen. Laws § 45-21.2-9 (hereinafter § 45-21.2-9 or the “Retirement statute”), based upon his cancer diagnosis for which he was receiving IOD benefits. In July of 2015, MERS’ Retirement Board voted to deny his application for accidental disability retirement benefits, finding that Lang did not prove that his cancer arose out of and in the course of his employment as a firefighter. The Board also notified him of his right to appeal its decision to the Rhode Island Superior Court under § 42-35-15 of the Administrative Procedures Act. Instead, Lang filed a de novo appeal to the Workers’ Compensation Court (“WCC”), alleging that § 45-21.2-9(f) of the Retirement statute provided the WCC with jurisdiction to hear his claim.

After receiving notice that Lang had filed a notice of appeal with the WCC, MERS filed a motion to dismiss the appeal for lack of subject matter jurisdiction, arguing that Lang’s claim belonged in Superior Court pursuant to the Administrative Procedures Act. In a written decision, the trial judge denied MERS’ motion to dismiss, and on October 28, 2015, she entered a pretrial order denying Lang’s appeal. Lang promptly filed a claim for trial.

Prior to proceeding to trial, MERS filed a motion to certify a question to the Rhode Island Supreme Court as to whether § 45-21.2-9 or § 45-19.1-1, et seq., creates a conclusive or rebuttable presumption that a firefighter who develops cancer is entitled to accidental disability retirement benefits under § 45-21.2-9. The trial judge granted the motion and certified the question; however, the Supreme Court declined to address the question. Lang then filed a motion for summary judgment, arguing that he was entitled to judgment as a matter of law because, pursuant to the statute, all cancers contracted by firefighters are presumed to be work-related. In a written decision regarding the motion, the trial judge concluded that based upon the
statutory language in §§ 45-19.1(a) and (b) and 45-21.1-9(c), the Legislature created a presumption that all cancers in firefighters arise out of and in the course of their employment. However, the trial judge denied the motion for summary judgment because Lang had not submitted sufficient evidence into the record to establish all of the essential elements of his claim. The matter then proceeded to trial.

The evidence presented at trial consisted of the affidavits of Lang (he did not testify), Dr. Raymond Chaquette (Lang’s treating oncologist), and William McKenna (Chief of the Cranston Fire Department) and the record of the proceedings and decision of the Retirement Board, which includes the reports of Dr. Chaquette and Dr. John A. Phillip, a general surgeon, who performed the surgery in September 2012 which led to the discovery of the cancer. Also in the record were the reports of the three (3) physicians who examined Lang at the request of the Board: Dr. Joseph DiBenedetto, Jr., a hematology/oncology specialist, Dr. Alberto Savoretti, an internal medicine specialist, and Dr. Anthony Testa, an internal medicine physician with a specialty in hematology and oncology. None of the physicians could state with any degree of certainty that Lang’s colon cancer was due to exposures which occurred while performing his duties as a firefighter, although they all agreed that he was permanently disabled. The affidavits of Lang and Chief McKenna establish that Lang was employed as a Cranston firefighter since 1996; he was diagnosed with cancer in September 2012 and immediately placed on IOD status; and he is unable to work as a firefighter due to his cancer.

At trial, the fact that Lang was unable to continue working as a firefighter due to colon cancer and metastatic colon cancer of the liver and lungs was not an issue in controversy. Instead, the trial judge was presented with the novel legal question of whether § 45-19.1-1, the Cancer Benefits for Fire Fighters’ statute (hereinafter the “CBFF statute”), creates a conclusive
or rebuttal presumption that cancer developed by a firefighter arises out of and in the course of employment, or if instead, a firefighter must prove a causal connection between his job and his cancer through the introduction of competent medical evidence.

To guide her analysis, the trial judge reviewed the language of the statute, and looked to City of East Providence v. Int'l Ass'n of Firefighters Local 850, 982 A.2d 1281 (R.I. 2009), a case in which the Rhode Island Supreme Court discussed the nature of cancer as an occupational disease in firefighters. The trial judge determined that the CBFF statute creates a “conclusive presumption” that any cancer developed by a firefighter arises out of and in the course of employment as a firefighter, and entitles the firefighter to an accidental disability pension under the Retirement statute without having to put forth medical evidence showing a causal connection between the firefighter’s cancer and his or her employment. Consequently, the trial judge ordered MERS to provide Lang with an accidental disability pension consistent with his application for the same in January 2014. Aggrieved by that decision, MERS filed this appeal.

MERS sets forth what are essentially three (3) reasons of appeal. First, MERS argues that the WCC has jurisdiction only over “determinations” by the Retirement Board made pursuant to § 45-19-1 (the IOD statute), and that because the Retirement Board did not make any determination regarding Lang pursuant to § 45-19-1, the WCC has no jurisdiction over Lang’s claim. Second, MERS argues that “occupational cancer” is not an “injury” under § 45-21.2-9(f) of the Retirement statute and therefore the WCC does not have jurisdiction to adjudicate appeals of applications for accidental disability retirement benefits based upon occupational cancer. Third, MERS argues that the trial judge erred as a matter of law in finding that the CBFF statute creates a “conclusive presumption” that any cancer developed by a firefighter arises out of and in the course of a firefighter’s employment. We will consider each reason of appeal in turn.
When reviewing a trial judge’s decision, the Appellate Division will not disturb a trial judge’s findings of fact unless those findings are clearly erroneous. *Diocese of Providence v. Vaz*, 679 A.2d 879, 881 (R.I. 1996); *Rashiti v. Narragansett Improvement Co.*, W.C.C. No. 2013-04379 (App. Div. Dec. 24, 2015); R.I. Gen. Laws § 28-35-28(b). However, when reviewing a question of law, the Appellate Division is permitted to engage in a *de novo* review of the record and “will affirm, reverse, or modify the decree appealed from” and may “take any further proceedings that are just.” R.I. Gen. Laws § 28-35-28(a). Because MERS appeals from a trial judge’s finding on a question of statutory construction, we will review the trial judge’s decision *de novo*. *Downey v. Carcieri*, 996 A.2d 1144, 1149 (R.I. 2010).

First, MERS argues that § 45-21.2-9(f) does not provide the WCC with jurisdiction over appeals from adverse decisions by the Retirement Board for occupational cancer disability retirement applications, and that the proper forum for such appeals is the Superior Court (as an appeal brought pursuant to the Administrative Procedures Act). MERS avers that § 45-21.2-9(f) provides an aggrieved party with an appeal to the WCC only for Retirement Board determinations made under § 45-19-1. MERS contends that because the Retirement Board made its determination in this case under § 45-21.2-9, and not under § 45-19-1, the WCC lacks jurisdiction to hear the claim. Our review of the two (2) statutes leads us to conclude that MERS has misconstrued the operative language in § 45-21.2-9(f). In our view, § 45-21.2-9(f) simply states that the WCC has jurisdiction over accidental disability retirement applications brought under § 45-21.2-9 in an effort to comply with the filing requirements in § 45-19-1. Nevertheless, we will undertake a proper analysis.

Before analyzing the Retirement statute itself, we note that in 2013 the General Assembly amended the statute establishing the WCC to provide this court with the “jurisdiction that may be
necessary to carry out its duties under the provisions of the Workers' Compensation Act, chapters 29 – 38 of this title and the provisions of Rhode Island general law § 45-21.2-9...” R.I. Gen. Laws § 28-30-1(a) (emphasis added). That amendment clearly gives the WCC some jurisdiction over applications brought under the Retirement statute. To determine the extent of that jurisdiction, we must look more closely at the statute, and do so following established canons of statutory construction.

Our Supreme Court has stated that when determining the meaning of a statute, the ultimate goal is to give effect to the legislature’s intent. State v. Diamante, 83 A.3d 546, 550 (R.I. 2014). To achieve that goal, we adhere to the fundamental principle that “when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” Id. at 548 (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)). We now look to the plain words of the relevant subsection of the Retirement statute, § 45-21.2-9(f), which reads:

In the event that any party is aggrieved by the determination of the retirement board pursuant to § 45-19-1, for an injury occurring on or after July 1, 2011, the party may submit an appeal to the Rhode Island workers' compensation court. The appellant shall file a notice of appeal with the retirement board and with the workers' compensation court within twenty (20) days of the entry of the retirement board's decision and shall serve a copy of the notice of appeal upon the opposing party.

Thus, a plain reading of this subsection indicates that a party aggrieved by a “determination of the retirement board pursuant to § 45-19-1, for an injury occurring on or after July 1, 2011...” may submit an appeal to the WCC. The question then is whether the WCC has jurisdiction only over a determination by the Retirement Board on an application for an accidental disability pension that was filed as a claim under § 45-19-1, as argued by MERS, or whether the WCC simply has jurisdiction over determinations made by the Retirement Board on applications for
accidental disability pensions that were made as a claim under the Retirement statute as an effort to comply with the filing requirements mandated in § 45-19-1.

The application of MERS’ interpretation of the statute would lead to an absurd result. As MERS correctly points out, the Retirement Board does not make determinations under § 45-19-1 (the IOD statute) involving benefits paid by a city or town prior to retirement. In fact, there is no provision in the IOD statute allowing a person to make any kind of application to the Retirement Board as a specific claim for those benefits under that statute. Yet MERS argues that this court has jurisdiction only over determinations by the Retirement Board regarding claims made specifically under the IOD statute. This position leads to an absurd result, because there are no circumstances in which a person makes an application to the Retirement Board designated as a claim under the IOD statute. If MERS’ argument is correct, then § 45-21.2-9(f) would provide the WCC with no new jurisdiction at all, which cannot be the Legislature’s intent. However, the IOD statute clearly and unambiguously directs a person collecting IOD benefits to apply for an accidental disability pension to the Retirement Board within a timely manner, or risk losing those benefits, as indicated in § 45-19-1(j):

Any person receiving injured on-duty benefits pursuant to this section, and subject to the jurisdiction of the state retirement board for accidental retirement disability, for an injury occurring on or after July 1, 2011, shall apply for an accidental disability retirement allowance from the state retirement board not later than the later of eighteen (18) months after the date of the person's injury that resulted in said person's injured on duty status or sixty (60) days from the date on which the treating physician certifies that the person has reached maximum medical improvement.

Read plainly, the language of § 45-19-1(j) directs a person collecting IOD benefits to submit an application for accidental disability retirement benefits to the Retirement Board (as a claim under § 45-21.2-9) no later than eighteen (18) months after the date of injury or sixty (60) days from
the date a treating physician certifies that the person has reached maximum medical improvement.

Read in conjunction, the plain language of both sections clearly and unambiguously means that § 45-21.2-9(f) provides the WCC with jurisdiction over appeals of adverse Retirement Board decisions on applications filed by individuals collecting IOD benefits in an effort to comply with § 45-19-1(j)'s time requirements. Because Lang was collecting IOD benefits and applied for accidental disability retirement benefits under § 45-21.2-9 in an effort to comply with the time requirements in § 45-19-1(j), and because his application was denied by the Retirement Board, § 45-21.2-9(f) allows him to appeal that denial to this court. Accordingly, we reject MERS' first reason of appeal and conclude that the WCC has jurisdiction to address Lang’s appeal.

In its second reason of appeal, MERS argues that “occupational cancer” is not an “injury” contemplated by § 45-21.2-9(f) and therefore the WCC does not have jurisdiction over an appeal from a denial by the Retirement Board for an accidental disability pension application predicated on occupational cancer. We disagree with this reasoning because essentially, if the argument advanced by MERS is correct, it would mean the Legislature intended to give the Superior Court jurisdiction over occupational cancer claims in the context of an accidental disability pension, but left jurisdiction to this court for all other accidental disability pension claims, without placing any words to that effect in the statute.

As explained above, in construing the statute we look to the plain and ordinary meaning of the words of the statute and make it our ultimate goal to give effect to the legislature’s intent. Diamante, 83 A.3d at 548, 550. We begin again with the relevant words of § 45-21.2-9(f):

In the event that any party is aggrieved by the determination of the retirement board pursuant to § 45-19-1, for an injury occurring on
or after July 1, 2011, the party may submit an appeal to the Rhode Island workers’ compensation court.

(Emphasis added.) A plain reading of this subsection indicates that in order for the WCC to have jurisdiction over Lang’s claim, he must show that his occupational cancer is an “injury” within the meaning of § 45-21.2-9(f) and also that it occurred on or after July 1, 2011. We note that neither § 45-21.2-9 et seq., nor § 45-19-1, the IOD statute, defines the word “injury.” However, § 45-19-1(f) of the IOD statute provides that anyone collecting benefits under that section is subject to “chapters 29 – 38 of title 28” (the Workers’ Compensation Act) “for all case management procedures and dispute resolution for all benefits.” Consequently, we believe the Legislature intended for us to treat the word “injury” in the IOD statute in the same manner as we treat the word “injury” under the various provisions of the Workers’ Compensation Act. Because the Retirement statute gives the WCC jurisdiction over appeals of retirement applications predicated on injuries for which a person is collecting IOD benefits, the definition of injury under the Workers’ Compensation Act would also apply in that context. If the Legislature intended to define the word “injury” differently in three (3) separate sections, we are confident it would have done so.

We must now determine whether “occupational cancer” is an injury as defined in this court. There is no dispute that in the WCC, “occupational diseases” caused by the peculiar characteristics of a particular employment are considered compensable personal injuries under the Workers’ Compensation Act. R.I. Gen. Laws § 28-34-2(33). Because § 45-21.2-9(c) of the Retirement statute and § 45-19.1-2(d) of the CBFF statute define “occupational cancer” as an injury due to certain peculiar characteristics firefighters face on the job (such as exposure to “smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances”), we conclude that
occupational cancer is an occupational disease as defined in the Workers’ Compensation Act, and therefore is a compensable injury under the IOD and Retirement statutes.

Any doubt about whether disability benefits for occupational cancer are covered under the IOD statute and the Retirement statute should be dispelled with a plain reading of § 45-19.1-3(a) of the Cancer Benefits for Fire Fighters’ statute, which states:

Any fire fighter, including one employed by the state, or a municipal fire fighter employed by a municipality that participates in the optional retirement for police officers and fire fighters, as provided in chapter 21.2 of this title, who is unable to perform his or her duties in the fire department by reason of a disabling occupational cancer which develops or manifests itself during a period while the fire fighter is in the service of the department, and any retired member of the fire department of any city or town who develops occupational cancer, is entitled to receive an occupational cancer disability, and he or she is entitled to all of the benefits provided for in chapters 19, 21 and 21.2 of this title and chapter 10 of title 36 if the fire fighter is employed by the state.

(Emphasis added.) The plain words of this statute are clear and unambiguous: firefighters who develop disabling occupational cancer are entitled to all the benefits of § 45-19-1 (the IOD statute), and to an accidental disability pension under § 45-21.2-9, the retirement for accidental disability statute, because those sections are included in Chapters 19 and 21.2 of Title 45.

Indeed, our Supreme Court signaled approval of such an interpretation in *City of East Providence v. Int'l Ass'n of Firefighters Local 850*, 982 A.2d 1281 (R.I. 2009). In that decision, the Court addressed the CBFF statute as applied to the IOD statute when deciding whether an arbitrator improperly awarded an East Providence firefighter reimbursement for sick leave in the form of IOD benefits based upon his occupational cancer. The Court noted that cancer under the CBFF statute is “simply a type of on-duty injury for which firefighters are to be paid IOD

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benefits, along with the many other on-duty injuries that firefighters can suffer in the performance of their jobs.” Id. at 1286.

For these reasons, we find that occupational cancer is an injury within the meaning of § 45-21.2-9(f) and § 45-19-1. Accordingly, Lang’s claim is properly before this court if he can show that his occupational cancer occurred on or after July 1, 2011. Lang can easily make that showing. It is axiomatic that in the WCC, the date of injury for an occupational disease is the date the occupational disease becomes disabling, meaning the date it results in partial or total incapacity of the employee’s ability to work. See R.I. Gen. Laws §§ 28-34-2 and 28-34-6. The record shows that Lang was diagnosed with colon cancer on September 4, 2012, and placed on IOD benefits (and incapacitated from work) on September 21, 2012. Therefore, Lang’s occupational cancer is an injury that occurred after July 1, 2011, and is properly before this court under § 45-21.2-9(f). For these reasons, we reject MERS’ second reason of appeal.

In its third and final reason of appeal, MERS argues that the trial judge erred in finding that the Cancer Benefits for Fire Fighters statute creates a “conclusive presumption” that any cancer developed in a firefighter arises out of and in the course of a firefighter’s employment. MERS reasons that if the General Assembly intended the CBFF statute to operate as a conclusive presumption regarding causation, it would have explicitly included the language “conclusive presumption,” because it knows how to do so. In support of its contention, MERS cites several examples of Rhode Island statutes that include the specific words “conclusive presumption” and “rebuttable presumption.” While we certainly agree that the General Assembly knows how to

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2 After the period for briefing and oral arguments closed on this appeal, MERS submitted a Citation of Supplemental Authority, asking us to consider Lincourt v. Employees’ Ret. Sys. of R.I., 2017 R.I. Super. LEXIS 93 (R.I. Super. Ct. June 6, 2017), a case in which a Superior Court judge found that § 45-19.1-1 does not create a conclusive presumption that cancer in a firefighter is work-related. MERS has asked us to consider this decision in support of its third reason of appeal. We decline MERS’ offer because doing so would require us to reopen briefing and schedule additional oral arguments, and we note that the limited weight of authority of this non-binding decision is outweighed by the need for a resolution on this matter by Mr. Lang’s survivors, who are still grieving his recent passing.
use such language, we do not think that it is required to do something simply because it knows how.

We look to the plain and ordinary meaning of the words of the statute to ascertain the intent of the Legislature in enacting the statute. Park v. Rizzo Ford, Inc., 893 A.2d 216, 221 (R.I. 2006). However, if the words of a statute are ambiguous -- meaning they are susceptible of more than one interpretation -- courts may glean the intent and purpose of the Legislature “from a consideration of the entire statute, keeping in mind its nature, object, language, and arrangement.” Algieri v. Fox, 122 R.I. 55, 58, 404 A.2d 72, 74 (1979) (citing Zannelli v. DiSandro, 84 R.I. 76, 121 A.2d 652 (1985)). In determining legislative intent, a particular provision should not be viewed in isolation, but rather in the context of the entire statute. State v. Caprio, 477 A.2d 67, 70 (R.I. 1984).

We look first at § 45-19.1-1 of the Cancer Benefits for Fire Fighters statute, entitled “Legislative findings,” which provides:

(a) The general assembly finds and declares that by reason of their employment:
(1) Fire fighters are required to work in the midst of, and are subject to, smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances;
(2) Fire fighters are continually exposed to a vast and expanding field of hazardous substances through hazardous waste sites and the transportation of those substances;
(3) Fire fighters are constantly entering uncontrolled environments to save lives and reduce property damage and are frequently not aware of potential toxic and carcinogenic substances that they may be exposed to;
(4) Fire fighters, unlike other workers, are often exposed simultaneously to multiple carcinogens, and the rise in occupational cancer among fire fighters can be related to the rapid proliferation of thousands of toxic substances in our every day environment; and
(5) The onset of cancers in fire fighters can develop very slowly, usually manifesting themselves from five (5) years to forty (40) years after exposure to the cancer-causing agent.
There is no ambiguity in this section. It is plainly evident that the General Assembly found that by reason of their employment, firefighters develop cancer at higher rates than other workers, due to the particular characteristics of their employment. The subsection that follows is also unambiguous, and makes clear that: “The general assembly further finds and declares that all of the previously stated conditions exist and arise out of or in the course of that employment.” § 45-19.1-1(b) (emphasis added).

Simply put then, any condition described in subsections (1) through (5) of § 45-19.1-1(a) arises out of or in the course of a firefighter’s employment. Subsection 45-19.1-1(a)(5) lists cancer as a condition. The plain words of the statute therefore indicate that cancer in a firefighter is a condition that arises out of or in the course of employment as a firefighter. We now must consider what effect the definition of “occupational cancer” has on that conclusion.

Section 45-19.1-2(d) entitled “Definitions,” provides the definition of “occupational cancer” that MERS bases its argument on. That subsection states that occupational cancer “means a cancer arising out of his or her employment as a fire fighter, due to injury from exposures to smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances while in the performance of active duty in the fire department.” We do not find that this definition changes the analysis above. The plain language of the definition of occupational cancer simply restates, in a different arrangement, the same language in subsections (1) through (5) of § 45-19.1-1(a). In utilizing the same language, the General Assembly simply intended to specifically define cancer in firefighters as “occupational cancer.” Therefore, we agree with the trial judge’s conclusion that the Cancer Benefits for Fire Fighters statute operates as a conclusive presumption that cancer in firefighters arises out of and in the course of their employment as firefighters.
The only question remaining is whether Lang is a firefighter eligible to claim a pension benefit under the Cancer Benefits for Fire Fighters statute. That question is easily resolved by a plain reading of § 45-19.1-3, entitled "Occupational cancer disability for fire fighters," which provides:

(a) Any fire fighter, including one employed by the state, or a municipal fire fighter employed by a municipality that participates in the optional retirement for police officers and fire fighters, as provided in chapter 21.2 of this title, who is unable to perform his or her duties in the fire department by reason of a disabling occupational cancer which develops or manifests itself during a period while the fire fighter is in the service of the department, and any retired member of the fire department of any city or town who develops occupational cancer, is entitled to receive an occupational cancer disability, and he or she is entitled to all of the benefits provided for in chapters 19, 21 and 21.2 of this title and chapter 10 of title 36 if the fire fighter is employed by the state.

(b) The provisions of this section apply retroactively in the case of any retired member of the fire department of any city or town.

(Emphasis added.) Lang is a firefighter employed by a fire department that participates in the optional retirement for police and firefighters program under Chapter 21.2 of Title 45. He is also a firefighter who developed cancer which manifested during a period in which he was in service to the fire department. Thus, Lang clearly falls within the ambit of the Cancer Benefits for Fire Fighters statute and is eligible to claim all of the benefits of Chapters 19, 21, and 21.2 of Title 45.

We find support for our conclusion in our Supreme Court's decision in City of East Providence, 982 A.2d 1281 (R.I. 2009). In that case, the Court interpreted the plain language of the CBFF statute to determine how it applied to the IOD statute. The issue was whether the CBFF made IOD benefits available to firefighters employed by the City of East Providence (the "City") despite that department's collective bargaining agreement purporting to limit the City's firefighters to compensation under its own injured on duty and retirement benefit agreement. Id.
at 1285. The case came to the Court on the City’s appeal of an arbitrator’s decision to award IOD benefits to a fire chief to whom the City had denied benefits, based on the type of cancer he developed. *Id.* at 1284.

The Court recited the full text of each section of the CBFF statute and concluded that the plain words of the statute “expressly provides injured on-duty benefits provided by chapters 19, 21, and 21.2 of title 45, and chapter 10 of title 36” to all firefighters, not merely those who participate in the optional retirement program under Chapter 21.2 of Title 45. *Id.* at 1288-89.

The Court reasoned that:

> [u]pon a reading of the statute, it is evident that the General Assembly intended to ensure that firefighters diagnosed with cancer receive injured on-duty benefits in accordance with the IOD statute, § 45–19–1, the Retirement of Municipal Employees statute, chapter 21 of title 45, the Optional Retirement for Members of Police Force and Fire Fighters statute, G.L. 1956 chapter 21.2 of title 45, and the Retirement System—Contributions and Benefits statute, G.L. 1956 chapter 10 of title 36.

*Id.* at 1288 (emphasis added).

The Court further noted that the “enactment of the ‘Cancer Benefits for Fire Fighters’ statute specifically designated cancer among firefighters as an on-duty illness, based on the General Assembly’s findings that firefighters are exposed to ‘a vast and expanding field of hazardous substances’ and that “[s]imply put, the ‘Cancer Benefits for Fire Fighters’ statute acknowledges the unfortunate fact that in the performance of their duties, firefighters develop cancer at a disproportionate rate, and provides a partial remedy by entitling them to ‘all of the benefits provided for in chapters 19, 21 and 21.2 of this title and chapter 10 of title 36.’” *Id.* In concluding, the Court stated clearly that “[t]he ‘Cancer Benefits for Fire Fighters’ statute explicitly provides injured on-duty benefits as governed by § 45–19–1 to firefighters who are diagnosed with cancer.” *Id.* at 1289.
We note that in reaching this decision, the Court never distinguished among the types of cancers firefighters may develop, nor did it consider whether the chief’s cancer in that case was causally connected to his employment by medical evidence, despite the fact that the City initially denied him IOD benefits because of the type of cancer he developed. *Id.* at 1284. Instead, the Court spoke broadly of “cancer” in firefighters, and concluded that the Cancer Benefits for Fire Fighters statute provides all of the benefits available under Chapters 19, 21, and 21.2 of Title 45 to firefighters who develop cancer. *Id.* at 1288-89. The Court’s reasoning signals that we have correctly construed the statute in this matter: that the CBFF creates a conclusive presumption that cancer in firefighters is work-related.

For the reasons explained above, we reject MERS’ third reason of appeal, and find that the General Assembly intended for the Cancer Benefits for Fire Fighters statute to operate as a conclusive presumption that cancer in firefighters is work-related occupational cancer compensable under Chapters 19, 21, and 21.2 of Title 45, and Chapter 10 of Title 36. We therefore deny and dismiss MERS’ appeal and affirm the decision and decree of the trial judge awarding Lang accidental disability retirement benefits § 45-21.2-9. In accordance with Rule 2.20 of the Rules of Practice of the Workers’ Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Ricci and Hardman, JJ., concur.

ENTER:

/s/ Olsson, J.

/s/ Ricci, J.

/s/ Hardman, J.
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS’ COMPENSATION COURT
APPELLATE DIVISION

KEVIN LANG

)

)

VS.

)

)

EMPLOYEES’ RETIREMENT W.C.C. 2015-04163
SYSTEM OF RHODE ISLAND


FINAL DECREED OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the claim of appeal of the
respondent, Employees’ Retirement System of Rhode Island, and upon consideration thereof, the
respondent’s appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on
September 16, 2016 be, and they hereby are affirmed.

2. That the respondent shall pay a counsel fee in the amount of Four Thousand and
00/100 ($4,000.00) Dollars to James E. Kelleher, Esq., attorney for the petitioner, Kevin Lang,
for the successful defense of the respondent’s claim of appeal.

Entered as the final decree of this Court this day of

PER ORDER:

John A. Sabatini, Administrator
ENTER:

Olsson, J.

Ricci, J.

Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were sent to Michael P. Robinson, Esq., and James E. Kelleher, Esq., on
CON NOR, J. This matter is before the Court on a de novo appeal filed by the petitioner, Kevin Lang (hereinafter "Lang"), from a decision issued by the Employees' Retirement System of Rhode Island, the respondent (hereinafter "MERS"). Lang's appeal is the first such appeal filed in this court since the Rhode Island General Assembly's enactment of R.I. General Laws § 45-21.2-9. Lang is seeking an accidental disability pension based upon a claim of colon cancer and metastatic colon cancer to his liver and lungs. A pretrial order was entered in this matter denying Lang's request for benefits, and from this pretrial order Lang filed a timely claim for trial.

Lang's claim for accidental disability retirement benefits presents a novel legal issue regarding the interpretation of §§ 45-21.2-9 and 45-19.1-1, et seq. In this regard, at the request of both Lang and MERS, the Court certified a question regarding the interpretation of these statutes to the Rhode Island Supreme Court. After thoughtful consideration, the Supreme Court declined to address this question, and the parties proceeded to litigate this matter before this Court.
As this case proceeded on the Court's trial calendar, a motion was filed by Lang seeking summary judgment. In his Motion for Summary Judgment, Lang argued that because there is no dispute with regard to the fact that he suffers from an occupational cancer, and because all occupational cancers in firefighters arise out of and in the course of their employment, he is entitled to judgment as a matter of law. Although this Court denied Lang's Motion for Summary Judgment, the Court addressed the issue of whether cancer in a firefighter, as described in § 45-19.1-1(a), arises out of and in the course of their employment. The Court in rendering its decision in this matter will once again address this issue.

The facts in this case are essentially undisputed. Lang has been a Cranston firefighter for over seventeen (17) years and has been a participant in MERS. On January 31, 2014, Lang applied for an accidental disability pension based upon a claim of colon cancer and metastatic colon cancer to his liver and lungs. Lang was diagnosed with this condition on September 4, 2012, and was placed on Injured on Duty (IOD) status as of September 21, 2012. On August 15, 2014, the Employees' Retirement System of Rhode Island's Disability Subcommittee voted to recommend to the Retirement Board that Lang's application for an accidental disability pension be denied. On September 10, 2014, the Retirement Board voted to accept the recommendation of the Disability Subcommittee to deny Lang's application for an accidental disability pension. In accordance with the Retirement Board's procedures, Lang appealed the Board's denial of his pension, and a hearing was held before the Subcommittee on March 6, 2015. Following this hearing, the Subcommittee voted to affirm its decision to deny Lang's application and continue its recommendation of a denial to the full board. On July 8, 2015, after hearing argument from Lang's counsel, the Board voted to accept the Subcommittee's recommendation and affirmed its denial of Lang's application for an accidental disability pension. On July 10, 2015, Lang was
sent written notice of the Board’s final decision advising Lang of the denial of his application
and right of judicial review. The Board instructed Lang that he could file an appeal of the
Board’s decision in the Superior Court pursuant to § 42-35-15 of the Administrative Procedures
Act; however, Lang filed an appeal with the Workers’ Compensation Court alleging that,
following the Legislature’s enactment of § 45-21.2-9(f) in 2013, the proper jurisdiction to hear
his appeal was in this Court. On this issue, this Court agreed, and this Court maintained
jurisdiction over Lang’s appeal.

During the course of litigation before this Court, Lang presented an affidavit representing
that he has been a member of the Cranston Fire Department since 1996, and in September 2012,
Dr. Raymond Choquette diagnosed him with cancer. The affidavit indicates that the Cranston
Fire Department was informed of Lang’s diagnosis and immediately placed Lang on IOD status.
Lang represents that he has been continuously receiving IOD benefits since September 2012. He
represents that, as a result of his cancer, he is unable to work as a firefighter for the City of
Cranston.

Lang presented the affidavit of Raymond Choquette, M.D. Dr. Choquette represented
that he is a medical doctor licensed in the State of Rhode Island with a specialty in oncology.
Dr. Choquette, by affidavit, stated that Lang is his patient, and in September 2012, he diagnosed
Lang with cancer. He stated that he continues to treat Lang, and he is aware that Lang is a
firefighter. Dr. Choquette opined that, as a result of his cancer, Lang is permanently disabled
from working as a firefighter.

Lang presented the affidavit of Chief William McKenna. By affidavit, Chief McKenna
stated that he is the Chief of the Cranston Fire Department, and in September 2012, he received
documentation from Lang regarding a diagnosis of cancer. He represented that based on that
diagnosis, Lang was immediately placed on Injured on Duty status, and remains on IOD status at present. Chief McKenna executed this affidavit on August 1, 2016.

The parties submitted the record of the Retirement Board with regard to Lang’s application for accidental disability retirement. The records of the Retirement Board were reviewed by the Court; in particular, the records of the physicians who treated and/or examined Lang following his diagnosis of cancer. It is clear from these records that Lang suffers from colon cancer/metastatic colon cancer to his liver and lungs. Despite this diagnosis, Dr. Choquette, his treating oncologist, could only state to a “possibility” that Lang’s cancer is a direct result of his duties and exposures as a firefighter for the City of Cranston. Dr. John A. Phillips, a general surgeon, signed a disability statement for Lang on April 2, 2014, and although he found Lang to be disabled from work, he could not relate Lang’s cancer to the performance of his duties as a firefighter. Dr. Joseph DiBenedetto, Jr., who is a hematology/oncology specialist, examined Lang on June 9, 2014, and diagnosed him with metastatic carcinoma of the colon to the liver and lungs. He described the etiology of colorectal cancer as complex, and he could not specifically relate Lang’s cancer to the exposures he may have experienced during the performance of his duties as a firefighter. Lang was examined on June 13, 2014, by Dr. Alberto Savoretti, an internal medicine specialist. Dr. Savoretti was uncertain as to the relationship of Lang’s cancer to the performance of his duties as a firefighter, but he felt that it was certainly possible that his exposure to hazardous substances caused his illness. On June 19, 2014, Lang was examined by Dr. Anthony Testa, an internal medicine physician with a specialty in hematology and oncology. Dr. Testa found Lang to be totally disabled from his work as a firefighter, but could not make a definitive correlation between his duties as a firefighter and his diagnosis of colon cancer.
The opinions from these five (5) physicians represent the totality of the medical evidence presented in this matter. It is evident in reading their statements, affidavits, and reports that none of these physicians can relate, to a "reasonable degree of medical certainty", Lang’s diagnosis of metastatic colon cancer to the performance of his job duties as a firefighter for the City of Cranston, even though they all found him disabled from his job as a firefighter. This Court must now address whether this medical evidence is sufficient to sustain Lang’s burden of proof in his claim for accidental disability retirement benefits.

Lang seeks to retire with an accidental disability and receive such pension pursuant to §45-21.2-9, which is codified under chapter 45-21.2 entitled “Optional Retirement for Members of the Police Force and Fire Fighters.” Section 45-21.2-9 expressly provides that firefighters who suffer from cancer as a result of their occupation as firefighters are entitled to a disability pension and are covered by the benefits provided by chapters 19, 19.1, and 21 of title 45:

“a municipal firefighter employed by a municipality that participates in the optional retirement for police officers and fire fighters as provided in this chapter, who is unable to perform his or her duties in the fire department by reason of a disabling occupational cancer which develops or manifests itself during a period while the fire fighter is in the service of the department, and any retired member of the fire force of any city or town who develops occupational cancer, is entitled to receive an occupational cancer disability and he or she is entitled to all of the benefits provided for in this chapter, chapters 19, 19.1, and 21 of this title * * *.”

Therefore, Lang, seeking to receive an accidental disability pension, must prove, among other elements, that his cancer was due to his occupation and that the cancer developed or manifested during the time of service in the Cranston Fire Department. Since the General Assembly accorded firefighters who are seeking accidental disability pensions under chapter 45-21.2 the benefits of chapter 45-19.1, it is imperative that this Court look to chapter 45-19.1, “Cancer Benefits for Fire Fighters,” for guidance on whether Lang has met his burden of proving that his cancer resulted from his occupation as a firefighter.
Section 45-19.1-3 specifically provides benefits owed to firefighters who develop cancer as a result of their occupation. Section 45-19.1-1(a) contains specific legislative findings which elaborate on the statute's purpose:

“(a) The general assembly finds and declares that by reason of their employment:

(1) Fire fighters are required to work in the midst of, and are subject to, smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances;

(2) Fire fighters are continually exposed to a vast and expanding field of hazardous substances through hazardous waste sites and the transportation of those substances;

(3) Fire fighters are constantly entering uncontrolled environments to save lives and reduce property damage and are frequently not aware of potential toxic and carcinogenic substances that they may be exposed to;

(4) Fire fighters, unlike other workers, are often exposed simultaneously to multiple carcinogens, and the rise in occupational cancer among fire fighters can be related to the rapid proliferation of thousands of toxic substances in our every day environment; and

(5) The onset of cancers in fire fighters can develop very slowly, usually manifesting themselves from five (5) years to forty (40) years after exposure to the cancer-causing agent.”

Therefore, under § 45-19.1-1(a)(1)-(4) the General Assembly explicitly found that firefighters who risk their lives in an effort to save the lives of others and reduce property damage are exposed to a vast amount of hazards, including carcinogenic and chemical substances. Firefighters have a higher incidence rate of cancer from unknown sources, than workers in other fields, which may develop slowly and may not manifest itself for multiple years after exposure to the cancer-causing agent. § 45-19.1-1(a)(3)-(5). Following this clear language elaborating on the unique dangers associated with the firefighting profession, the General Assembly, under § 45-19.1-1(b), expressly declared that “all of the previous stated conditions exist and arise out of or in the course of that employment.” Therefore, cancer, which the General Assembly
indicated as an illness sustained by firefighters under § 45-19.1-1(a)(4), falls under the purview of § 45-19.1-1(b) which declares that such an illness arises out of and in the course of a firefighter’s employment.\(^1\) This clear language indicates that the General Assembly intended to create a presumption that all cancer in firefighters arises from their employment.


Further, if a statute’s intent cannot be ascertained from its face, courts will determine the intent and purpose of the General Assembly “from a consideration of the entire statute, keeping in mind [the] nature, object, language, and arrangement” of the provision to be construed. Algiero v. Fox, 122 R.I. 55, 58, 404 A.2d 72, 74 (1979) (citing Zannelli v. DiSandro, 84 R.I. 76, 121 A.2d 652 (1985)). Even if this Court were to delve into the intent of the General Assembly, which it is not required to do because the statute is unambiguous, the Rhode Island Supreme Court has already opined that “it is evident that the General Assembly intended to ensure that firefighters diagnosed with cancer receive injured on-duty benefits in accordance with the IOD

\(^1\) Occupational cancer is defined under § 45-21.2-9(c) as “a cancer arising out of employment as a fire fighter, due to injury due to exposures to smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances while in the performance of active duty in the fire department.”
statute [as well as the benefits in accordance with] the Optional Retirement for Member of Police
Force and Fire Fighters statute” under chapter 45-21.2. Int’l Ass’n of Firefighters Local 850,
982 A.2d at 1288. Therefore, this Court finds that §45-19.1-1(b) creates a conclusive
presumption that all cancer in firefighters under §45-19.1-1(a) arises out of and in the course of
their employment.

Moreover, this Court looks to the Rhode Island Supreme Court’s decision in Int’l Ass’n
of Firefighters Local 850 for guidance on the meaning and implications of the “Cancer Benefits
for Fire Fighters” statute. In Int’l Ass’n of Firefighters Local 850, Chief Moniz of the East
Providence Fire Department was diagnosed with prostate cancer, which resulted in him taking
sick leave and missing forty-four (44) days of work in order to receive cancer treatment. 982
A.2d at 1283. Upon his return to active duty, Chief Moniz requested that his sick time be
converted to IOD time pursuant to the IOD statute, §45-19-1, which provides that a firefighter
may receive IOD pay when injured in the course of his performance of his dutics.2 Id. This
matter was arbitrated and the arbitrator found that “by enacting the ‘Cancer Benefits for Fire
Fighters’ statute, the General Assembly amended the IOD statute to include cancer as an
occupational injury for Rhode Island firefighters.” Id, at 1284. Therefore, the arbitrator deemed
Chief Moniz’s prostate cancer to be an occupational injury and awarded him benefits under the
IOD statute. The City of East Providence moved to vacate the award, and the Superior Court
denied the Motion to Vacate, concluding that the arbitrator made the appropriate findings of fact
and conclusions of law. Id, at 1285. The Supreme Court affirmed the decision of the Superior
Court. Id.

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2 The collective bargaining agreement between the City of East Providence and the Fire Department incorporated
Although Int'l Ass'n of Firefighters Local 850 involves how the "Cancer Benefits for Fire Fighters" statute comported with the IOD statute, the Supreme Court expounded that the "Cancer Benefits for Fire Fighters" statute applies to firefighters who participate in the optional retirement program and are seeking an accidental disability pension. The Supreme Court specifically and explicitly stated that the General Assembly conferred the provisions and benefits provided under the "Cancer Benefits for Fire Fighters" statute to firefighters seeking an accidental disability pension based upon a diagnosis of cancer by stating that:

"[s]imply put, the 'Cancer Benefits for Fire Fighters' statute acknowledges the unfortunate fact that in the performance of their duties, firefighters develop cancer at a disproportionate rate, and provides a partial remedy by entitling them to 'all of the benefits provided for in chapters 19, 21 and 21.2 of this title and chapter 10 of title 36.'” Id. at 1288 (quoting § 45-19.1-3(a)) (emphasis added).

Thus, instead of merely focusing on the IOD statute, the Supreme Court specifically noted that the "Cancer Benefits for Fire Fighters" statute also applied to the retirement provisions of title 45, including chapter 45-21.2, under which Lang seeks redress.

Indeed, the Supreme Court's logic is sound, as a single standard should apply under the "Cancer Benefits for Fire Fighters" statute where the General Assembly does not indicate otherwise. MERS' argument that the pertinent language in Int'l Ass'n of Firefighters Local 850

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3 "Upon a reading of the statute, it is evident that the General Assembly intended to ensure that firefighters diagnosed with cancer receive injured on-duty benefits in accordance with the IOD statute, § 45-19-1, the Retirement of Municipal Employees statute, chapter 21 of title 45, the Optional Retirement for Members of Police Force and Fire Fighters statute, G.L. 1956 chapter 21.2 of title 45, and the Retirement System—Contributions and Benefits statute, G.L. 1956 chapter 10 of title 36. The enactment of the 'Cancer Benefits for Fire Fighters' statute specifically designated cancer among firefighters as an on-duty illness, based on the General Assembly's findings that firefighters are exposed to 'a vast and expanding field of hazardous substances' and that the 'rise in occupational cancer among fire fighters can be related to the rapid proliferation of thousands of toxic substances.' Section 45-19.1-1(a)(3)-(4). Simply put, the 'Cancer Benefits for Fire Fighters' statute acknowledges the unfortunate fact that in the performance of their duties, firefighters develop cancer at a disproportionate rate, and provides a partial remedy by entitling them to 'all of the benefits provided for in chapters 19, 21 and 21.2 of this title and chapter 10 of title 36.'” Int'l Ass'n of Firefighters Local 850, 982 A.2d 1281, 1288 (R.I. 2009).
constitutes dicta which should not be relied upon is unpersuasive. In Int'l Ass'n of Firefighters Local 850, the Rhode Island Supreme Court noted that "the only issue before this Court is whether Chief Moniz's leave for treatment of his prostate cancer should have been deducted from his sick leave reserve or whether that time should have been restored because his leave fell within the ambit of G.L. 1956 § 45-19-1.3." 982 A.2d at 1283 n.1. Lang contends that an examination of chapter 45-19.1 and the implied application of a conclusive presumption were essential to the issue before the Supreme Court. Upon a reading of Int'l Ass'n of Firefighters Local 850, this Court finds that such language was central to the Supreme Court's affirmation of the conclusions of fact and law made by the arbitrator.

Though the principal issue before the Supreme Court in Int'l Ass'n of Firefighters Local 850 was whether the arbitrator's decision was appropriate in finding that Chief Moniz should be awarded IOD benefits, the Supreme Court had to examine the scope and meaning of the "Cancer Benefits for Fire Fighters" statute. An examination of the "Cancer Benefits for Fire Fighters" statute was necessary to determine that it was proper for the arbitrator to award a firefighter diagnosed with cancer with IOD benefits. Id. at 1286 (stating that it would be "impossible for the arbitrator to resolve the dispute without looking to the 'Cancer Benefits for Fire Fighters' statute because its application to East Providence firefighters is the central issue."). In particular, as Lang argues in his Supplemental Memorandum, "[i]f having to prove a causal connection between [Moniz's] prostate cancer and some firefighting activity was present in the Statute, such a determination would have been central to the arbitrator's decision and thus would have been central to the Supreme Court's decision." EE's Sup. Mem. at 1. Therefore, "[i]f the Supreme Court saw anything other than a conclusive presumption," then the arbitrator and the Court would have required Moniz to establish a causal connection as a necessary element of his claim.
Id. at 1-2. This Court finds Lang’s argument to be persuasive. The Supreme Court’s affirmation of the arbitrator’s award of IOD benefits to Moniz for his cancer without requiring Moniz to demonstrate a causal connection signifies that such a causal connection is conclusively established pursuant to § 45-19.1-1(b) where a firefighter under § 45-19.1-1(a) contracts cancer.

MERS objects to such an interpretation, stating that the Court’s holding merely found that an arbitrator did not manifestly disregard the law. MERS proffers that an arbitrator’s “mere error in the law or failure to understand the law would not have justified a reversal.” Such a statement misconstrues the standard utilized by the Int’l Ass’n of Firefighters Local 850 Court. While the Court in Purvis Systems, Inc. v. Am. Sys. Corp., 788 A.2d 1112, 1117-18 (R.I. 2002) noted, in the context of an arbitrator’s interpretation of a contract, that “awards premised on ‘clearly erroneous’ interpretations of a contract have been affirmed where the result was rationally based upon the contract[,]” such a situation is inapplicable to the matter of statutory interpretation before the Int’l Ass’n of Firefighters Local 850 Court.

The standard of “manifest disregard” in arbitration proceedings is analogous to that of “clear error.” See Berthod Realtors, Inc. v. J.W. Riker-Northern Rhode Island, Inc., 636 A.2d 1328, 1328-29 (R.I. 1994). A decision is in clear error where the prevailing party failed to satisfy its burden of proof as to a necessary element, such as causation. In the context of a workers’ compensation occupational disease (mesothelioma) case, the Rhode Island Supreme Court determined that an employee had not met his burden of proof regarding causation where the testimony regarding causation was speculative. Gallagher v. Nat’l Grid USA/Narragansett Elec., 44 A.3d 743, 750 (R.I. 2012). Thus, MERS’ reliance on the general principle that the standards for IOD status or workers’ compensation benefits may be less demanding than those prescribed for accidental disability benefits is flawed. Although an IOD claim may possess
elements different from a retirement benefits claim, just as a claim in workers' compensation may require elements different from those in tort, all elements of the applicable claim must nonetheless be satisfied. The silence of the arbitrator and the Supreme Court on this issue indicates that the Supreme Court interpreted the statute to invoke a conclusive presumption; anything other than a conclusive presumption would require the arbitrator and the Supreme Court to discuss causation as a necessary element.

In light of the above analysis, this Court finds that the language of §45-19.1-1(b) contains a conclusive presumption that a firefighter's cancer arises out of and in the course of employment. Based on the evidence presented in this matter, Lang has demonstrated that he has been a Cranston firefighter for over seventeen (17) years, and in September 2012 was diagnosed with metastatic colon cancer and began receiving injured on duty benefits. He has further proven that he is a participant in MERS. All of the doctors who examined Lang determined that he suffers from colon cancer and metastatic colon cancer to his liver and lungs, and they all agree that he is unable to work as a result of this condition. In light of the determination that this Court has made in finding that § 45-19.1-1(b) creates a conclusive presumption that a firefighter's cancer arises out of and in the course of employment, this Court finds that Lang is entitled to receive accidental disability retirement benefits, and he shall be awarded same.

In light of the above, the following finding is made:

1. That Lang has proven by a fair preponderance of the credible evidence that he is entitled to accidental disability retirement benefits based on his claim of occupational cancer, specifically, colon cancer/metastatic colon cancer to his liver and lungs, which was diagnosed on September 4, 2012.

It is, therefore, ordered:
1. That Lang shall be paid accidental disability retirement benefits consistent with his January 31, 2014 application for same.

2. That MERS shall pay a counsel fee to Lang's counsel, James Kelleher, Esq., in the amount of $7,000 for his successful prosecution of this matter.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a decree, copy of which is enclosed, shall be entered on September 16, 2016 at 10:00 a.m.
Workers' compensation — Firefighter — Cancer

Workers' compensation — Firefighter — Cancer

By: Tom Egan  August 3, 2017

Where the Municipal Employees' Retirement System of Rhode Island (MERS) has challenged a decision of a trial judge awarding accidental disability retirement benefits for occupational cancer to a Cranston firefighter, the challenge must be rejected, as (1) the Superior Court does not have exclusive jurisdiction over such appeals and (2) a state statute (G.L. §45-19.1-3) creates a conclusive presumption that cancer in firefighters is work-related.

Jurisdictional issue

"First, MERS argues that §45-21.2-9(f) does not provide the WCC with jurisdiction over appeals from adverse decisions by the Retirement Board for occupational cancer disability retirement applications, and that the proper forum for such appeals is the Superior Court (as an appeal brought pursuant to the Administrative Procedures Act). MERS avers that §45-21.2-9(f) provides an aggrieved party with an appeal to the WCC only for Retirement Board determinations made under §45-19-1. MERS contends that because the Retirement Board made its determination in this case under §45-21.2-9, and not under §45-19-1, the WCC lacks jurisdiction to hear the claim. Our review of the two (2) statutes leads us to conclude that MERS has misconstrued the operative language in §45-21.2-9(f). In our view, §45-21.2-9(f) simply states that the WCC has jurisdiction over accidental disability retirement applications brought under §45-21.2-9 in an effort to comply with the filing requirements in §45-19-1."

"The application of MERS' interpretation of the statute would lead to an absurd result. As MERS correctly points out, the Retirement Board does not make determinations under §45-19-1 (the IOD statute) involving benefits paid by a city or town prior to retirement. In fact, there is no provision in the IOD statute allowing a person to make any kind of application to the Retirement Board as a specific claim for those benefits under that statute. Yet MERS argues that this court has jurisdiction only over determinations by the Retirement Board regarding claims made specifically under the IOD statute. This position leads to an absurd result, because there are no circumstances in which a person makes an application to the Retirement Board designated as a claim under the IOD statute. If MERS' argument is correct, then §45-21.2-9(f) would provide the WCC with no new jurisdiction at all, which cannot be the Legislature's intent. However, the IOD statute clearly and unambiguously directs a person collecting IOD benefits to apply for an accidental disability pension to the Retirement Board within a timely manner, or risk losing those benefits, as indicated in §45-19-1(j): 'Any person receiving injured on-duty benefits pursuant to this section, and subject to the jurisdiction of the state retirement board for accidental retirement disability, for an injury occurring on or after July 1, 2011, shall apply for an accidental disability retirement allowance from the state retirement board not later than the later of eighteen (18) months after the date of the person's injury that resulted in said person's injured on duty status or sixty (60) days from the date on which the treating physician certifies that the person has reached maximum medical improvement.' Read plainly, the language of §45-19-1(j) directs a person collecting IOD benefits to submit an application for accidental disability retirement benefits to the Retirement Board (as a claim under §45-21.2-9) no later than eighteen (18) months after the date of injury or sixty (60) days from the date a treating physician certifies that the person has reached maximum medical improvement.

"Read in conjunction, the plain language of both sections clearly and unambiguously means that §45-21.2-9(f) provides the WCC with jurisdiction over appeals of adverse Retirement Board decisions on applications filed by individuals collecting IOD benefits in an effort to comply with §45-19-1(j)'s time requirements. Because [Kevin] Lang was collecting IOD benefits and applied for accidental disability retirement benefits under §45-21.2-9 in an effort to comply with the time requirements in §45-19-1(j), and because his application was denied by the Retirement Board, §45-21.2-9(f) allows him to appeal that denial to this court. Accordingly, we reject MERS' first reason of appeal and conclude that the WCC has jurisdiction to address Lang's appeal.

"In its second reason of appeal, MERS argues that 'occupational cancer' is not an 'injury' contemplated by §45-21.2-9(f) and therefore the WCC does not have jurisdiction over an appeal from a denial by the Retirement Board
for an accidental disability pension application predicated on occupational cancer. We disagree with this reasoning because essentially, if the argument advanced by MERS is correct, it would mean the Legislature intended to give the Superior Court jurisdiction over occupational cancer claims in the context of an accidental disability pension, but left jurisdiction to this court for all other accidental disability pension claims, without placing any words to that effect in the statute. ...

"We must now determine whether 'occupational cancer' is an injury as defined in this court. There is no dispute that in the WCC, 'occupational diseases' caused by the peculiar characteristics of a particular employment are considered compensable personal injuries under the Workers' Compensation Act. R.I. Gen. Laws §28-34-2(33). Because §45-21.2-9(c) of the Retirement statute and §45-19.1-2(d) of the [Cancer Benefits for Fire Fighters (CBFF)] statute define 'occupational cancer' as an injury due to certain peculiar characteristics firefighters face on the job (such as exposure to 'smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances'), we conclude that occupational cancer is an occupational disease as defined in the Workers' Compensation Act, and therefore is a compensable injury under the IOD and Retirement statutes. ...

"For these reasons, we find that occupational cancer is an injury within the meaning of §45-21.2-9(f) and §45-19.1. Accordingly, Lang's claim is properly before this court if he can show that his occupational cancer occurred on or after July 1, 2011. Lang can easily make that showing.""

Conclusive presumption

"In its third and final reason of appeal, MERS argues that the trial judge erred in finding that the Cancer Benefits for Fire Fighters statute creates a 'conclusive presumption' that any cancer developed in a firefighter arises out of and in the course of a firefighter's employment. MERS reasons that if the General Assembly intended the CBFF statute to operate as a conclusive presumption regarding causation, it would have explicitly included the language 'conclusive presumption,' because it knows how to do so. In support of its contention, MERS cites several examples of Rhode Island statutes that include the specific words 'conclusive presumption' and 'rebuttable presumption.' While we certainly agree that the General Assembly knows how to use such language, we do not think that it is required to do something simply because it knows how. ...

"... It is plainly evident that the General Assembly found that by reason of their employment, firefighters develop cancer at higher rates than other workers, due to the particular characteristics of their employment. The subsection that follows is also unambiguous, and makes clear that: 'The general assembly further finds and declares that all of the previously stated conditions exist and arise out of or in the course of that employment.' §45-19.1-1(b) (emphasis added).

"Simply put then, any condition described in subsections (1) through (5) of §45-19.1-1(a) arises out of or in the course of a firefighter's employment. Subsection 45-19.1-1(a)(5) lists cancer as a condition. The plain words of the statute therefore indicate that cancer in a firefighter is a condition that arises out of or in the course of employment as a firefighter. We now must consider what effect the definition of 'occupational cancer' has on that conclusion.

"Section 45-19.1-2(d) entitled 'Definitions,' provides the definition of 'occupational cancer' that MERS bases its argument on. That subsection states that occupational cancer 'means a cancer arising out of his or her employment as a firefighter, due to injury from exposure to smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances while in the performance of active duty in the fire department.' We do not find that this definition changes the analysis above. The plain language of the definition of occupational cancer simply restates, in a different arrangement, the same language in subsections (1) through (5) of §45-19.1-1(a). In utilizing the same language, the General Assembly simply intended to specifically define cancer in firefighters as 'occupational cancer.' Therefore, we agree with the trial judge's conclusion that the Cancer Benefits for Fire Fighters statute operates as a conclusive presumption that cancer in firefighters arises out of and in the course of their employment as firefighters.

"... Lang is a firefighter employed by a fire department that participates in the optional retirement for police and firefighters program under Chapter 21.2 of Title 45. He is also a firefighter who developed cancer which manifested during a period in which he was in service to the fire department. Thus, Lang clearly falls within the ambit of the Cancer Benefits for Fire Fighters statute and is eligible to claim all of the benefits of Chapters 19, 21, and 21.2 of Title 45.

"We find support for our conclusion in our Supreme Court's decision in City of East Providence v. Int'l Ass'n of Firefighters Local 850, 982 A.2d 1281 (R.I. 2009). ...
"... The Court's reasoning signals that we have correctly construed the statute in this matter: that the CBFF creates a conclusive presumption that cancer in firefighters is work-related.

"For the reasons explained above, we reject MERS' third reason of appeal, and find that the General Assembly intended for the Cancer Benefits for Fire Fighters statute to operate as a conclusive presumption that cancer in firefighters is work-related occupational cancer compensable under Chapters 19, 21, and 21.2 of Title 45, and Chapter 10 of Title 36. ..."


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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. 

SUPERIOR COURT

(FILED: June 6, 2017)

ROBERT L. LINCOURT : Petitioner/Appellant:

vs. :

THE EMPLOYEES’ RETIREMENT SYSTEM : C.A. No. PC-2015-0602
OF RHODE ISLAND, by and through SETH MAGAZINER, in his capacity as Chair and through WILLIAM B. FINELLI, in his capacity as Chair of the Disability Subcommittee of the EMPLOYEES’ RETIREMENT SYSTEM OF RHODE ISLAND

Respondents/Appellees:

DECISION

TAFT-CARTER, J. This matter is before the Court for decision on the appeal of Petitioner Robert L. Lincourt of the January 20, 2015 decision of the Board of the Employees’ Retirement System of Rhode Island (ERSRI), which denied the application of Petitioner Lincourt (Petitioner) for a disability pension following his retirement from the Fire Department of the Town of North Providence, Rhode Island. Petitioner contends that he satisfied the requirements for receiving a disability pension, and ERSRI erred in finding that he failed to do so. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

Petitioner was hired by the Fire Department of the Town of North Providence on October 30, 2007. Petitioner was diagnosed with cancer in his right kidney in September 2010. Later that month, he underwent surgery which removed that kidney.
Petitioner thereafter applied for a disability pension on January 14, 2011. Shortly after filing his application, "Lincourt submitted an 'Applicant's Physician's Statement for Disability' form signed by Frank Fraioli, Jr., D.O., and dated January 21, 2011." R. 20 at 326. Dr. Fraioli opined that "it is presumed that his cancer was caused by exposure during his employment as a firefighter." Id. A medical report from Dr. Vincent J. Zizza, dated December 29, 2010, stated that Petitioner's "kidney cancer could have been caused from his job." He added that Petitioner "did well" after the surgery which removed his right kidney. Id. Dr. Stephen G. McCloy prepared a medical report pursuant to a workers' compensation claim. He found that Petitioner "is actually capable of all duties," and his assertion that he should not return to employment as a firefighter "is not supported by objective physical deficits or impairments in his examination." Id. at 327.

On August 31, 2011, Petitioner was examined by Vishram B. Rege, M.D. Dr. Rege found that Petitioner's "disability appears to have occurred in the performance of his duties and is not the result of willful negligence or misconduct, or as a result of age or length of service." Id. Dr. Rege also opined that "[t]here is an 80% chance that the cancer will never recur." Significantly, he found that Petitioner is disabled because "he faces potential problems[,]" and he did not state any duties required of a firefighter that Petitioner is presently unable to perform. Id.

Petitioner was also examined by Alberto Savoretti, M.D. on June 8, 2012. He found that Petitioner "is not disabled, and given the timeline of his illness, the cancer was not work related." Id. He further concluded that "[t]here is no disability . . . the cancer was already there when [Lincourt] started working [for the Town of North Providence Fire Department], this cannot be construed or considered an occupational exposure, therefore . . . the diagnosis of renal cancer is unrelated and was pre-existing to his employment as a North Providence Firefighter." Id. Dr. Savoretti further found the Petitioner to be "physically and mentally capable and competent" and
able to “work all manner of jobs.” Id. He concluded that “[t]he threat of trauma from firefighting to his other kidney is not excessive as the kidney is well protected, and the cancer risk . . . would not be more from occupation reasons than say landscaping . . . There is not a reason not to work as a firefighter.” Id.

Raymond F. Chaquette, M.D. examined the Petitioner on November 7, 2013. Id. at 328. He also concluded that Petitioner was capable of working as a firefighter. Dr. Chaquette found specifically that the Petitioner is “in good physical condition and clearly could carry out the duties associated with being a firefighter.” Id. Noting that the Petitioner “freely admits that he has no physical disabilities that bother him at any time[,]” he concluded “from a physical point of view [Lincourt] is not disabled in any way.” Id.

William B. Finelli, Chairman of the (ERSRI) Subcommittee (Subcommittee), wrote the decision of February 6, 2014. After reviewing the evidence presented, the Subcommittee found that “Lincourt is not disabled.” Id. at 329. Additionally, it wrote, “the Subcommittee cannot find a causal relationship between Lincourt’s cancer and his job.” Id. The Subcommittee addressed the physicians who examined Petitioner. It referenced that “Dr. Chaquette noted that Lincourt ‘freely admits that he has no physical disabilities that bother him at any time.’ Likewise, Dr. Savoretti also found that Lincourt was ‘physically and mentally capable and competent’ and that ‘[h]e can work all manner of jobs.’” Id. The Subcommittee then addressed Dr. Rege and stated that Dr. Rege “indicated that [Petitioner] is disabled ‘because he faces potential problems,’ not because of any specific inability to perform his job duties . . . [and] ‘[t]here is an 80% chance that the cancer will never recur.’” Id. The Subcommittee declared that it did not accept the assertion of Petitioner “that he is disabled because of potential future problems[.]” Id. at 329-30. It also found that “he is
not presently physically or mentally incapacitated for further service such that he should be retired.” Id. at 330.

The Subcommittee accepted the conclusion of Dr. Savoretti that “the cancer was already there when [Lincourt] started working [for the Town of North Providence Fire Department] . . . [and] therefore . . . the diagnosis of renal cancer is unrelated and was pre-existing to his employment as a North Providence Firefighter.” Id. The Subcommittee cited the finding of Dr. Chaquette, who similarly determined that he could not link Petitioner’s cancer with his employment as a firefighter. Id. The Subcommittee then addressed the conclusions of Dr. Rege. Specifically, it found that Dr. Rege, while concluding that the Petitioner’s condition “may” have been caused by exposure to carcinogens in the course of his duties, “appeared to base his opinion on causation on a statutory presumption,” stating that “[t]he cancer is considered to be an Occupational cancer as defined by RIGL.” The Subcommittee found that “Dr. Fraioli also appeared to base his opinion on a presumption that the cancer was work related.” Id. It did “not find that the general laws mandate a finding that Lincourt’s disability was caused by his job duties[].” Id. It concluded that “Lincourt is not disabled, and that there is no causal relationship between his kidney cancer and his job.” Id.


On that date, the Subcommittee met and heard argument from the Petitioner. R. 32 at 443-53. Counsel for Petitioner argued that according to the Americans with Disabilities Act and Rhode Island statutes, “a person that has cancer in remission is clearly still disabled because the cancer can come back.” Id. at 445. He further argued that the decision of the Subcommittee was
erroneous because “there is a statutory presumption under the law that does cover his cancer.” Id. The Petitioner told the Subcommittee that he was disabled from being a firefighter because he cannot incur the exposure to potential carcinogens and thus risk damage to his remaining kidney. Id. at 448. It also heard from Mayor Charles Lombardi, who recommended affirmation of the earlier decision to deny the application of Petitioner. Id. at 452-53. After considering the evidence that the parties presented, the Subcommittee again recommended that Petitioner not be awarded an accidental disability pension. R. 33 at 463-68.


At the hearing, counsel for ERSRI summarized the findings of the Subcommittee and argued that its findings should be upheld. R. 41 at 519. Counsel for Petitioner again argued that “the subcommittee was incorrect because that statute [G.L. 1956 § 45-19-1] finds that cancer is caused by firefighters’ exposure to carcinogens.” Id. He further argued that even in the event that Dr. Savoretti was correct in his conclusion that Petitioner had developed cancer prior to employment with the Fire Department, the condition was likely to have been aggravated by Petitioner’s exposure to carcinogens in the course of said employment. Id. at 519-20.

Counsel for the Town of North Providence also addressed the Board. He advocated that the Board should uphold the finding of the Subcommittee because Petitioner “has no functional impairment, no disability to perform all of the ordinary and necessary functions of a firefighter.” Id. at 520. He argued that there were other potential causes for the Petitioner developing cancer, stating that “[b]oth Dr. Savoretti and Dr. Chaquette, and Dr. McCloy, who originally examined
him for the town, indicated that he has a hobby of dirt biking and he has a landscape business, and he has been subject to exposures that could well produce cancer, equally to the extent that his three-year tenure as a firefighter might have.” Id. He further argued that the Board should accept the conclusion of Dr. McCloy, who had “examined . . . [the Petitioner] in connection with his injured-on-duty claim.” Id. Specifically, he emphasized that Dr. McCloy, “in response to the question is he totally or partially disabled . . . [responded] Mr. Lincourt is not disabled. He does have a permanent scar. He does have a permanent loss of his right kidney. He invokes the cancer-presumption statute, and states that further exposure to professional fire fighting increases his risks of cancer.” Id. at 520-21. However, according to counsel for the Town of North Providence, Dr. McCloy concluded that though Petitioner “believes that he should not return to his role as a firefighter[,] . . . [t]his belief is not supported by objective physical deficits or impairments in his examination.” Id. at 521. He urged the Board to accept Dr. McCloy’s finding that the Petitioner “is actually capable of all duties.” Id.

Petitioner then offered additional testimony to the Board with respect to causation of his physical defects and limitations. He explained that “in regards to the dirt bike riding . . . I crashed on it the first time I rode it[,]” and he has not been on a dirt bike since that first time. Id. He further testified that “the landscaping company was a one day a week grass cutting thing that I did . . . when I took the job as a firefighter because I took a pay cut from my existing job, and on my days off I needed to make up that money.” Id.

The Board also heard from Mayor Lombardi. He spoke in opposition to the application. He stated that “[w]e [the Town of North Providence and the Fire Department] feel he is perfectly capable to come back to work, even if it were for light duty.” Id. at 526.
The Board voted to uphold the recommendation of the Subcommittee by a vote of 9-8. Id. at 526-27. On January 20, 2015, the Board sent Petitioner a written notification of the denial. R. 42 at 538-39.

On February 13, 2015, Petitioner filed the appeal presently before this Court. Petitioner also filed a motion to remand to the Subcommittee on March 20, 2015. This Court denied said motion to remand on July 22, 2016.

II

Standard of Review

Pursuant to § 42-35-15, the Superior Court has jurisdiction to review ERSRI decisions. The statute provides as follows:

“(1) In violation of constitutional or statutory provisions;
“(2) In excess of the statutory authority of the agency;
“(3) Made upon unlawful procedure;
“(4) Affected by other error or law;
“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Sec. 42-35-15(g).

It is well settled in Rhode Island that when our Court is reviewing an agency decision pursuant to § 42-35-15, the review of our Court is limited in scope. See Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). Thus, the Court “is confined to a determination of whether there is any legally competent evidence to support the agency’s decision.” Envtl. Sci. Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993) (citing Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)). This Court must affirm the decision of an

A court must give deference to the findings of an agency. "The law in Rhode Island is well settled that an administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency." *State v. Chuley*, 808 A.2d 1098, 1103 (R.I. 2002) (quoting *In re Lallo*, 768 A.2d 921, 926 (R.I. 2001)). However, this Court "may reverse, modify, or remand the agency’s decision if the decision is ... made upon unlawful procedure, is affected by other errors of law, [or] is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]" *R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd.*, 650 A.2d 479, 485 (R.I. 1994) (citing § 42-35-15(g) (further citation omitted)).

When reviewing the decision of an administrative agency, this Court "may not, on questions of fact, substitute its judgment for that of the agency whose action is under review." *Id.* (citing *Lemoine v. Dep’t M.H.R.H.*, 113 R.I. 285, 291, 320 A.2d 611, 614-15 (1974)). The Court "cannot substitute its judgment on the evidence even though it might be inclined to view that evidence differently than did the Board." *Id.* This Court will "reverse factual conclusions of administrative agencies only when they are completely bereft of competent evidentiary support in the record." *Sartor v. Coastal Res. Mgmt. Council*, 542 A.2d 1077, 1083 (R.I. 1988) (citing *Milardo v. Coastal Res. Mgmt. Council of R.I.*, 434 A.2d 266, 272 (R.I. 1981)).

This Court "must defer to the agency’s determinations regarding questions of fact." *Town of Burrillville v. R.I. State Labor Relations Bd.*, 921 A.2d 113, 118 (R.I. 2007) (citing *State Dep’t of Envtl. Mgmt. v. State Labor Relations Bd.*, 799 A.2d 274, 277 (R.I. 2002) (further citation omitted)). However, "questions of law—including statutory interpretation—are reviewed de

III

Analysis

Petitioner contends on appeal that the Board erred in failing to properly apply a statute enacted in 1986 that governs the determination of disability for firefighters. The Court notes that § 45-19.1-1, entitled “Cancer Benefits for Fire Fighters,” provides that employment as a firefighter entails exposure to hazards that are not typically encountered in other occupations. The Legislature specifically found:

“(1) Fire fighters are required to work in the midst of, and are subject to, smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances;
“(2) Fire fighters are continually exposed to a vast and expanding field of hazardous substances through hazardous waste sites and the transportation of those substances;
“(3) Fire fighters are constantly entering uncontrolled environments to save lives and reduce property damage and are frequently not aware of potential toxic and carcinogenic substances that they may be exposed to;
“(4) Fire fighters, unlike other workers, are often exposed simultaneously to multiple carcinogens, and the rise in occupational cancer among fire fighters can be related to the rapid proliferation of thousands of toxic substances in our every day environment; and
“(5) The onset of cancers in fire fighters can develop very slowly, usually manifesting themselves from five (5) years to forty (40) years after exposure to the cancer-causing agent.”

Petitioner contends that this finding of increased exposure to carcinogens by firefighters, in conjunction with the language in § 45-19.1-3—providing that a firefighter is eligible “to receive an occupational cancer disability [pension]” if he or she “is unable to perform his or her duties in the fire department by reason of a disabling occupational cancer which develops or manifests
itself during a period while the fire fighter is in the service of the department”—compels the conclusion that Petitioner is entitled to a disability pension.

Here, the Subcommittee concluded that while the Petitioner was diagnosed with kidney cancer while employed as a firefighter, there was no “causal relationship between Lincourt’s cancer and his job” as a firefighter. R. 20 at 329. The Subcommittee noted “that the relevant statute, R.I.G.L. § 45-21.2-9, [entitled Retirement for accidental disability,] requires a causal nexus between the allegedly disabling occupational cancer[] and the claimant’s actual job[,]” Id. Furthermore, in order to prevail on his claim, Petitioner must establish “that the cancer aris[es] out of employment as a firefighter. The evidence does not support such a causal relationship.” Id. (internal quotation marks omitted).

Petitioner seemingly argues that when a firefighter is diagnosed with a cancer that could have been caused by occupational exposure to carcinogens, there is a presumption that the cancer is “occupational.” The Town of North Providence participates in the ERSRI system and therefore is subject to the statute Petitioner is seeking to invoke. Sec. 45-19.1-1 entitled “Cancer Benefits for Fire Fighters.” However, when our Legislature has sought to create a presumption, it has done so explicitly. See G.L. 1956 § 9-1-50(a) (“Failure to make payment [of insurance claim] within thirty (30) days shall raise a presumption that failure to do so was a willful and wanton disregard for the rights of the claimant.”); G.L. 1956 § 11-9-1.2 (“[When a] physician is of the opinion, based upon a reasonable medical certainty, that any person depicted in it is under the age of eighteen (18) years, then there shall be created a rebuttable presumption of that fact.”); G.L. 1956 § 31-51-5(a) (“The registered owner of a motor vehicle shall not operate or allow the motor vehicle to be operated in violation of this chapter. There shall be a rebuttable presumption
that the registered owner of the vehicle that is photographed pursuant to this chapter was operating the vehicle.

Conversely, the Legislature did not prescribe a presumption that a firefighter diagnosed with cancer shall be presumed to suffer "occupational cancer" for purposes of §§ 45-19.1-1, et seq. In fact, § 45-19.1-2(d) defines "Occupational cancer" as "cancer arising out of his or her employment as a fire fighter, due to injury from exposures to smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances while in the performance of active duty in the fire department." Application of the plain meaning of the statute is that "cancer arising out of" employment denotes that the Legislature intended to provide a remedy for firefighters diagnosed with cancer that was in some way caused by occupational hazards. See Unistrut Corp. v. State Dep't of Labor and Training, 922 A.2d 93, 98 (R.I. 2007) (citing Moore v. Ballard, 914 A.2d 487, 490 (R.I. 2007) ("When a statute is clear and unambiguous we are bound to ascribe the plain and ordinary meaning of the words of the statute and our inquiry is at an end."). "It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." City of E. Providence v. Int'l Ass'n of Firefighters Local 850, 982 A.2d 1281, 1288 (R.I. 2009) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996) (further citation omitted)).

Petitioner cites City of E. Providence for the proposition that "there can be no question but that that statute is intended to provide a remedy to firefighters who suffers [sic] from cancer that arises from their employment." See Pl.'s Mem. at 12 (citing City of E. Providence, 982 A.2d at 1288). Clearly, this statute was enacted by the Legislature in order to provide a remedy for any firefighter "who suffers from cancer that arises from their employment." (Emphasis added.)
As noted above, our Legislature has chosen, in the course of construction of various statutes, to include language implying a presumption. This Court finds no such language in §§ 45-19.1-1 et seq. meaning that any firefighter diagnosed with cancer is presumed to be suffering from “occupational cancer.”

When exercising jurisdiction pursuant to § 42-35-15, this Court has limited review of an agency decision. The Court “must uphold the agency’s conclusions when they are supported by any legally competent evidence in the record.” Rocha v. State Pub. Utils. Comm’n, 694 A.2d 722, 725 (R.I. 1997) (further citations omitted). In the within matter, the Board reviewed the testimony of several physicians, each of whom examined the Petitioner. While the Board did not hear testimony from the physicians, it reviewed the findings of the Subcommittee and upheld the Subcommittee’s judgment that Petitioner did not demonstrate a causal connection between the cancer diagnosis and the occupational hazards of his work as a firefighter.¹

There is ample evidence in the record to support the findings of the Subcommittee, and therefore, the Board was not erroneous in upholding its findings. See R.I. Pub. Telecomms. Auth., 650 A.2d at 485 (citing § 42-35-15(g) (A court may reverse a final decision of an agency where the decision is “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]”)). The Subcommittee extensively addressed in its decision at the hearing that took place on February 6, 2014 the opinions offered by physicians who treated Petitioner. It addressed the opinion of Dr. Fraioli, who stated that “it is presumed that his cancer was caused by exposure during his employment as a firefighter.” R. 20 at 326. The Subcommittee found that Dr.

¹ The Court notes that the Subcommittee also did not hear testimony from the treating physicians and, like the Board, it had access to their medical reports. Therefore, the Committee was not required to give special deference to the Subcommittee as the original factfinder. Cf. Durfee, 621 A.2d at 208 (“the further away from the mouth of the funnel that an administrative official is when he or she evaluates the adjudicative process, the more deference should be owed to the factfinder”).
Fraioli “appeared to base his opinion on a presumption that the cancer was work related.” Id. at 330. The Subcommittee also noted the opinion of Dr. Rege, who examined the Petitioner on August 31, 2011. He stated that the Petitioner’s “disability appears to have occurred in the performance of his duties[.]” Id. at 327. The Subcommittee found that Dr. Rege “appeared to base his opinion on causation on a statutory presumption,” as Dr. Rege stated that Petitioner’s “cancer is considered to be an Occupational cancer as defined by R.I.G.L.” Id. at 330.

Moreover, the Subcommittee found that the statute did not mandate a presumption that a firefighter diagnosed with cancer was afflicted as a result of occupational hazards. It is “‘well settled that an administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency.’” Chuley, 808 A.2d at 1103 (quoting In re Lallo, 768 A.2d at 926). Therefore, the Subcommittee’s weighing of the medical opinions proffered by different physicians is afforded considerable deference.

One week after Petitioner filed his application, Dr. Fraioli, the Petitioner’s treating physician, wrote that “it is presumed that his cancer was caused by exposure during his employment as a firefighter.” R. 20 at 326. Dr. Savoretti, who examined the Petitioner on June 8, 2012, found that “the cancer was already there when [Lincourt] started working [for the Town of North Providence Fire Department[,]” Id. at 330. He concluded that “this [cancer] cannot be construed or considered an occupational exposure[,]” Id. Dr. Chaquette, who examined the Petitioner on November 7, 2013, told the Subcommittee that “[i]n regards to the issue of his kidney cancer being associated with his employment as a firefighter . . . to exposures of various sorts of the last several years one could not prove or disprove this fact with . . . certainty.” Id. While “a treating physician’s opinion is entitled to great weight, it does not automatically control or obviate the need to evaluate the record as [a] whole.” Hogan v. Apfel, 239 F.3d 958, 961 (8th
Cir. 2001) (citing Prosch v. Apfel, 201 F.3d 1010, 1013 (8th Cir. 2000)). The finder of fact “may discount or disregard such an opinion if other medical assessments are supported by superior medical evidence[.]” Id. Here, the Subcommittee (and later the Board) weighed the competing medical evidence and concluded that the Petitioner did not meet his burden.

Petitioner also contends that under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(4)(D)—a section explaining “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active”—as well as under the comparable Rhode Island statute, § 42-87-1(1)(i-iv), he is disabled and thus entitled to receive an accidental disability pension. Petitioner cites Hoffman v. Carefirst of Fort Wayne Inc., 737 F. Supp. 2d 976 (N.D. Ind. 2010) for the proposition that kidney cancer, even if the cancer is in remission, is a disability pursuant to the ADA (and therefore also under the comparable above-mentioned Rhode Island statute).

Petitioner’s reliance on Hoffman is misplaced. The Hoffman case merely held that renal cancer, even if in remission, is a disability covered by the ADA as it applies to a plaintiff claiming that he suffered discrimination based on a disability. Whether the Petitioner in the within case is entitled to an accidental disability pension is not governed by the ADA, nor is such a determination governed by the comparable Rhode Island statute, §§ 42-87-1 et seq. The aforementioned statutes prohibit discrimination on the basis of a disability. Courts have held that §§ 42-87-1 et seq. is applicable to a plaintiff alleging “discrimination and retaliation in violation of the Rhode Island Civil Rights of People with Disabilities Act[.]” Caron v. Fedex Freight, Inc., 2016 WL 6537533, at *2 (D.R.I. Oct. 3, 2016). However, when a plaintiff is seeking an accidental disability pension, courts will apply the statute governing that category of workers. For example, a plaintiff employed by the state seeking a pension based on an accidental

Here, this Court finds that the ADA (and the comparable Rhode Island statute) are not determinative in evaluating whether Petitioner is “disabled” for purposes of his application for a disability pension. As in the cases above, this Court will examine whether the finder of fact properly applied the statute that governs the class of employees applicable to the Petitioner; in this case, §§ 45-19.1-1, et seq. entitled “Cancer Benefits for Fire Fighters.”

When reviewing an agency decision, this Court “must uphold the agency’s conclusions when they are supported by legally competent evidence on the record.” Interstate Navigation Co. v. Div. of Pub. Utils., 824 A.2d 1282, 1286 (R.I. 2003) (citing Rocha, 694 A.2d at 725). This is true “even in situations in which the court, after examining the certified record, might be inclined to view the evidence differently and draw different inferences from those of the agency below.” Barrington Sch. Comm., 608 A.2d at 1138 (citing Cahoone v. Bd. of Review of the Dep’t of Emp’t Sec., 104 R.I. 503, 506, 246 A.2d 213, 214-15 (1968)). Here the Subcommittee reviewed the medical evidence presented in support of the Petitioner’s contention that he was disabled due to occupational cancer, and they considered the evidence presented in opposition. It concluded that the Petitioner did not prove that he was disabled, and it concluded that he did not prove that his diagnosis of kidney cancer was the result of his employment as a firefighter. See Ladd v. Barnhart, 2005 WL 1657106, at
*2 (W.D. Va. 2005) ("[In] the not uncommon situation of conflicting medical evidence . . . [t]he trier of fact has the duty to resolve that conflict.") (quoting Richardson v. Perales, 402 U.S. 389, 399 (1971)). Its findings, and the subsequent decision of the Board upholding its findings, were supported by the evidence in the record, and were not "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]" R.I. Pub. Telecomms. Auth., 650 A.2d at 485 (citing § 42-35-15(g)). This Court "must uphold the agency's conclusions when they are supported by any legally competent evidence in the record." Rocha, 694 A.2d at 725 (further citations omitted). Here, the findings of the Subcommittee and the Board are supported by sufficient legally competent evidence such that this Court must uphold their findings.

IV

Conclusion

This Court has reviewed the entire record before it. A thorough review of the decision of the Board reveals substantial evidence to support the Board's conclusion that Petitioner was not eligible for an accidental disability pension at the time he ended his employment with the North Providence Fire Department. The Board's decision on said application was thus not in excess of its statutory authority. The Court therefore finds that the decision of the Board to deny the application is supported by the reliable, probative, and substantial evidence on the record, and is not an abuse of discretion, clearly erroneous, or affected by error of law. Substantial rights of the Petitioner have not been prejudiced. Accordingly, the January 20, 2015 decision of the Board is affirmed. Counsel shall prepare appropriate judgment for entry.
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<td>JUSTICE/MAGISTRATE:</td>
<td>Taft-Carter, J.</td>
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<td>For Plaintiff:</td>
<td>Edward C. Roy, Jr., Esq.</td>
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<td>For Defendant:</td>
<td>Michael P. Robinson, Esq.</td>
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Supreme Court

No. 2014-88
(13-92 S)

Mark Mancini : 

v. : 

City of Providence et al. : 

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Supreme Court

No. 2014-88
(13-92 S)

Mark Mancini :  
v. : 
City of Providence et al. :

Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

OPINION

Justice Robinson, for the Court. This case comes before us pursuant to a September 26, 2013 order of the United States District Court for the District of Rhode Island certifying a question to this Court in accordance with Article I, Rule 6(a) of the Supreme Court Rules of Appellate Procedure. The certified question reads as follows:

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1 Article I, Rule 6(a) of the Supreme Court Rules of Appellate Procedure provides in pertinent part as follows:

“This Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this Court.”

The authorization which is accorded by the above-quoted rule is discretionary. See In re Tetreault, 11 A.3d 635, 639 (R.I. 2011) (citing Jefferson v. Moran, 479 A.2d 734, 738 (R.I. 1984)). On April 16, 2014, we issued an order reflecting our decision to exercise that discretion in the instant case and to accept the certified question for determination.
"Does Section 28-5-7(6) of the Rhode Island Fair Employment Practices Act, R.I. Gen. Laws § 28-5-1 et seq. (‘FEPA’), provide for the individual liability of an employee of a defendant employer and, if so, under what circumstances?"

For the reasons set forth in this opinion, we answer the certified question in the negative—G.L. 1956 § 28-5-7(6) does not provide for the individual liability of an employee of a defendant employer.

I

Facts and Travel

It is not necessary for us to delve too deeply into the factual background of this case due to the fact that we are called upon to answer only a narrow question of law. It suffices to say that there is an action pending in federal court in which plaintiff, Sergeant Mark Mancini, alleges that he was illegally denied a promotion to the position of Lieutenant in the Providence Police Department. According to the Certification Order, the eleven-count complaint involves claims of employment and disability discrimination against the City of Providence and Hugh Clements, Jr., the Chief of Police of the Providence Police Department. At issue in the instant proceeding is plaintiff's count claiming that Chief Clements is liable, in his individual capacity, for the City's failure to have promoted plaintiff in alleged violation of FEPA § 28-5-7(6). In the federal action, Chief Clements moved to dismiss the count alleging that he had violated § 28-5-7(6) on the basis that, in his view, that statutory section does not provide for individual liability. The District Court subsequently certified to this Court the question with which we are presently grappling. Our role in this case is limited to answering the legal question certified to us.
II

Standard of Review

Our jurisprudence is clear that “certified questions are questions of law and are reviewed de novo by this Court.” In re Tetreault, 11 A.3d 635, 639 (R.I. 2011); see also Western Reserve Life Assurance Co. of Ohio v. ADM Associates, LLC, 116 A.3d 794, 798 (R.I. 2015). Moreover, as we have often stated, this Court adheres to the de novo standard when reviewing issues of statutory construction. DeMarco v. Travelers Insurance Co., 26 A.3d 585, 616 (R.I. 2011); see also State v. LaRoche, 925 A.2d 885, 887 (R.I. 2007).

III

Analysis

A

Individual Liability

In the instant case, we are called on to determine whether or not § 28-5-7(6) provides for individual liability. That statutory section provides as follows:

“It shall be an unlawful employment practice * * * [f]or any person, whether or not an employer, employment agency, labor organization, or employee, to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful employment practice, or to obstruct or prevent any person from complying with the provisions of this chapter or any order issued pursuant to this chapter, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful employment practice[.]”

Sergeant Mancini argues before this Court that what he considers to be the plain and unambiguous language of § 28-5-7(6) provides for individual liability. He points out to the Court that Connecticut, Massachusetts, and New York have anti-discrimination statutes with aiding and abetting language and that some courts applying that language have, in his words,
“consistently held that individual employees of the employer may be held liable for unlawful employment practices;” he urges the Court to follow the cited judicial interpretations of Connecticut, Massachusetts, and New York law. See Ping Zhao v. Bay Path College, 982 F. Supp. 2d 104 (D. Mass. 2013); Maher v. Alliance Mortgage Banking Corp., 650 F. Supp. 2d 249 (E.D.N.Y. 2009); Farrar v. Town of Stratford, 537 F. Supp. 2d 332 (D. Conn. 2008); Bogdahn v. Hamilton Standard Space Systems International Inc., 741 A.2d 1003 (Conn. Super. Ct. 1999); Lopez v. Commonwealth, 978 N.E.2d 67 (Mass. 2012). He further directs this Court’s attention to the fact that FEPA calls for a broad and liberal construction in order to effectuate its purpose of “safeguard[ing]” the rights of employees “to obtain and hold employment without * * * discrimination.” Section 28-5-3.

Disagreeing with the statutory analysis proposed by Sergeant Mancini, Chief Clements contends that § 28-5-7(6) is ambiguous when taken in the context of the FEPA statute as a whole; and he encourages this Court to follow the reasoning of the Supreme Courts of Alaska, California, and Minnesota and hold that § 28-5-7(6) does not provide for individual liability. See Mills v. Hankla, 297 P.3d 158 (Alaska 2013); Reno v. Baird, 957 P.2d 1333 (Cal. 1998); Rasmussen v. Two Harbors Fish Co., 832 N.W.2d 790 (Minn. 2013).²

We enter upon this important exercise in legal analysis by recalling the venerable principle of statutory construction that, in construing a statute, “our ultimate goal is to give effect to the General Assembly’s intent.” DeMarco, 26 A.3d at 616 (internal quotation marks omitted). In furtherance of that goal, “when the language of a statute is clear and unambiguous, [this

² We note and appreciate the additional legal submissions, in the form of amicus curiae briefs, which this Court has received from the Attorney General of the State of Rhode Island and the Rhode Island Commission for Human Rights. In addition, we acknowledge and express our appreciation for the joint amicus curiae brief filed by the Rhode Island Association for Justice and the American Civil Liberties Union of Rhode Island.
Court] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” LaRoche, 925 A.2d at 887 (internal quotation marks omitted); see also DeMarco, 26 A.3d at 616. However, “[t]he plain meaning approach * * * is not the equivalent of myopic literalism, and it is entirely proper for us to look to the sense and meaning fairly deducible from the context.” National Refrigeration, Inc. v. Capital Properties, Inc., 88 A.3d 1150, 1156 (R.I. 2014) (internal quotation marks omitted); see Raiche v. Scott, 101 A.3d 1244, 1248 (R.I. 2014); see also Reed Dickerson, The Interpretation and Application of Statutes 111 n.24 (1975) (“[A] word in isolation (i.e., without context) begins with a very wide area of meaning, for it may occur in many hundreds of situations and may be used as a label for scores of objects; but by means of the practical and linguistic contexts in which it is used we can whittle it down to precisely that subarea of meaning which it must have in any specific utterance.”) (internal quotation marks omitted). When confronted with an ambiguous statute, we must look to the entire statutory scheme to deduce the legislative intent; our interpretive gaze should not be restricted to a mere “isolated provision,” In re Harrison, 992 A.2d 990, 994 (R.I. 2010) (internal quotation marks omitted); and “under no circumstances will [we] construe a statute to reach an absurd result.” National Refrigeration, Inc., 88 A.3d at 1156 (internal quotation marks omitted).

In our opinion, it is evident upon reading § 28-5-7(6) that that statutory section is ambiguous with respect to whether or not it imposes individual liability. The fact that courts within Rhode Island have come to opposite conclusions with respect to whether or not to impose individual liability under § 28-5-7(6)\(^3\) and the fact that courts around the country have come to

\(^3\) Although the question of whether G.L. 1956 § 28-5-7(6) provides for individual liability is a question of first impression for this Court, we are aware that it has been addressed by both the Rhode Island Superior Court and the United States District Court for the District of Rhode Island. In Evans v. Rhode Island Department of Business Regulation, No. 01-1122, 2004 WL 2075132 at *3 (R.I. Super. Ct. Aug. 21, 2004), a justice of the Superior Court held that an
opposing conclusions when interpreting state statutes with identical or similar language to that of § 28-5-7(6) bolster our confidence in our conclusion that the statutory language at issue is indeed ambiguous.

As such, while the statute before us does make reference to liability of "any person, whether or not an *** employee," that language should not be viewed in isolation. See In re Harrison, 992 A.2d at 994. The rest of the statutory section imposes liability for aiding and abetting employment discrimination, preventing compliance with FEPA, and/or attempting to commit an unlawful employment practice. In the instant case, the alleged unlawful employment practice involved a decision of Chief Clements which negatively affected Sergeant Mancini's ultimate chances for promotion. It was solely the act of Chief Clements which was the alleged unfair employment practice at issue in the instant case. Accordingly, for § 28-5-7(6) to constitute a rational basis for the imposition of individual liability on the Chief, the finder of fact

individual could be personally liable for "conduct amounting to FEPA violations." Conversely, seven years later, in Brinhurst v. Cardi's Department Store, Inc., No. 10-1025, 2011 WL 9379273 at *3 (R.I. Super. Ct. Dec. 30, 2011), another justice of the Superior Court chose not to vary from a previous ruling by another justice in the still-pending case which had dismissed charges brought under FEPA against an individual defendant.


Sergeant Mancini contends that this Court should follow the Ping Zhao, Maher, and Bogdahn line of cases imposing individual liability. However, after exhaustive review of the cases and much reflection, we do not find their reasoning persuasive.
would necessarily have to determine that he aided and abetted himself. In our judgment, such an interpretation would contort the statutory language to an extent that would not be linguistically or jurisprudentially acceptable. We recognize that at least one trial court has interpreted a similarly worded statute⁵ as allowing for a finding of liability on the basis of the employee at issue having aided and abetted himself. See Maher, 650 F. Supp. 2d at 261. However, we are simply unable to conclude, after carefully scrutinizing the statutory language at issue, that such an interpretation is reasonable or reflective of what we perceive to have been the legislative intent. To apply the language of § 28-5-7(6) against an employee who was the sole perpetrator with respect to the alleged unlawful employment practice “would create a strange and confusing circularity where the person who has directly perpetrated the harassment only becomes liable through the employer whose liability in turn hinges on the conduct of the direct perpetrator.” Rasmussen, 832 N.W.2d at 801 (internal quotation marks omitted). We decline to construe a statute to reach a result that we consider to be incompatible with logic and conventional English usage. See Ryan v. City of Providence, 11 A.3d 68, 76 (R.I. 2011) (“Such an illogical interpretation is not permitted by our rules of statutory construction.”); see also National Refrigeration, Inc., 88 A.3d at 1156.⁶

⁵ Under N.Y. Exec. Law § 296(6) (McKinney 2016), it is an “unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.”

⁶ We note, additionally, that several trial courts have interpreted language similar to that of § 28-5-7(6) to allow for individual liability but only as a derivative claim—the defendant must have “committed a wholly individual and distinct wrong *** separate and distinct from the claim in main ***.” Ping Zhao, 982 F. Supp. 2d at 115 (internal quotation marks omitted); see Bolick v. Alea Group Holdings, Ltd., 278 F. Supp. 2d 278, 282 (D. Conn. 2003); see also Fisher v. Town of Orange, 885 F. Supp. 2d 468, 476-77 (D. Mass. 2012). It is our decided opinion that such an interpretation is untenable. If the General Assembly had intended such a result, it is our view that it would not have used such ambiguous language to achieve that end.
We recognize that the General Assembly has expressed its desire that FEPA be “construed liberally.” Section 28-5-38(a). But such a call for a liberal construction should not be understood as an authorization for the courts to “[i]n the face of the structure of the statute;” we decline to construe a statute to reach an incongruous end as a result of a misguided view that a liberal construction mandate calls for the wholesale abandonment of other venerable principles of statutory construction. U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995); see State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005) (“[T]his Court will not broaden statutory provisions by judicial interpretation unless such interpretation is necessary and appropriate in carrying out the clear intent or defining the terms of the statute.”) (internal quotation marks omitted); Simeone v. Charron, 762 A.2d 442, 448 (R.I. 2000); see also Bandoni v. State, 715 A.2d 580, 596 (R.I. 1998) (“[T]he function of adjusting remedies to rights is a legislative responsibility rather than a judicial task * *.”).

It is our view that, if the General Assembly intended to authorize the imposition of individual liability, it would have done so by using language far clearer than that employed in § 28-5-7(6). See Rasmussen, 832 N.W.2d at 801 (“If the Legislature had intended to create liability for any individual employee who engaged in an unfair employment practice in the employment setting, it could have done so without resorting to a theory of aiding and abetting liability.”); see generally Franconia Associates v. United States, 536 U.S. 129, 141 (2002) (“A waiver of the sovereign immunity of the United States cannot be implied but must be unequivocally expressed.”) (emphasis added) (internal quotation marks omitted); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985) (stating that “Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself”)

- 8 -
We fully concur with the eloquently expressed reasoning of the Supreme Court of Alaska in reaching a conclusion about the import of statutory language very similar to that of § 28-5-7(6):

“We do not believe the legislature intended to use the aiding and abetting provision to hold employees directly liable for their discrimination. Given the otherwise clear terms of the statute, we will not assume that on the critically important issue of individual liability the legislature decided not to use similarly clear language. We decline to hold that the legislature ‘intended to accomplish a result so significant by a method so abstruse.’” Mills, 297 P.3d at 172 (emphasis added) (quoting Reno, 957 P.2d at 1342).

At the end of the day, after closely analyzing the language of § 28-5-7(6), it is our unequivocal conclusion that said statute does not authorize the imposition of individual liability.

Our conclusion is buttressed by the fact that § 28-5-6(8)(i), as amended by P.L. 2013, ch. 413, § 1, defines “[e]mployer” to include “any person in this state employing four (4) or more individuals[;]” in our view, it would not be logical to conclude, without far more textual evidence, that the General Assembly intended to exempt employers with less than four employees from potential liability but simultaneously intended to authorize the imposition of liability on individuals under the ambiguous language of § 28-5-7(6).

We base our response to the certified question squarely on traditional principles of statutory construction. However, we note that allowing for the possibility of individual liability would have a predictably chilling effect on the discretionary management decisions of

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7 We are aware that the United States Supreme Court’s decision in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985), was superseded by statute, as recognized in Lane v. Pena, 518 U.S. 187, 198 (1996). However, it goes without saying that that fact does not alter the viability of the hermeneutic approach to statutory interpretation employed by the Supreme Court in Atascadero State Hospital, which we emulate in this opinion.

8 Alaska Stat. Ann. § 18.80.260 (West 2016) reads as follows: “It is unlawful for a person to aid, abet, incite, compel, or coerce the doing of an act forbidden under this chapter or to attempt to do so.”
supervisory employees—since such a regime would, in all likelihood, result in supervisors frequently tending to make employment decisions based on their apprehensiveness as to the possibility of suit rather than on what they deem to be in the best interest of the employer. It is our view that, as a matter of public policy, a supervisor should not have to be concerned about keeping his or her house or car, or having enough wherewithal to pay for the education of his or her children when deciding, for example, between two employees who are candidates for a promotion. That is especially true because, if the supervisor makes such a decision for unlawful reasons, the individual aggrieved has recourse against the employer under FEPA and therefore has a means to remedy the harm done. We further note that imposing individual liability would create a substantial question, in the case of a collective decision, as to which individual might be liable. Also, the remedies provided by FEPA include the issuance of a cease-and-desist order, hiring, reinstatement, upgrading of employees with or without back pay, and admission or restoration to union membership. Section 28-5-24. It is clear to us that those statutory remedies more clearly relate to the employer as such rather than to an individual. See Rhode Island Board of Governors for Higher Education v. Newman, 688 A.2d 1300, 1302 (R.I. 1997) (stating that, in conducting statutory analysis, a court should “first examine the statute in its entirety and then the individual provisions in the context of the whole, not as if each provision were independent of the whole”).

The Supreme Court of California took into account many of the just-referenced concerns in holding that the California Fair Employment and Housing Act did not provide for individual liability. Reno, 957 P.2d at 1347. After carefully parsing that court’s reasoning, we find its opinion especially convincing. The court in Reno noted that “[m]any of the federal cases which found no personal liability against individual supervisory employees based their decisions in part
on the incongruity that would exist if small employers were exempt from liability while individual nonemployer supervisors were at risk of personal liability.” Id. at 1339 (quoting Janken v. GM Hughes Electronics, 53 Cal. Rptr. 2d 741, 751 (Cal. Ct. App. 1996)). The Supreme Court of California likewise found it “incongruous” to think that the legislature in California would protect employers with fewer than five employees from the burden of litigating discrimination claims but simultaneously intended to impose the possibility of liability on individual persons who are not employers at all. Id. at 1340. In discussing further factors weighing in favor of its conclusion that the California statute in question did not impose individual liability, the Reno court made the following observations that strike us as being especially perceptive and telling:

“[T]o submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties ***.

“*** [I]t is manifest that if every personnel manager risked losing his or her home, retirement savings, hope of children’s college education, etc., whenever he or she made a personnel management decision, management of industrial enterprises and other economic organizations would be seriously affected.

“*** [S]upervisory employee[s] [would be coerced into] not [making] the optimum lawful decision for the employer. Instead, the supervisory employee would be pressed to make whatever decision was least likely to lead to a claim of discrimination against the supervisory employee personally, or likely to lead only to that discrimination claim which could most easily be defended. The employee would thus be placed in the position of choosing between loyalty to the employer’s lawful interests at severe risk to his or her own interests and family, versus abandoning the employer’s lawful interest and protecting his or her own personal interests.” Id. at 1340, 1341 (internal quotation marks omitted).
Finally, in addressing aiding and abetting language similar to that contained in § 28-5-7(6), the California Supreme Court found it linguistically questionable whether an employee who exercises personnel management authority is aiding and abetting his or her employer: "[T]he stilted and unusual nature of such a usage alone casts doubt on [a construction imposing individual liability]." Reno, 957 P.2d at 1343. The California Supreme Court held that, if the legislature intended to provide for individual liability, it "would have done so by language more direct and less susceptible to doubt." Id. We are fully in accord with, and find applicable to our situation, the jurisprudentially sound conclusion reached by the California Supreme Court: if the General Assembly intended to impose individual liability under FEPA, it could and would readily have done so without resorting to the markedly unclear and ambiguous language contained in § 28-5-7(6). We do not believe that the General Assembly would mandate so far-reaching a result by speaking in so veiled and cryptic a manner.

Accordingly, after extensive review of the relevant statute and considerable reflection, we answer the certified question in the negative—§ 28-5-7(6) does not provide for the individual liability of an employee of a defendant employer.  

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9 California Gov't Code § 12940(i) (West 2016) states that it is an unlawful employment practice, "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

10 While we have based our response to the certified question on our own jurisprudence and principles of statutory construction, we note with great interest that the United States Court of Appeals for the First Circuit has reached a decision that is quite comparable to the instant decision in its construction of Title VII (42 U.S.C. § 2000e et seq.). See Fantini v. Salem State College, 557 F.3d 22, 28 (1st Cir. 2009). In construing our own employment discrimination statute, we have often looked for guidance to federal jurisprudence. See, e.g., Weeks v. 735 Putnam Pike Operations, LLC, 85 A.3d 1147, 1156 n.11 (R.I. 2014). And we are pleased to note that our reasoning with respect to the instant case contains similarities to the reasoning of the First Circuit with respect to the federal statute.
B

Deference to Agency Interpretation

The Rhode Island Commission for Human Rights (RICHr) points out, in its amicus curiae brief, that it is the administrative agency to which has been confided a significant role with respect to the administration and enforcement of FEPA and that it has “a long history of holding individual non-employer respondents liable for aiding and abetting discrimination.” The agency urges us to give deference to its reading of FEPA. However, deferential consideration of the approach of RICHr with respect to the issue of individual liability does not alter our ultimate legal conclusion under the particular circumstances of the instant case.

We are well aware that this Court has stated that, “[i]f a statute’s requirements are unclear or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference as long as that construction is not clearly erroneous or unauthorized.” Duffy v. Powell, 18 A.3d 487, 490 (R.I. 2011) (quoting State v. Swindell, 895 A.2d 100, 105 (R.I. 2006)); see also Labor Ready Northeast, Inc. v. McConaghy, 849 A.2d 340, 345 (R.I. 2004); Pawtucket Power Associates Limited Partnership v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993); Berkshire Cablevision of Rhode Island, Inc. v. Burke, 488 A.2d 676, 679 (R.I. 1985).

However, it should not be forgotten that we have also expressly stated that an agency’s interpretation is “not controlling” and, further, that “regardless of * * * deference due, this Court always has the final say in construing a statute.” In re Proposed Town of New Shoreham Project, 25 A.3d 482, 506 (R.I. 2011); see also Berkshire Cablevision of Rhode Island, Inc., 488 A.2d at 679. We certainly have never suggested that we owe any administrative agency’s interpretation blind obeisance; rather, the “true measure of a court’s willingness to defer to an
agency's interpretation of a statute ‘depends, in the last analysis, on the persuasiveness of the interpretation, given all the attendant circumstances.’” Unistrut Corp. v. State of Rhode Island Department of Labor and Training, 922 A.2d 93, 101 (R.I. 2007) (quoting United States v. 29 Cartons of * * * an Article of Food, 987 F.2d 33, 38 (1st Cir. 1993)). In the instant case, we are confronted with widely divergent opinions from other jurisdictions as well as from courts within this state.\textsuperscript{11} In addition, rather than being confronted with a fact-intensive issue or an issue of a technical nature, we are in this case considering a pure question of law, which does not require special expertise beyond what the members of this Court possess. See Arnold v. Rhode Island Department of Labor and Training Board of Review, 822 A.2d 164, 167 (R.I. 2003) (stating, in the context of an appeal from a decision of an administrative agency, that this Court is “free * * * to conduct a de novo review of determinations of law made by an agency”); see also Rossi v. Employees' Retirement System, 895 A.2d 106, 110 (R.I. 2006). Accordingly, under the circumstances of this case, any deference due to RICHR’s interpretation of § 28-5-7(6) simply does not overcome our conviction that, if the General Assembly intended § 28-5-7(6) to provide for individual liability, it would not have used language so abstruse to accomplish its aim.

\textbf{IV}

\textbf{Conclusion}

For the reasons set forth in this opinion, we answer the question certified to us in the negative—§ 28-5-7(6) does \textbf{not} provide for the individual liability of an employee of a defendant employer. The papers in this case may be remanded to the United States District Court for the District of Rhode Island for further proceedings.

\textsuperscript{11} See footnotes 3 and 4, supra.
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June 23, 2017

Supreme Court

(PC 04-6001)

Matthieu W. Yangambi : 
v. : 
Providence School Board et al. :

NOTICE: This opinion is subject to formal revision before publication in the Rhode Island Reporter. Readers are requested to notify the Opinion Analyst, Supreme Court of Rhode Island, 250 Benefit Street, Providence, Rhode Island 02903, at Telephone 222-3258 of any typographical or other formal errors in order that corrections may be made before the opinion is published.
Supreme Court

(PC 04-6001)
Dissent begins on Page 32)

Matthieu W. Yangambi : 

v. : 

Providence School Board et al. : 

Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

OPINION

Justice Goldberg, for the Court. The parties in this case are before the Supreme Court on cross-appeals from a Superior Court judgment following a jury verdict in favor of the plaintiff, Matthieu W. Yangambi (plaintiff or Dr. Yangambi), on a single claim of employment discrimination based on national origin. The defendants, the Providence School Board and the City of Providence (Providence or defendants), have challenged the Superior Court justice’s jury instructions on several grounds and argue that the Superior Court justice: (1) applied an incorrect law concerning evidentiary presumptions in an employment discrimination case; (2) improperly weighed the evidence; and (3) invaded the province of the jury. The defendants also contend that the Superior Court justice erred when she vacated the jury’s finding that the plaintiff failed to mitigate his damages. The plaintiff’s cross-appeal arises from the denial of a motion for judgment as a matter of law on a separate count in the complaint that also alleged employment discrimination. The plaintiff contends that the defendants failed to satisfy their burden of production, they did not articulate a nondiscriminatory reason for the adverse employment decision, and therefore, the plaintiff was entitled to judgment as a matter of law. For the reasons
discussed herein, all appeals are denied and dismissed, and the judgment of the Superior Court is affirmed.

Facts and Travel

Doctor Yangambi, who is of African descent, immigrated to this country from the Democratic Republic of the Congo (the Congo) and, the evidence disclosed, speaks English with a pronounced French accent. He graduated with a Bachelor’s degree in biomedical sciences from the University of Kinshasa in the Congo. He was a full-time high school teacher in the Congo for two years and also taught high school science part-time in Gabon, a neighboring country, for three years. While in Gabon, Dr. Yangambi also worked in a supervisory capacity at a nephrology department for ten years, working with nursing students as they transitioned from academia to practice. Doctor Yangambi immigrated to the United States in February 1990.

In 1992, Dr. Yangambi began his teaching career with Providence as a substitute physics teacher at Hope High School.\(^1\) In 1993, he was hired as a full-time biology and physiology teacher at Mount Pleasant High School (Mount Pleasant), where he currently is employed. In 1998, Dr. Yangambi received his Master’s degree in administration from Providence College and his certification to be a middle or high school principal. In 2006, he earned a doctorate in educational leadership from Johnson & Wales University.

During the term of his employment, Dr. Yangambi applied for approximately forty\(^2\) positions within the Providence School Department (the Department), but he was rejected every time. In 2003, Dr. Yangambi filed a charge of discrimination with the Rhode Island Commission for Human Rights (the commission), claiming that Providence had failed to promote him based

\(^1\) Doctor Yangambi received his certification from Providence College to teach middle and high school biology, core sciences, and general science in January 1993.

\(^2\) Doctor Yangambi was permitted to present evidence on ten of these positions.
on his national origin. On October 7, 2004, the commission issued a right to sue notice; and, on November 5, 2004, Dr. Yangambi filed an employment discrimination suit, charging that Providence violated the Fair Employment Practices Act (FEPA) and the Rhode Island Civil Rights Act (Civil Rights Act) by failing to promote him to numerous administrative positions based on his national origin. In November 2007, Dr. Yangambi filed an amended complaint, averring that Providence had again failed to promote him based not only on his national origin,\(^3\) but also in retaliation for his claims of employment discrimination. The case was tried before a jury in March and April of 2014.\(^4\)

This appeal is confined to two of the positions that were not awarded to Dr. Yangambi; each application was for an opening as assistant principal at Mount Pleasant—the first, in 2002 (2002 Position) and the second, in 2004 (2004 Position).

2002 Position

In May 2002, an opening was announced for the 2002 Position; the posting required that the applicant possess three years of teaching experience and a certification by the Rhode Island Department of Education (the Department of Education) for a secondary principal. Doctor Yangambi, who met these requirements, applied for the 2002 Position; however, he was not interviewed,\(^5\) nor was he notified that he did not meet the minimum qualifications for the position. According to Gail Hareld (Harelld), a human resources administrator for Providence, applicants who met the minimum qualifications generally were forwarded to the hiring

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\(^3\) Doctor Yangambi also alleged racial discrimination in his complaint. But he stipulated before trial that he would not introduce allegations of racial discrimination at trial and would limit his allegations to national origin and retaliation discrimination.

\(^4\) We have been provided with no explanation for the delay in this case.

\(^5\) It was Dr. Yangambi’s testimony that there were no interviews for this position; it simply was awarded to John Craig.
committee, and those who were not deemed qualified were notified by Providence. It is not contested that, in 2002, Dr. Yangambi met the teaching experience and requisite certification requirements established by the Department of Education. Specifically, Dr. Yangambi had approximately fifteen years of teaching experience, ten years of supervisory experience in a hospital setting, and had obtained a secondary principal certificate. He had been at Mount Pleasant since 1993. Nonetheless, Dr. Yangambi received neither an interview nor a rejection letter from Providence. The defendant offered no explanation for this circumstance.

The position was awarded to John Craig (Craig). Craig testified that, at the time of the posting, he was serving as acting assistant principal at Mount Pleasant and that he previously had served as an assistant principal in Johnston for approximately one-and-a-half years. Craig had fourteen years of teaching experience; and, in 1999, he received a Master’s degree in administration from Providence College. He explained that he obtained his secondary principal certification shortly after earning his Master’s degree. Specifically regarding the 2002 Position, Craig testified that, while working in Johnston, he was encouraged to contact the principal at Mount Pleasant at the time, Nancy Mullen (Principal Mullen), about an assistant principal vacancy; however, he understood that “it would only be an acting [position], and [by] taking that position [he] would be taking a risk of not getting the [permanent] position * * *.” Although Craig testified at trial that he was interviewed for the position, this testimony conflicted with his deposition testimony in which he admitted that he was not interviewed. Nonetheless, Craig could not remember the names of anyone who conducted the interview but was confident that Principal Mullen did not participate. He recalled that the majority of members on the interview panel were from the human resources department. Craig’s testimony that Principal Mullen did not participate in the interview is in conflict with Providence’s hiring policies, as set forth by
Hareld and other witnesses, and that formed the basis of the defense in this case. That policy required administrators from the particular school to be involved in the interview process.\(^6\)

Providence failed to produce evidence about who, if anyone, including Craig, was in fact interviewed in 2002, what name or names were forwarded to the Superintendent, who were the members of the interview committee, or how the candidates were ranked. Further, despite the irrefutable evidence that Dr. Yangambi met the qualifications for the 2002 Position, there was no testimony or other evidence produced that explained why Dr. Yangambi was not granted an interview for the 2002 Position.

Numerous witnesses testified on behalf of Providence and offered testimony about the general hiring procedures that were in place in Providence. According to Hareld,\(^7\) the procedure required that an open position was to be posted—for a minimum of ten days—setting forth the minimum qualifications necessary for the position. Hareld testified that the names of applicants who met the minimum qualifications would be forwarded to the interview committee for an interview. The interview committee was composed of a range of individuals, depending on the type and location of the vacancy, and chaired by a chairperson, usually an administrator from the hiring school. Importantly, regardless of the position or the location, a Providence human resources representative and an equal employment opportunity (EEO) officer often served on each interview committee. Hareld explained that the members of the interview committee would pose questions, which were determined in advance, to each applicant and rate the response on a

\(^6\) Doctor Yangambi testified that Principal Mullen had previously expressed to him that he “speak[s] French and [has] a deep voice, [and] when [he] speak[s] English people cannot understand what [he is] talking about.” During her deposition, Principal Mullen denied making this statement.

\(^7\) Although Hareld did not start working for Providence until 2003, her testimony is relevant as to the general hiring practices allegedly followed by Providence.
scale of one to five. After the scores were tallied, the names of the top two or three applicants were recommended to the Superintendent, who would forward his or her recommendation to Providence. Providence would then vote on whether to award the position to the recommended applicant.

Joyce O'Connor (O'Connor), Providence's EEO officer from 1986 to 2012,\(^8\) also testified and corroborated Hareld's testimony about Providence's hiring practices.\(^9\) Although O'Connor testified that one of her responsibilities as an EEO officer was "to see that basically the candidates were treated fairly during the interview * * *"; she too could not offer any testimony about the 2002 interview committee, who was interviewed, or who was recommended to the Superintendent. Providence failed to produce any ranking sheets or other documentary evidence and was unable to identify the other candidates, if any, who were interviewed for the position. In the fall of 2003, Dr. Yangambi filed a complaint with the commission.

**2004 Position**

While Dr. Yangambi's complaint was pending before the commission, he applied for the 2004 Position of Assistant Principal at Mount Pleasant. This position included a closing date of April 2, 2004, with which Providence did not comply. Doctor Yangambi was not interviewed until June, more than two months after the expiration of the interview period and, notably, after the successful candidate became qualified. Providence's internal procedures required that interviews be held within ten days of the closing date of the posting. Hareld testified that "[i]t's not that [Providence doesn't] follow the procedure[,]" but that it is dependent "upon the availability of the applicants as well as the people on the interview committee." During this

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\(^8\) O'Connor did not begin scoring applicants until the 2007-2008 school year.

\(^9\) Tomás Ramírez, Acting Assistant Superintendent for Human Resources and Labor Relations, also testified consistently regarding the hiring process that Providence utilized.
interregnum, the candidate, Michael Sollitto (Sollitto), who was awarded the position, who did not meet the minimum qualifications at the closing date, acquired the requisite certificates. Doctor Yangambi testified that although he met the minimum qualifications for the position—the same qualifications set forth for the 2002 Position—he was not awarded the position. Instead, Sollitto, a Mount Pleasant social studies teacher, who did not meet the minimum qualifications at the time he applied, was appointed. Sollitto testified that he first began working for Providence at Mount Pleasant in 1995 as a long-term substitute teacher. He was hired as a permanent teacher at Roger Williams Middle School in 1998 and transferred to Mount Pleasant in 1999. On April 2, 2004, when the application period closed, Sollitto had not yet obtained a Master’s degree in administration and certification as a secondary principal. Sollitto clearly benefited from the fact that the interviews were postponed for at least two months. In April 2004, Sollitto was serving an internship at Mount Pleasant as part of his Master’s degree curriculum requirements. He did not become credentialed until May 2004. Providence’s departure from the internal promotional procedures favored Sollitto.

Again, Providence failed to produce any ranking sheets for the 2004 Position. There was no evidence about who was interviewed, save for Dr. Yangambi and Sollitto, or the number of candidates who were recommended to the Superintendent. O’Connor, who was the EEO officer, testified that she served on the interview committee for the 2004 Position but could recall almost nothing else and had no notes or documents. She could not recall where Dr. Yangambi ranked “unless [she] had seen the sheets”—which, of course, were not produced. According to O’Connor, she did not know that Dr. Yangambi was from the Congo; but she was also certain that the interview committee did not discuss Dr. Yangambi’s national origin during the interview. Save for O’Connor’s testimony, which generously can be characterized as stating
what she did not know and what the committee did not do, Providence failed to produce any
evidence about what did occur; nor did Providence proffer any reason why Sollitto was selected
for the 2004 Position over Dr. Yangambi.10

Motion for Judgment as a Matter of Law

At the close of the evidence, plaintiff moved for judgment as a matter of law for the
counts relating to the 2002 Position and the 2004 Position, in accordance with Rule 50 of the
Superior Court Rules of Civil Procedure. The basis for the Rule 50 motion centered on
defendants’ failure to meet their burden of production and to articulate a legitimate,
nondiscriminatory reason for not promoting Dr. Yangambi. The Superior Court justice denied
the Rule 50 motion, opining that:

“if there [was] no evidence at all upon which the jury could
conclude that there [was] a non-discriminatory reason for the
employment action, then plaintiff would be entitled to judgment
[as a matter of law]. However, in this case, there was at least some
evidence that the candidates were ranked and that the highest
ranking candidates were the ones who were recommended to the
Superintendent. * * * For [the 2002 Position] there also [was]
evidence that * * * Craig had better qualifications. * * *
[A]lthough the defendant[s] did not articulate clear and specific
non-discriminatory reasons for [their] failure to promote plaintiff
to [the 2002 Position and 2004 Position], it did come forward with
evidence to create questions of fact about the elements of
plaintiff’s claim for intentional discrimination.

“The only thing defendants’ failure to articulate a clear and
specific non-discriminatory reason for its failure to promote did—
the only thing that did was to give plaintiff the benefit of a
rebuttable presumption. It didn’t entitle plaintiff to judgment as a
matter of law.”

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10 Providence’s failure to present any records regarding the 2004 Position, or witnesses with
knowledge of the events, in the face of a pending complaint to the commission gives rise to the
suspicion of mendacity recognized by the United States Supreme Court in St. Mary’s Honor
2012); Casey v. Town of Portsmouth, 861 A.2d 1032, 1038 (R.I. 2004).
Recognizing that many of the cases presented by the parties arose in the context of summary judgment, the Superior Court justice held that, at trial, a plaintiff always bears the burden of persuasion in employment discrimination cases. The Superior Court justice also declared that a rebuttable presumption of discrimination arises when a plaintiff proves his or her 

* * * prima facie case—that is “(1) he is a member of the protected class[;] * * * (2) he applied for an open position; (3) he was not selected; and (4) the employer ‘filled the position by hiring another individual with similar qualifications.’” McGarry v. Pielech, 47 A.3d 271, 280 (R.I. 2012) (quoting Casey v. Town of Portsmouth, 861 A.2d 1032, 1037 (R.I. 2004)).

The plaintiff also moved for judgment as a matter of law on defendants’ affirmative defense of failure to mitigate damages, contending that this defense hinged on Dr. Yangambi’s failure to apply to comparable positions outside of the City of Providence, even though defendants did not present any evidence that comparable positions actually existed. The Superior Court justice reserved on the motion, but declared that she “would be surprised if the jury came back and said [that plaintiff] failed to mitigate [damages].”

**Jury Instructions**

The burden-shifting paradigm set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) was the subject of great debate in this case. The defendants vigorously opposed the Superior Court justice’s conclusion, at the close of the evidence, that defendants were required to produce direct evidence of a nondiscriminatory reason for their failure to promote plaintiff to the 2002 Position and the 2004 Position. Significantly, with respect to several counts in this case, defendants did produce evidence of a nondiscriminatory reason for their adverse employment decision. The Superior Court justice
concluded that defendants failed to meet this burden only with respect to the 2002 Position and the 2004 Position.

The defendants objected to the Superior Court justice's proposed jury instruction on the law of presumptions as applied to the 2002 Position and the 2004 Position—the only counts to which the Superior Court justice applied the burden-shifting paradigm—arguing that the Superior Court justice essentially took the issue away from the jury. Over this objection, the Superior Court justice gave a lengthy and detailed instruction to the jury on the 2002 Position and the 2004 Position and the law of presumptions. Because we are required to review jury instructions in their entirety and do not consider a selected portion or sentence, see State v. Long, 61 A.3d 439, 445 (R.I. 2013), we set forth the instruction in its entirety:

"Presumptions are rules of law designed to assist parties to a lawsuit in proving their claims. Presumptions are not evidence. They are tools for proving a specific fact or facts. A presumption is an assumption of fact that the law requires the jury to make so long as certain underlying facts are proved to be true. In other words, if certain facts and circumstances have been proved to be true, then the law requires the jury to assume that certain other facts also have been proved to be true. The law uses presumptions to make it easier to prove facts that experience and logic tell us are most probably true but which are often difficult to demonstrate with direct evidence.

"Here's a simple example: Pretend there's a case in which the parties dispute the date on which a letter was sent. Rhode Island has a state law that requires the jury to assume that the letter was deposited with the post office on the same date as appears in the postmark. Once the underlying facts are proved; that is, that the letter has a certain postmark and that the postmark bears, say, yesterday's date, then the jury must assume that the letter was, indeed, deposited with the post office yesterday. The law requires the jury to assume this fact until the party against whom the presumption operates comes forward with opposing evidence to

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11 We note with interest, however, that our review of the transcript reveals that the Superior Court justice used defendants' proposed jury instructions as a foundation for her instructions on this issue.
refute or rebut that assumed fact[,] thereby overcoming or negating the presumption.

“A presumption may be rebutted; that is, negated by contrary evidence. If the jury finds that evidence refuting the assumed fact has been produced during the trial, then the presumption has been rebutted. The presumption ceases to operate and no longer has any effect. As a result, the party who has the burden of proving the fact or facts in question must now prove those facts by the greater weight of the evidence and cannot rely on the help of the presumption. A party relying upon the benefit of a presumption can do so only until there is contrary evidence which renders the presumption inoperable.

“With respect to the [2002 Position and the 2004 Position] and the discrimination claims, [Dr.] Yangambi enjoys the benefit of a presumption. In a failure-to-promote discrimination claim, once the employee establishes that, 1, he was qualified for a promotion; 2, he was rejected despite his qualifications; and, 3, the position remained open or was filled by someone of a different national origin with similar or lesser qualifications, or the position remained open and the employer continued to seek applications from persons of similar qualifications, the jury is required to assume that the employer’s failure to promote the employee was motivated, at least in part, by discrimination. If the employee succeeds in proving these first three elements of his claim, a rebuttable presumption of intentional discrimination arises and the burden shifts to the employer to show a legitimate, non-discriminatory reason for its employment action. Although the employer need do no more than demonstrate a reason which, taken as true, would justify a conclusion that its employment decision was based on a non-discriminatory motive, the law also expects the employer to clearly and specifically articulate its reasons. In other words, the employer is expected to clearly set forth the reasons for the employee’s rejection. Doing so frames the factual issue with sufficient clarity so that the employee will have a full opportunity to demonstrate *** that the employer’s articulated reasons for failing to promote him [were] a mere pretext or ploy. Therefore, if an employer does not articulate a clear and specific explanation for the employment decision, the employee is afforded the benefit of a presumption and the jury is required to assume the employment decision was the result of intentional discrimination.

“In this case, [Providence] articulated clear and specific reasons for not promoting [Dr.] Yangambi to the positions identified in Joint Exhibits 3, 4, 7, 9 and 10. For example, one
witness testified that she participated in [Dr.] Yangambi’s interview and that [Dr.] Yangambi’s scores were low. Because [Providence] articulated a clear and specific reason for its action, [Dr.] Yangambi is not entitled to the benefit of any presumption of discrimination. On the other hand, [Providence] failed to clearly and specifically articulate its reasons for not promoting [Dr.] Yangambi to the [2002 and 2004 Positions]. Therefore, with respect to those positions only—those two positions only, the jury is required to assume [Providence’s] failure to promote [Dr.] Yangambi was motivated, at least in part, by intentional discrimination unless the jury finds there is contrary or opposing evidence that refutes this presumption. In this way, the presumption assists [Dr.] Yangambi with his ultimate burden of persuading the jury that, with respect to the [2002 and 2004 Positions], he has proved all of the elements of his claim of intentional discrimination by a fair preponderance of the evidence. Importantly, however, if the jury finds there is contrary or opposing evidence to refute this presumption of intentional discrimination, [Dr.] Yangambi loses the benefit of the presumption and the jury can no longer assume intentional discrimination.

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“As in most Court cases, the law places the burden of proof on a person who is making a claim. All that means is that every person making a claim carries the obligation or responsibility of proving that claim. This is founded in common sense. Someone who is advancing a proposition has the burden of sustaining its validity. Here, the plaintiff is advancing a proposition concerning the defendant’s conduct and the resulting harm done to plaintiff. Therefore, plaintiff must produce evidence that, when considered in light of all of the other facts proved at trial, leads the jury to conclude that what the plaintiff claims to be true is, indeed, more likely true than not.” (Emphasis added.)

At the conclusion of the jury instruction, defense counsel stated that he would “reiterate [defendants’] objections at the charging conferences ***.” The Superior Court justice recognized that the objections raised at the conferences were preserved and incorporated into the sidebar discussion.
On April 8, 2014, the jury found for defendants on the 2002 Position and returned a verdict for plaintiff on the 2004 Position. The jury awarded Dr. Yangambi $182,710.45 in back pay and $8,000 in emotional suffering for the 2004 Position, but it also found that plaintiff had failed to mitigate his damages, thereby forfeiting the back pay award. However, on May 9, 2014, the Superior Court justice granted the motion for judgment as a matter of law on the issue of mitigation of damages, declaring that she “should not have charged the jury on the mitigation question [and] invited * * * a verdict in defendants’ favor on the mitigation defense that was not supported by the law or legally sufficient evidence.” The Superior Court justice explained that “[i]n failure-to-promote cases, the law recognizes that staying on the job, as opposed to quitting and taking a lesser or less secure job, counts as mitigation.” She noted that, because Providence intentionally did not produce any evidence of comparable positions, it was impossible for the jury to compare “promotional opportunities, compensation, job responsibilities, working conditions[,] status * * * salary, job duties, benefits, job security[,] and seniority.” Providence contended that it was not required to present evidence of comparable employment opportunities outside Providence, because Dr. Yangambi admitted that he did not consider any positions outside of Providence. The Superior Court justice rejected this argument. The defendants have renewed this contention on appeal.

An amended judgment was entered awarding plaintiff $382,545.13 in damages.\textsuperscript{12} Both parties timely appealed.

Standard of Review


\textsuperscript{12} Specifically, plaintiff was awarded $182,710.35 in back pay, $106,885.61 in interest, $8,000 in compensatory damages, $83,665 in attorneys’ fees, and $1,284.17 in costs.
jury instructions is well settled. A charge ‘need only adequately cover[] the law.’” Long, 61 A.3d at 445 (quoting State v. Cardona, 969 A.2d 667, 674 (R.I. 2009)). “This Court examines ‘the instructions in their entirety to ascertain the manner in which a jury of ordinary intelligent lay people would have understood them, * * * and * * * review[s the] challenged portions * * * in the context in which they were rendered.’” Id. (quoting Cardona, 969 A.2d at 674). “A ‘trial justice is bound to ensure that the jury charge sufficiently addresses the requested instructions and correctly states the applicable law.’” Id. (quoting State v. Sivo, 925 A.2d 901, 913 (R.I. 2007)). “[A]n erroneous charge warrants reversal only if it can be shown that the jury ‘could have been misled’ to the resultant prejudice of the complaining party.” Id. (quoting Sivo, 925 A.2d at 913).

“Our review of a trial justice’s decision on a motion for judgment as a matter of law is de novo.” McGarry, 47 A.3d at 279 (quoting Medeiros v. Sitrin, 984 A.2d 620, 625 (R.I. 2009)). “This Court, like the trial justice, will examine ‘the evidence in the light most favorable to the nonmoving party, without weighing the evidence or evaluating the credibility of witnesses, and draw from the record all reasonable inferences that support the position of the nonmoving party. * * * If, after such a review, there remain factual issues upon which reasonable persons might draw different conclusions, the motion for [judgment as a matter of law] must be denied, and the issues must be submitted to the jury for determination.’” Oliveira v. Jacobson, 846 A.2d 822, 829 (R.I. 2004) (quoting Estate of Fontes v. Salomone, 824 A.2d 433, 437 (R.I. 2003)).

Issues

Doctor Yangambi alleges on appeal that the Superior Court justice erred in denying his Rule 50 motion for judgment as a matter of law on the count related to the 2002 Position. The plaintiff contends that he was entitled to judgment as a matter of law because Providence failed
to articulate a legitimate, nondiscriminatory reason for its employment decision in relation to the 2002 Position. He argues that it is uncontested that he successfully proved his prima facie case under McDonnell Douglas Corp, and that the Superior Court justice acknowledged on more than one occasion that defendants failed to meet their burden of production. According to plaintiff, he was entitled to judgment as a matter of law with respect to the 2002 Position because defendants failed to rebut the presumption of discrimination that arose after he established his—undisputed—prima facie case.

In their appeal, defendants assign error to the Superior Court justice's jury instructions and the grant of plaintiff's Rule 50 motion on the issue of mitigation of damages. Specifically, defendants aver that the Superior Court justice invaded the province of the jury by instructing the jury that they were “required” to presume, at least in part, that Providence discriminated against Dr. Yangambi. The defendants also contend that the Superior Court justice improperly weighed the evidence when considering whether a presumption of discrimination remained in this case and also misconstrued the law of presumptions.

On the issue of mitigation of damages, defendants argue that the Superior Court justice erred in concluding that, by remaining in his current teaching position, plaintiff mitigated his damages and in further holding that Providence was required to present evidence that comparable employment existed.13

Background

The case on appeal requires this Court to review the principles set forth by the United States Supreme Court in a trilogy of cases that form the bedrock of procedural and substantive

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13 The defendants also submit that, even if the issue of mitigation of damages should not have gone to the jury as a matter of law, the Superior Court justice erred in making this determination after the jury returned a verdict.
law in discrimination claims, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1993). In McDonnell Douglas Corp., 411 U.S. at 802-04, the Court set forth a three-part, burden-shifting paradigm for employment discrimination cases based upon disparate treatment. This time-honored burden-shifting trial framework imposes a structured approach to the burdens of production and persuasion that are at play in a discrimination trial and serves as “a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.” Furmano Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). The McDonnell Douglas Corp. burden-shifting paradigm assists in overcoming two prevalent hurdles in discrimination cases. First, it recognizes that the plaintiff is not likely to prove his or her case by direct evidence of discriminatory animus—for example, interview committees are not likely to discuss the race or national origin of an applicant—and second, it constitutes a judicial recognition that “the employer has the best access to the reasons that prompted him to fire, reject, discipline or refuse to promote the complainant.” Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979) (emphasis added).

Initially, it is the plaintiff who bears the burden of establishing a prima facie case of discrimination by showing that (i) he or she is a member of a protected class; (ii) was qualified for an open position and applied for it; (iii) was rejected; and (iv) was neglected in favor of someone with similar qualifications. McDonnell Douglas Corp., 411 U.S. at 802. Once the plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises and “[t]he burden of production, but not the burden of persuasion, then shifts to the defendant to offer a nondiscriminatory reason” for its decision not to hire or promote the plaintiff. McGarry, 47 A.3d at 280. It is then incumbent upon the employer “to articulate a plausible, legitimate, and
nondiscriminatory justification" for its adverse employment decision. Resare v. Raytheon Co., 981 F.2d 32, 42 (1st Cir. 1992). If the defendant articulates a legitimate, nondiscriminatory reason for not hiring or promoting the plaintiff, it has met its burden of production, and the rebuttable presumption of discrimination afforded to the plaintiff disappears. McGarry, 47 A.3d at 280. "The burdens of proof and persuasion [then] fall squarely upon the plaintiff to demonstrate that the defendant's tendered explanation is only a pretext and that discrimination was the true motive underlying the hiring decision." Id. at 280-81. "To satisfy this third prong, a plaintiff must do more than simply cast doubt upon the employer's justification." Resare, 981 F.2d at 42.

In Burdine, 450 U.S. at 253, the United States Supreme Court expounded upon the defendant's burden of production in a discrimination case and explained that this "intermediate evidentiary burden[] serves to bring the litigants and the court expeditiously and fairly to th[e] ultimate question" before the factfinder—whether "the defendant intentionally discriminated against the plaintiff[.]" The burden rests with the defendant to produce evidence clearly setting forth "that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Id. at 254. The Court in Burdine was careful to separate the defendant's burden of production from the burden of persuasion that remains with the plaintiff. The Court acknowledged that:

"The defendant need not persuade the court that it was actually motivated by the proffered reasons. * * * It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." Id. at 254-55 (emphasis added).
Having declared that the defendant’s burden in an employment discrimination case is to produce admissible evidence that “clearly set[s] forth” the reasons for the adverse employment decision, the Supreme Court acknowledged that the burden of production was minimal, but genuine: “the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.” Id. at 255, 257. The nondiscriminatory reasons which the employer articulates must be “clear and reasonably specific.” Id. at 258. “Placing this burden of production on the defendant * * * serves simultaneously to meet the plaintiff’s prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.” Id. at 255-56. Because the plaintiff in an employment discrimination case shoulders both a burden of production and the ultimate burden of persuasion, and is required “to demonstrate that the defendant’s tendered explanation is only a pretext and that discrimination was the true motive,” McGarry, 47 A.3d at 281, nonetheless, the reason for the adverse employment decision that the defendant articulates must be “clearly set forth” through introduction of admissible evidence. Burdine, 450 U.S. at 255.

In Hicks, 509 U.S. at 508-10, the Supreme Court examined the role of the trial justice, sitting as a factfinder, once the defendant proffers a nondiscriminatory reason for the adverse employment decision. The issue in Hicks was whether a plaintiff, after successfully establishing a prima facie case of discrimination, was entitled to judgment as a matter of law after the trial justice, sitting as the factfinder, found that he did not believe the employer’s nondiscriminatory reasons for demoting and discharging the plaintiff. Id. at 508. The Supreme Court disagreed and reiterated that “the * * * plaintiff at all times bears the ‘ultimate burden of persuasion,’” id. at 511, and “a reason [articulated by the employer] cannot be proved to be ‘a pretext for
discrimination’ unless it is shown both that the reason was false, and that discrimination was the real reason,” id. at 515. However, the factfinder’s disbelief of the reasons articulated by the defendant “(particularly if disbelief is accompanied by suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.” Id. at 511; see also McGarry, 47 A.3d at 281-82. Accordingly, at the Rule 50 stage in the trial, if the trial justice concludes that the employer met its burden of production and articulated a nondiscriminatory reason for the employment decision, the presumption falls away. The Court, of course, may not weigh the evidence when passing on a motion for judgment as a matter of law. See Hicks, 509 U.S. at 509.

The Court in Hicks also proceeded to sharpen the McDonnell Douglas Corp. framework when the employer fails to articulate a nondiscriminatory reason:

“If the finder of fact answers affirmatively—if it finds that the prima facie case is supported by a preponderance of the evidence—it must find the existence of the presumed fact of unlawful discrimination and must, therefore, render a verdict for the plaintiff.” ** Thus, the effect of failing to produce evidence to rebut the McDonnell Douglas ** presumption is not felt until the prima facie case has been established, either as a matter of law (because the plaintiff’s facts are uncontested) or by the factfinder’s determination that the plaintiff’s facts are supported by a preponderance of the evidence. It is thus technically accurate to describe the sequence as we did in Burdine: ‘First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ ** As a practical matter, however, and in the real-life sequence of a trial, the defendant feels the ‘burden’ not when the plaintiff’s prima facie case is proved, but as soon as evidence of it is introduced. The defendant then knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it unless the plaintiff’s prima facie case is held to be inadequate in law or fails to convince the factfinder. It is this practical coercion which causes the McDonnell Douglas presumption to function as a means of
'arranging the presentation of evidence.'” Hicks, 509 U.S. at 510 n.3 (quoting Burdine, 450 U.S. at 252-53, and Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988)).

Therefore, unless the jury ultimately is unpersuaded by the plaintiff's evidence, an employer's failure to produce a nondiscriminatory reason for the employee’s rejection may be fatal to the defendant once the plaintiff proves his or her prima facie case. With this background, we consider each appeal in turn.

Analysis

The 2002 Position

At the close of the evidence, plaintiff moved for judgment as a matter of law on the 2002 Position, arguing that plaintiff established a prima facie case, resulting in a rebuttable presumption of discrimination, and that defendants failed to rebut this presumption by articulating a legitimate nondiscriminatory reason for their failure to promote. The plaintiff argued that, because defendants failed to satisfy their burden of production, judgment as a matter of law was appropriate. It does not appear to have been contested, and defendants have conceded in their papers to this Court, that plaintiff established his prima facie case in relation to both the 2002 Position and the 2004 Position. Accordingly, the question before the Superior Court justice and this Court on de novo review, is whether defendants articulated a legitimate, nondiscriminatory reason for rejecting Dr. Yangambi in 2002 and awarding the position to Craig, an applicant with similar qualifications.

The United States Supreme Court has stated:

“At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production—i.e., has failed to introduce evidence which, taken as
true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law under [Rule 50] * * *." Hicks, 509 U.S. at 509 (emphasis added).

Therefore, “if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issues of fact remain[] in the case.” Burdine, 450 U.S. at 254. Likewise, if the defendant fails to introduce evidence that would permit the jury to conclude that “there was a nondiscriminatory reason,” judgment for the plaintiff must enter. Hicks, 509 U.S. at 509.

In this case, the Superior Court justice concluded that defendants did not articulate a nondiscriminatory reason for their hiring decisions in 2002 and 2004, and we are hard-pressed to disagree with this finding, which, we conclude, presents a question of law. However, the Superior Court justice also concluded that defendants did not remain completely “silent” on this issue. The Supreme Court has recognized that “[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors,” including “the strength of the plaintiff’s prima facie case [in this case it is undisputed], the probative value of the proof that the employer’s explanation is false, and any other evidence that supports the employer’s case and that properly may be considered on a motion for judgment as a matter of law.” Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148-49 (2000). The Superior Court justice found that defendants failed to articulate any nondiscriminatory reason, but she erroneously held that defendants were required to do so with direct evidence.14 However, she did acknowledge that defendants presented evidence that Craig may have been more qualified for the 2002 Position than Dr. Yangambi.

14 Although the Superior Court justice declared that “there was at least some evidence that the candidates were ranked and that the highest ranking candidates were the ones who were recommended to the Superintendent,” she failed to point to any witness or any specific testimony on this point. We therefore decline to consider this finding.
As noted, the McDonnell Douglas Corp. framework has been established to assist the presentation of evidence. See Furnco Construction Corp., 438 U.S. at 577; Loeb, 600 F.2d at 1014. The rebuttable presumption which arises when a prima facie case has been established essentially forces the defendant to articulate a reason for its employment decision so that the plaintiff can continue on with his or her case. See Burdine, 450 U.S. at 255-56. The issue before this Court is whether, having concluded that defendants failed to meet their burden of production and did not articulate any reason for failing to appoint Dr. Yangambi in 2002, it was error to deny the motion for judgment as a matter of law and send the case to the jury. Although resolution of this issue presents the Court with a close question, we are satisfied that the Superior Court justice carefully reviewed the evidence in this case and concluded that defendants were not completely silent and that there was some evidence that Craig may have been the more qualified candidate. We decline to disturb this ruling. Our de novo review persuades us that evidence that Craig was more qualified than Dr. Yangambi, viewed in the light most favorable to defendants, was sufficient to overcome the motion for judgment as a matter of law.

2004 Position

The defendants appeal from the jury verdict in favor of plaintiff on the 2004 Position. The defendants assign two errors: (1) the Superior Court justice erred in instructing the jury that it was required to presume that defendants’ hiring decision was motivated, at least in part, by national origin discrimination; and (2) it was error to grant plaintiff’s Rule 50 motion as it related to the issue of mitigation of damages after the jury had already returned a verdict that plaintiff failed to mitigate his damages.
Jury Instructions and the Burden-Shifting Paradigm

Specifically, defendants assign error to a selective portion set forth in a single sentence of the jury instructions on the issue of the presumption of discrimination: “the jury is required to assume [Providence’s] failure to promote [Dr.] Yangambi was motivated, at least in part, by intentional discrimination * * *.” (Emphasis added.) This Court’s function in passing on jury instructions mandates a review of the jury charge as a whole, see Long, 61 A.3d at 445; the complete sentence upon which defendants’ appeal rests reads: “the jury is required to assume [Providence’s] failure to promote [Dr.] Yangambi was motivated, at least in part, by intentional discrimination unless the jury finds there is contrary or opposing evidence that refutes this presumption.” (Emphasis added.) The Superior Court justice also reiterated this point when she instructed the jury: “Important, however, if the jury finds there is contrary or opposing evidence to refute this presumption of intentional discrimination, [Dr.] Yangambi loses the benefit of the presumption and the jury can no longer assume intentional discrimination.” (Emphasis added.) Nonetheless, defendants contend that the Superior Court justice: (1) improperly applied the law of presumptions, (2) impermissibly weighed the evidence, and (3) invaded the province of the jury.

(a) Direct and Circumstantial Evidence

We begin by noting that the Superior Court justice was mistaken when she indicated that the employer is required to satisfy its burden of production with direct evidence. Although a defendant in an employment discrimination case is required to “articulate” a “clear” and “specific” nondiscriminatory reason for its employment decision, a defendant may do so by “admissible evidence,” circumstantial or direct. Burdine, 450 U.S. at 253, 255, 258; see also State v. Patel, 949 A.2d 401, 414 (R.I. 2008) (“[Courts] do not distinguish between the probative
value of circumstantial and direct evidence[.]”). However, proof by circumstantial evidence does not diminish the burden that must be met: the employer must articulate a nondiscriminatory reason for the adverse employment decision.

The law is unwavering that an employer’s nondiscriminatory reason—whether established by direct or circumstantial evidence—must be clear and specific, in order to frame the factual issues such that the plaintiff, who bears the ultimate burden of persuasion, can prove “the crux of * * * a discrimination case”—“that the defendant’s purported reason for not hiring the plaintiff was false, [and] that discrimination was the real reason.” McGarry, 47 A.3d at 281; see also Burdine, 450 U.S. at 258 (“[T]he defendant’s explanation of its legitimate reasons must be clear and reasonably specific.”); Chapman v. Al Transport, 229 F.3d 1012, 1034 (11th Cir. 2000) (holding that a defendant’s legitimate and nondiscriminatory reason can be subjective as long as it is “clear and reasonably specific” (quoting Burdine, 450 U.S. at 258)); E.E.O.C. v. Flasher Co., 986 F.2d 1312, 1316 (10th Cir. 1992) (“[T]he defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion. * * * However, the proffered reason for the action taken against the minority employee must be reasonably specific and clear.” (citing Burdine, 450 U.S. at 254, 258)). The defendant essentially must “produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.” Reeves, 530 U.S. at 142 (quoting Burdine, 450 U.S. at 254). Thus, we are of the opinion that the Superior Court justice’s reasoning that direct evidence was necessary was flawed. However, because this error is not relevant to our analysis, we deem it harmless. The Superior Court justice did not inform the jury that defendants could meet their burden of production only by direct evidence and
correctly instructed the jury, before the start of the trial, on the probative value of circumstantial and direct evidence.

(b) Defendants' Burden of Production

Turning to defendants' central contention, our review of this record confirms that defendants failed to offer any evidence articulating a legitimate, nondiscriminatory reason for not promoting Dr. Yangambi to the 2004 Position that remotely qualifies as "clear and reasonably specific." Burdine, 450 U.S. at 258. The defendants merely presented testimony about their general hiring practices, which appear to be ad hoc at best and admittedly not always honored. This testimony, while suggestive of a general policy, had little bearing on the 2004 Position and begs the question as to why Dr. Yangambi was not promoted. Generic testimony regarding an employer's customary hiring or promotional practices, standing alone, does not articulate a "clear and reasonably specific" nondiscriminatory reason why one employee was promoted over another. Id.

To be sure, hiring practices and policies are relevant in employment discrimination cases. But such hiring practices—and an employer's faithful adherence to these procedures—should serve as the starting point for the employer's nondiscriminatory reason and not the finish line. Evidence about the members of the interview committees, the names of the candidates and their respective qualifications, who among them was interviewed, how they were ranked, and evidence that, at the conclusion of this process, a different candidate was selected, is the grist of the employer's adherence to its hiring practices. In this case, defendants failed to present a scintilla of evidence about the candidates, what they were asked, how they were ranked, or whose name or names were forwarded to the Superintendent. Was it only the successful candidate's name that was forwarded? Employers do not satisfy their burden of production with
a general reference to their “fair” hiring practices, particularly when, as in this case, the employer offers no evidence that these hiring practices were honored. The evidence also demonstrated that Providence’s deviation from these hiring practices benefited the successful candidate, who was not qualified for the position at the time that the application period closed.

The only testimony presented that was relevant to the interviews held in relation to the 2004 Position was that of O’Connor. The crux of O’Connor’s testimony was that she did not know that Dr. Yangambi came from the Congo, but she was sure the committee did not discuss his national origin, and she could not recall his ranking without reviewing the ranking sheets, which were not available. Certainly, this testimony, while marginally relevant to the issues in this case, does not qualify as a nondiscriminatory reason why Dr. Yangambi was not selected for the 2004 Position.

In stark contrast, we note that, with respect to eight other claims that went to the jury, defendants presented specific reasons why Dr. Yangambi was not promoted and even produced ranking sheets for three of those positions. The Superior Court justice also found “that [defendants] did have people who could have articulated the reason [Dr.] Yangambi wasn’t promoted for [the 2004 Position]” and failed to do so. She found that defendants “chose to rely on other evidence from which [they] hope[,] the jury will draw an inference concerning what the legitimate non-discriminatory reason must have been.” Although employers are not foreclosed from articulating a nondiscriminatory reason through circumstantial evidence, see McGarry, 47 A.3d at 281, the evidence produced must amount to more than mere generalities from which a factfinder is expected to deduce a reason by piling inference upon inference. This is not a syllogistic exercise. See Reeves, 530 U.S. at 141 (“[T]he question facing triers of fact in discrimination cases is both sensitive and difficult,” and * * * ‘[t]here will seldom be
‘eyewitness’ testimony as to the employer’s mental processes.” (quoting United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983))). An employer who overlooks the role of the trial justice in deciding whether a presumption has been overcome, does so at its peril.

The defendants call our attention to the fact that plaintiff vigorously challenged Providence’s hiring practices, arguing that plaintiff—and presumably the jury—could draw an inference that defendants’ nondiscriminatory reason for not promoting Dr. Yangambi was that he was “outranked” for the position. Such an inference is permissible when there is evidence about the results of the hiring practices, such as the names of the candidates, the members of the interview committee, and the rankings. Significantly, this meager testimony was the only evidence that defendants produced on the 2004 Position, and plaintiff had every right to challenge it. However, our de novo review of the record in this case leads us to the same conclusion as the Superior Court justice: defendants failed to satisfy their burden to produce admissible evidence articulating a legitimate nondiscriminatory reason for their employment decision.15

In this case, it was incumbent upon the Superior Court justice to determine whether the first and second prongs of McDonnell Douglas Corp.—that plaintiff established a prima facie case and, if so, whether defendants presented evidence that rebutted the presumption of discrimination—had been satisfied. We are of the opinion that the issue of whether a party has met its burden of production is a question of law. See Caldwell v. Paramount Unified School

15 Because we are of the opinion that, taking all of defendants’ evidence as true, defendants still did not satisfy their burden of production, we deem it unnecessary to determine if the Superior Court justice improperly weighed the evidence. Even if the Superior Court justice did err in her analysis, we conduct de novo review in these circumstances. Since we arrive at the same conclusion—defendants did not meet their burden—any error is harmless.
District, 41 Cal. App. 4th 189, 201 (Cal. Ct. App. 1995) ("[W]hether or not a plaintiff has met his or her prima facie burden, and whether or not the defendant has rebutted the plaintiff’s prima facie showing, are questions of law for the trial court, not questions of fact for the jury.").

We also point to Rule 304(a) of the Rhode Island Rules of Evidence, which provides:

"The effect of a presumption affecting the burden of producing evidence in civil cases is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate." (Emphasis added.)

According to the Advisory Committee’s note to Rule 403: "[i]f the adverse party does offer contradictory evidence, * * * the court does not instruct the jury that it may presume the existence of the presumed fact." However, "[i]f the adverse party offers no contradictory evidence, the court instructs the jury that if it finds the basic fact,\textsuperscript{16} it must find the presumed fact." \textit{Id.} (emphasis added). Therefore, it is the function of the trial justice to undertake this analysis in order to properly instruct the jury.

\textbf{(c) The Jury Instruction}

"It is well-established that when reviewing jury instructions, we do so holistically, and not in a piecemeal fashion." \textit{Contois v. Town of West Warwick}, 865 A.2d 1019, 1028 (R.I. 2004) (citing \textit{State v. Perry}, 779 A.2d 622, 625 (R.I. 2001)). Furthermore, "[w]e shall not exaggerate out of context a single word or phrase or sentence in an instruction; rather, the challenged portion will be examined in the context of the entire instruction." \textit{Lieberman v.}

\textsuperscript{16} We are cognizant that the note to Rule 403 states that "the court instructs the jury that if it finds the basic fact * * *." However, we perceive no issue with the Superior Court justice instructing the jury that the basic facts were found, as the facts necessary to prove plaintiff’s prima facie case were not contested at trial and are conceded on appeal.
Bliss-Doris Realty Associates, L.P., 819 A.2d 666, 672 (R.I. 2003) (quoting Perry, 779 A.2d at 625). We do not agree with defendants’ contention that the Superior Court justice erred by including the phrase “the jury is required.” Indeed, in that same sentence, the Superior Court justice clearly advised that “unless the jury finds there is contrary or opposing evidence that refutes this presumption[,]” in which case the presumption was rebutted. (Emphasis added.) She continued: “Importantly, however, if the jury finds there is contrary or opposing evidence to refute this presumption of intentional discrimination, [Dr.] Yangambi loses the benefit of the presumption and the jury can no longer assume intentional discrimination.” Reviewing the instruction in its entirety, we perceive no error.

The defendants also argue that the Superior Court justice erroneously relayed to the jury that “defendant[s] failed to articulate a nondiscriminatory reason.” Although the Superior Court justice indicated to the jury that defendants had articulated nondiscriminatory reasons for some claims and had not done so for others, namely the 2002 Position and the 2004 Position,¹⁷ that is the function of a trial justice when instructing a jury on a question of law. The Superior Court justice instructed the jury that, although plaintiff was entitled to a presumption, it was rebuttable if the jury found contrary evidence—albeit evidence that was not specific enough to deflate the presumption in its entirety—to rebut the presumption. Presumably this is just what the jury did

¹⁷ The Superior Court justice charged on this point as follows:

“In this case, [Providence] articulated clear and specific reasons for not promoting [Dr.] Yangambi to the positions identified in Joint Exhibits 3, 4, 7, 9 and 10. For example, one witness testified that she participated in [Dr.] Yangambi’s interview and that [Dr.] Yangambi’s scores were low. Because [Providence] articulated a clear and specific reason for its action, [Dr.] Yangambi is not entitled to the benefit of any presumption of discrimination. On the other hand, [Providence] failed to clearly and specifically articulate its reasons for not promoting [Dr.] Yangambi to the [2002 and 2004 Positions].”

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in regard to the 2002 Position, where the qualifications of the successful candidate equaled or exceeded those of Dr. Yangambi. Accordingly, we are of the opinion that the Superior Court justice did not err in instructing the jury on the law of presumptions and its application to this particular discrimination claim.

Mitigation of Damages

Finally, defendants argue that the Superior Court justice erred in granting judgment as a matter of law on the affirmative defense that plaintiff failed to mitigate damages. Specifically, defendants contend that they were not required to present evidence of equal employment opportunities outside Providence because it was plaintiff's position at trial that he would not have considered employment outside Providence. The Superior Court justice rejected that argument, explaining that in the absence of evidence of comparable positions that were substantially equivalent, in terms of salary, promotion opportunities, seniority, job duties, working conditions, and convenience to the employee's home, a reasonable juror could not undertake the requisite analysis on mitigation of damages. We agree with this ruling and are not convinced that, in order to mitigate damages, plaintiff was required to consider employment outside Providence.

In order to prove that a plaintiff failed to mitigate damages, the employer must prove that "(i) though substantially equivalent jobs were available in the relevant geographic area, (ii) the claimant failed to use reasonable diligence to secure suitable employment." Quint v. A.F. Staley Manufacturing Co., 172 F.3d 1, 16 (1st Cir. 1999); see also Trainor v. HEI Hospitality, LLC, 699 F.3d 19, 29 (1st Cir. 2012). However, an employer is "relieved ** of the burden to prove the availability of substantially equivalent jobs in the relevant geographic area once it has been shown that the former employee made no effort to secure suitable employment." Quint, 172
F.3d at 16; see also Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 54 (2d Cir. 1998); Sellers v. Delgado College, 902 F.2d 1189, 1193 (5th Cir. 1990). These principles of law only apply to alternative and equal employment in a relevant geographical area.

“Our review of a trial justice’s decision on a motion for judgment as a matter of law is de novo.” McGarry, 47 A.3d at 279 (quoting Medeiros, 984 A.2d at 625). A review of the record indicates that Dr. Yangambi applied for approximately forty administrative positions in Providence and had a particularized interest in working within the City of Providence. Specifically, Dr. Yangambi lives in Providence and is part of the fabric of its diversity. He has an interest in continuing his career in an urban setting and learning more about Providence’s rich culture. Doctor Yangambi also recognized that seniority is important when working in a school system; and, having taught in Providence since 1992, he would have lost these valuable seniority rights if he moved elsewhere. See Jurgens v. E.E.O.C., 903 F.2d 386, 389 (5th Cir. 1990) ("[W]here an employer discriminatorily denies promotion to an employee, that employee’s duty to mitigate damages encompasses remaining on the job."); Equal Employment Opportunity Commission v. Safeway Stores, Inc., 634 F.2d 1273, 1285 (10th Cir. 1980) (recognizing that the plaintiff’s decision to remain on the job was “prudent under the circumstances” given his “long-term position” with his employer). Certainly, remaining on the job and soldiering through so many disappointments was the plaintiff’s decision to make and was “prudent under the circumstances,” because there was no proof that going elsewhere would have been more remunerative. We are not satisfied that Dr. Yangambi was required to seek employment outside of Providence, with its attendant loss of seniority rights, in order to mitigate damages. We are of the opinion that the Superior Court justice properly reserved on the plaintiff’s Rule 50 motion and subsequently granted the motion after the jury returned its verdict.
Conclusion

For the reasons discussed herein, the judgment is affirmed. The Superior Court justice’s denial of the plaintiff’s Rule 50 motion on the 2002 Position is affirmed. Likewise, in regard to the 2004 Position, the jury verdict and grant of the plaintiff’s Rule 50 motion as it relates to the issue of mitigation of damages is affirmed. The papers in this case shall be remanded to the Superior Court.

Justice Robinson, dissenting. I have respect for the majority’s attempt to reconcile the jury instructions which guided the jury in this complex case with well-established principles of employment discrimination law; but I fundamentally disagree with what the majority has written in that regard, and I must record my very strong dissent. In my opinion, the jury was provided with a fundamentally erroneous instruction; and, therefore, I am convinced that the jury’s verdict for the plaintiff should be vacated.

I begin by noting my agreement with the principle set forth as follows in the majority opinion: “We are of the opinion that the issue of whether a party has met its burden of production is a question of law.” However, where I fundamentally part company with the majority is with respect to its explicit agreement with the trial justice, after a de novo review, that defendants “failed to offer any evidence articulating a legitimate, nondiscriminatory reason for not promoting Dr. Yangambi to the 2004 Position that remotely qualifies as ‘clear and reasonably specific.’” (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)). The fatal flaw in that rather conclusory statement is revealed by the sentence that

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1 I note that the jury verdict in this case was favorable to plaintiff with respect to his claim of national origin discrimination as to the 2004 promotion decision. Pursuant to the explicit January 5, 2011 Stipulation between the parties, the allegations of race discrimination that were contained in the second amended complaint were not litigated at trial.

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immediately follows it in the majority opinion: “The defendants merely presented testimony about their general hiring practices, which appear to be ad hoc at best and admittedly not always honored.” In my view, it defies logic and it is inconsistent with settled principles in this domain of the law to concede that defendants “presented testimony about their general hiring practices,” but then to conclude, as the majority does, that “[g]eneric testimony regarding an employer’s customary hiring or promotional practices, standing alone, does not articulate a clear and reasonably specific nondiscriminatory reason why one employee was promoted over another.” (Emphasis added.) (Internal quotation marks omitted.) In my considered judgment, that testimony about defendants’ general hiring practices fulfilled their burden of production; and I fail to see how it is not as “clear and reasonably specific” as Burdine, 450 U.S. at 258, requires that it be. See also St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507 (1993) (“[T]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action.”) (emphasis in original) (internal quotation marks omitted); Smith v. F.W. Morse & Co., Inc., 76 F.3d 413, 421 (1st Cir. 1996) (stating that a defendant’s burden of production is a “modest hurdle”).

The defendants in the instant case sustained their burden by producing evidence; it matters not whether that evidence persuaded the trial justice. See Hicks, 509 U.S. at 509 (“By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, [the] petitioners sustained their burden of production, and thus placed themselves in a better position than if they had remained silent.”) (emphasis in original) (internal quotation marks omitted); see also Burdine, 450 U.S. at 254 (“The defendant need not persuade the court that it was actually motivated by the proffered reasons.”). The plaintiff remained free to attack with hammer and
tong (as the record shows he most determinedly did) that articulated legitimate, nondiscriminatory reason (i.e., the existence of "general hiring practices") as being, in the majority's words, "ad hoc at best and admittedly not always honored." The majority opinion goes on at great length to point to what it considers to be lapses from adherence to those "general hiring practices" where the 2004 promotion decision was concerned. And I readily concede that pointing to such flaws would have been fair game (and indeed was precisely that) for plaintiff to use in seeking to prove pretext and to carry his ultimate burden of persuasion. See Hicks, 509 U.S. at 507 ("It is important to note *** that although the McDonnell Douglas presumption shifts the burden of production to the defendant, [t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") (emphasis in original) (internal quotation marks omitted). In my opinion, defendants did not have to prove that they followed the "general hiring practices" with respect to the 2004 promotion decision in order to meet their burden of production; it was for plaintiff to provide contrary proof in the course of the third phase under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).2

Moreover, in my judgment, the jury instruction in this case contained a fundamental flaw (a flaw that is so grave that it certainly can be said that a jury "could have been misled by [the] erroneous charge to the resultant prejudice" of defendants; see State v. Ventre, 910 A.2d 190,

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2 I note that, in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981), the United States Supreme Court stated, with respect to a defendant's burden of production, that "[t]he sufficiency of the defendant's evidence should be evaluated by the extent to which it "present[s] a legitimate reason for the action and *** frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." The fact that, in the instant case, plaintiff was clearly able to identify the legitimate, nondiscriminatory reason that defendants presented and that plaintiff was, thus, able to attempt to demonstrate pretext by arguing that defendants did not follow their "general hiring practices," is further indication that defendants did actually meet their burden of production.
197 (R.I. 2006)). I refer specifically to the language in the jury instruction whereby the jury was explicitly informed as follows with respect to defendants:

"[The defendants] failed to clearly and specifically articulate [their] reasons for not promoting Mr. Yangambi to the [2004 Position]. Therefore, with respect to [said position,] the jury is required to assume the [defendants'] failure to promote Mr. Yangambi was motivated, at least in part, by intentional discrimination unless the jury finds there is contrary or opposing evidence that refutes this presumption."

I fundamentally disagree that defendants failed to clearly and specifically articulate their reasons, and I therefore disagree that the jury was "required" to assume the fact of intentional discrimination on defendants' part. This reasoning is inconsistent with the finely balanced allocation of the burdens of proof and production that is outlined in McDonnell Douglas Corp., 411 U.S. at 802-04, and the cases that have exegeted and refined that seminal case. See, e.g., Hicks, 509 U.S. 502; Burdine, 450 U.S. 248. As such, in my opinion, this case should be remanded for a new trial.

I do not lightly dissent, but I have no choice but to do so. I am convinced that the verdict for the plaintiff was reached after the jury had been instructed in a fundamentally erroneous way. I believe that the balanced procedural approach that was outlined in the seminal McDonnell Douglas Corp. case has been materially disregarded in this case and that the result reached is inconsistent with settled principles of law. With regret that I cannot join the majority, but nevertheless with some degree of fervor, I respectfully submit my unequivocal dissent.

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3 Since I believe that the fundamental error in the jury instructions requires a new trial in this case, I need not and do not reach the difficult issues surrounding the question of mitigation of damages (i.e., the adequacy vel non of plaintiff's attempts to mitigate his damages and the manner in which that issue was handled as a matter of civil procedure).
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<td>Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.</td>
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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.  

SUPERIOR COURT  

(FILED: November 18, 2016)

RONALD N. RENAUD,  

Plaintiff,  

v.  

GINA RAIMONDO, Alias, individually and in her Capacity as Governor of the State of Rhode Island; MICHAEL DIBIASE, Alias, individually and in his Capacity as Director, Department of Administration of the State of Rhode Island; and THE STATE OF RHODE ISLAND,  

Defendants.  

C.A. No. PC-2016-0910

DEcision

SILVERSTEIN, J. Before the Court is the Defendants’—Gina Raimondo, individually and in her capacity as Governor of the State of Rhode Island; Michael DiBiase, individually and in his capacity as Director of the Department of Administration of the State of Rhode Island; and the State of Rhode Island (Defendants)—Motion to Dismiss Plaintiff Ronald N. Renaud’s (Renaud) First Amended Complaint pursuant to Rule 12 of the Rhode Island Superior Court Rules of Civil Procedure. The Court has jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

In June of 2007, Renaud was hired as the Executive Director of the Department of Administration (DOA) of the State of Rhode Island. First Am. Compl. at 2, ¶ 1. As DOA’s Executive Director, Renaud was a classified state employee with permanent status. Id. at ¶ 3.
Renaud served as the DOA’s Executive Director until March 20, 2015, when Defendant DiBiase informed him that his position had been abolished and he had been laid off.  Id. at ¶ 5.  On February 29, 2016, Renaud initiated this lawsuit asserting that he was unlawfully terminated.

Following Renaud’s initial Complaint in February of 2016, Defendants moved to dismiss. After several months, during which the parties engaged in considerable motion practice, Renaud filed his First Amended Complaint on September 1, 2016. Again, Defendants moved to dismiss. The Court heard arguments on the Motion to Dismiss the First Amended Complaint on October 5, 2016. After that hearing, the Court accepted supplemental memoranda from both parties.

II

Standard of Review

“‘[T]he sole function of a motion to dismiss is to test the sufficiency of the complaint.’” R.I. Emp’t Sec. Alliance, Local 401 v. State, Dep’t of Emp’t & Training, 788 A.2d 465, 467 (R.I. 2002) (hereinafter R.I. Emp’t) (per curiam) (alteration in original) (quoting R.I. Affiliate, ACLU v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). In testing a complaint’s sufficiency, the Court “‘assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiff[.]’” Id. (quoting St. James Condo. Ass’n v. Lokey, 676 A.2d 1343, 1346 (R.I. 1996)). “[N]o complaint will be deemed insufficient unless it is clear beyond a reasonable doubt that the plaintiff will be unable to prove his right to relief[.]” Bragg v. Warwick Shoppers World, Inc., 102 R.I. 8, 12, 227 A.2d 582, 584 (1967). Accordingly, a motion to dismiss “should not be granted ‘unless it appears to a certainty that the plaintiff[ ] will not be entitled to relief under any set of facts which might be proved in support of [his] claim.’” R.I. Emp’t, 788 A.2d at 467 (internal alterations omitted) (quoting St. James Condo Ass’n, 676 A.2d at 1346).
III

Discussion

Renaud’s primary claim in his First Amended Complaint is that he was wrongfully terminated due to his political affiliation. This claim is listed as part 7(a) of Count I in his First Amended Complaint. Defendants argue that the Court should dismiss Renaud’s First Amended Complaint because of his failure to properly exhaust his administrative remedies under G.L. 1956 § 36-4-42, which pertains to state employees, such as Renaud, who allege discrimination on the basis of political beliefs. According to Defendants, Renaud’s claim should first have been brought to the Personnel Appeal Board, not to this Court. Defendants contend that taking Renaud’s allegations as true—specifically that he was laid off and his job was abolished due to his political affiliation—he failed to first exhaust his administrative remedies with the Personnel Appeal Board and that, as a result, this Court should dismiss Renaud’s claim for wrongful termination.

Renaud responds to this contention with two arguments. First, Renaud maintains that he did not have to bring his claim with the Personnel Appeal Board; doing so was permissive, he avers, not mandatory. Essentially, Renaud argues that after he was laid off he had two distinct options: appeal to the Personnel Appeal Board or bring suit in this Court. Renaud believes that is the case because § 36-4-42 provides that aggrieved state employees “may” appeal to the Personnel Appeal Board for relief. Defendants contend that the use of the word “may” does not allow Renaud to circumvent the Personnel Appeal Board.

Second, Renaud asserts that he did not need to seek a remedy with the Personnel Appeal Board because doing so would have been futile. According to Renaud, appealing to the Personnel Appeal Board would have been futile because (a) the Personnel Appeal Board, which
is comprised of members appointed by the Governor, was biased against him and would therefore be incapable of rendering an impartial decision in his favor and (b) the Personnel Appeal Board lacked the authority to restore Renaud to a position that had been abolished. In response, Defendants contend that the Personnel Appeal Board was perfectly capable of rendering a decision in Renaud’s case. According to Defendants, the mere allegation of potential bias against a government board made up of appointees is insufficient to invoke the futility exception to the requirement that a plaintiff first exhaust his administrative remedies prior to seeking judicial relief. Moreover, Defendants argue that the Personnel Appeal Board is tasked with the authority to provide precisely the remedy Renaud sought.

In addition to maintaining that he did not need to first seek a remedy with the Personnel Appeal Board, Renaud alleges myriad claims throughout his First Amended Complaint. Although divided into two counts that generally allege wrongful termination, Renaud’s First Amended Complaint also contains allegations that Defendants violated numerous constitutional provisions. Specifically, in the introductory paragraph to his First Amended Complaint, Renaud states violations of the First, Sixth, and Fourteenth Amendments of the United States Constitution as well as violations of Article I, Sections 5, 21, and 24, Article II, Section 7,1 and Article IX, Section 2 of the Rhode Island Constitution. With a passing reference to 42 U.S.C. § 1983, Renaud appears to allege that Section 1983 is the mechanism that provides him with relief for the alleged violations of the federal constitution. These allegations all seem to be set alongside Count II of his First Amended Complaint, which generally alleges that Defendants violated Renaud’s constitutional right to continued employment.

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1 There is no such provision in the Rhode Island Constitution.
Finally, in parts 7(b) through (d) of Count I, Renaud alleges various forms of a civil conspiracy. According to Renaud, Defendants conspired to lay him off and abolish the position of Executive Director based on his political affiliation.

A

Failure to Exhaust Administrative Remedies

Generally, “a plaintiff first must exhaust his administrative remedies before seeking judicial review of an administrative decision.” Almeida v. Plasters’ & Cement Masons’ Local 40 Pension Fund, 722 A.2d 257, 259 (R.I. 1998) (per curiam) (citing Burns v. Sundlun, 617 A.2d 114, 117 (R.I. 1992)). “It is well settled that a plaintiff aggrieved by a state agency’s action first must exhaust administrative remedies before bringing a claim in court.” R.I. Emp’t, 788 A.2d at 467. The exhaustion requirement “serves two purposes: (1) it aids judicial review by allowing the parties and the agency to develop the facts of the case, and (2) it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, perhaps avoiding the necessity of any judicial involvement.” Id. at 467 (internal quotation marks omitted) (quoting Burns, 617 A.2d at 117).

A plaintiff’s failure to exhaust his administrative remedies may warrant dismissal of his complaint for lack of subject matter jurisdiction. Almeida, 722 A.2d at 259; Jacob v. Burke, 110 R.I. 661, 673, 296 A.2d 456, 463 (1972) (explaining that “when a litigant has failed to exhaust his administrative remedies the trial justice, may, in his discretion, dismiss an entire complaint for lack of subject matter jurisdiction”). Indeed, the Rhode Island Supreme Court “has ‘indicated [its] strong preference for proceeding with an administrative procedure through judicial review as opposed to instituting a separate action . . .’” Richardson v. R.I. Dep’t of Educ., 947 A.2d

However, although the exhaustion requirement may result in dismissal for lack of subject matter jurisdiction, see, e.g., R.I. Emp’t, 788 A.2d at 469, the Rhode Island Supreme Court has “recognized exceptions to the exhaustion requirement—for example, when an appeal to an administrative review board would be futile . . . .” Almeida, 722 A.2d at 259 (citing M.B.T. Constr. Corp. v. Edwards, 528 A.2d 336, 337-38 (R.I. 1987)). The futility exception has been applied in cases where an administrative agency lacks the authority to do what the plaintiff requests, such as invalidating a zoning ordinance or declaring a statute unconstitutional. See, e.g., M.B.T. Constr. Corp., 528 A.2d at 337-38; Kingsley v. Miller, 120 R.I. 372, 374, 388 A.2d 357, 359 (1978). Barring the applicability of an exception to the exhaustion requirement, such as futility, the Court may dismiss a claim for lack of subject matter jurisdiction when a plaintiff fails to exhaust the administrative remedies available to him or her. See R.I. Emp’t, 788 A.2d at 467; Almeida, 722 A.2d at 259; Burns, 617 A.2d at 117.

Here, according to his First Amended Complaint, Renaud was a classified state employee with permanent status. First Am. Compl. at 2, ¶¶ 1, 3. Renaud’s status in this respect entitled him to certain rights under the Merit System Act, codified at chapter 4 of Title 36 of the Rhode Island General Laws. Specifically, pursuant to § 36-4-42:

“Any state employee with . . . permanent status who feels aggrieved by an action of an appointing authority resulting in a demotion, suspension, layoff, or dismissal or by any personnel action which an appointing authority might take which causes the person to believe that he or she had been discriminated against because of his or her . . . political . . . beliefs, may, within thirty (30) calendar days of the mailing of the notice of that action, appeal in writing to the personnel appeal board for a review or public hearing.” (Emphasis added.).
The Personnel Appeal Board “is an independent agency of the state designed to protect the interests of state employees under the merit system.” Dep’t of Corr. of State of R.I. v. Tucker, 657 A.2d 546, 549 (R.I. 1995). Furthermore, the General Assembly has specifically mandated that “[t]he [P]ersonnel [A]ppeal [B]oard shall hear appeals: . . . [b]y any person who holds the belief that he or she has been discriminated against because of his or her . . . political . . . beliefs in any personnel action.” Section 36-3-10(a)(3); see also § 36-3-10(b). If a state employee is dissatisfied with the Personnel Appeal Board’s determination, he or she may then appeal to this Court for relief through the normal course as provided in the Administrative Procedures Act. See G.L. 1956 § 42-35-15.

Section 36-4-42 provided Renaud with precisely the remedy he now seeks. As a state employee with permanent status who alleges that he was laid off because of his political affiliation, Renaud fits squarely within the language of § 36-4-42. The Personnel Appeal Board exists, in part, to hear such a claim. See § 36-3-10(a)(3). Similarly, his claim that the position of Executive Director was abolished to remove him from state employment arises under § 36-4-42 because it alleges a “personnel action . . . which causes the person to believe that he or she had been discriminated against because of his . . . political . . . beliefs.” Even if Defendants had abolished the position of Executive Director due to Renaud’s political beliefs, Renaud’s remedy was first with the Personnel Appeal Board. See § 36-3-10(a)(3).

According to the information and allegations in his First Amended Complaint, Renaud took no action to seek relief through the administrative procedure outlined in § 36-4-42. In failing to appeal his layoff or job abolition through the administrative avenue of relief available to him, Renaud failed to exhaust his administrative remedies as required by § 36-4-42. See R.I. Emp’t, 788 A.2d at 467; Almeida, 722 A.2d at 259.
Renaud was required to appeal to the Personnel Appeal Board even though § 36-4-42 uses the word “may.” See § 36-4-42. When interpreting a statute, the Court looks first to its plain meaning. Mut. Dev. Corp. v. Ward Fisher & Co., LLP, 47 A.3d 319, 328 (R.I. 2012). “It is well settled that when the language of a statute is clear and unambiguous, the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” Tanner v. Town Council of E. Greenwich, 880 A.2d 784, 796 (R.I. 2005) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)). “[W]hen [the Court] examine[s] an unambiguous statute, ‘there is no room for statutory construction and [it] must apply the statute as written.’” Id. (quoting State v. DiCicco, 707 A.2d 251, 253 (R.I. 1998)).

While it appears that our Supreme Court has not yet had the occasion to address the use of “may” in § 36-4-42, it has indicated that the use of “may” elsewhere in the Merit System Act does not allow a plaintiff to circumvent the exhaustion requirement. See Mikaelian v. Drug Abuse Unit, 501 A.2d 721, 725-26 (R.I. 1985). In Mikaelian, the Rhode Island Supreme Court held that the plaintiff, a state employee covered both by the Merit System Act and a collective bargaining agreement, failed to properly exhaust his administrative remedies and affirmed the dismissal of his case. Id. at 726. The Court determined that the plaintiff had two remedies—one under his collective bargaining agreement and another under § 36-4-40. Id. As the Court stated, in addition to his remedy under the collective bargaining agreement, “[the] plaintiff, as a merit-system employee, had the option of proceeding through the appeal mechanism set forth in . . . §§ 36-3-10 and 36-4-40.” Id. Because the plaintiff neither sought relief through a collectively-bargained grievance procedure nor appealed to the Personnel Appeal Board under § 36-4-40, the Court found that he “had not exhausted either of the administrative remedies open to him.” Id.
Thus, the use of the word “may” in § 36-4-40 did not relieve the plaintiff of the requirement that he first seek his administrative remedy with the Personnel Appeal Board before seeking judicial relief. See id.

The same rule applies here: the use of the word may in § 36-4-42 does not relieve Renaud of the requirement that he first exhaust his administrative remedy with the Personnel Appeal Board. See id. Like the plaintiff in Mikaelian, Renaud is a classified state employee covered by the Merit System Act. See 501 A.2d at 725-26; see also § 36-4-42; First Am. Compl. at 2, ¶¶ 1, 3. Just as the use of the word “may” in § 36-4-40 did not allow the plaintiff in Mikaelian to circumvent the administrative process, the use of the word “may” in § 36-4-42 does not allow Renaud to circumvent the Personnel Appeal Board and come directly to this Court. See Mikaelian, 501 A.2d at 725-26. Thus, although the use of the word “may” in § 36-4-42 implies a sense of permissiveness, Renaud had to first exhaust his administrative remedy with the Personnel Appeal Board. See id. at 726. Renaud had an administrative remedy available to him; he elected not to exhaust it. See id. The use of the word “may” does not relieve Renaud of that requirement.

In addition, Renaud likely had an administrative remedy available to him pursuant to § 36-4-38, entitled “Dismissal.” Under § 36-4-40,

“Any person with . . . permanent status who feels aggrieved by an action of the personnel administrator may . . . make a request in writing for an appeal hearing to the administrator of adjudication for the department of administration, and be heard within fourteen (14) calendar days of receipt of the appeal request.”

If that person then “feels aggrieved by a decision of the administrator of adjudication [he] may, within thirty (30) calendar days of the rendering of a decision, request in writing for the personnel appeal board to review the decision or conduct a public hearing.” Sec. 36-4-41. As is the case with his failure to seek administrative relief under § 36-4-42, Renaud’s First Amended Complaint is devoid of any information that he took action pursuant to this procedural route. See Mikaelian, 501 A.2d at 725-26. Again, Renaud failed to first exhaust his administrative
Moreover, although futility is a recognized exception to the exhaustion requirement, it does not apply here.  See, e.g., M.B.T. Constr. Corp., 528 A.2d at 337-38.  First, unlike the plaintiff in M.B.T. Constr. Corp., the Personnel Appeal Board had the power to grant Renaud the relief he now seeks.  See id.  Section 36-4-42 provides, in pertinent part:

"[T]he personnel appeal board shall render a decision . . . which may confirm or reduce the demotion, suspension, layoff, or dismissal of the employee or may reinstate the employee and the board may order payment of part or all of the salary to the employee for the period of time he or she was demoted, suspended, laid off, or dismissed.  The decision of the board shall be final and binding upon all parties concerned, and upon the finding of the personnel administrator, or upon appeal, in favor of the employee, the employee shall be forthwith returned to his or her office or position without loss of compensation, seniority, or any other benefits he or she may have enjoyed, or under such terms as the appeal board shall determine.  The employee who is returned to his or her office or position by the appeal board following a review or public hearing shall be granted by the state of Rhode Island counsel fees, payable to his or her representative counsel, of fifty dollars ($50.00) for each day his or her counsel is required to appear before the appeal board in the behalf of the aggrieved employee."

After a hearing, the Personnel Appeal Board had the authority to reinstate Renaud without loss of compensation.  Thus, Renaud’s remedy was within the power of the Personnel Appeal Board to award.  See id.; see, e.g., Disano v. Personnel Appeal Bd., No. C.A. 95-4754, 1997 WL 839869, at *4 (R.I. Super. Jan. 8, 1997) (Sheehan, J.) (affirming decision of the Personnel Appeal Board that reinstated a laid-off state employee to a job that had been abolished); Romano v. Pare, No. C.A. 83-3020, 1984 WL 559244, at *1-2 (R.I. Super. Nov. 30, 1984) (Gibney, J.) (denying injunctive relief to reinstate a state employee whose position had been abolished because that employee had an adequate remedy with the Personnel Appeal Board).  Because the Personnel Appeal Board had the authority to do what Renaud seeks, appealing his layoff to the Personnel Appeal Board would not have been futile.  See M.B.T. Constr. Corp., 528 A.2d at 337-38.

remedies in accordance with the well-settled requirement that he do so.  See R.I. Emp’t, 788 A.2d at 467; Mikaelian, 501 A.2d at 725-26.
Furthermore, appealing to the Personnel Appeal Board would not have been futile because of an alleged bias amongst its members. Renaud’s argument on this issue is twofold. First, he contends that the Personnel Appeal Board was unable to render an impartial decision in his case because it is subordinate to Defendants’ control, meaning that the members were biased against him. Second, he alleges that seeking relief from the Personnel Appeal Board was futile because its members are appointed by the Governor. In support of these contentions, Renaud cites to two cases: O’Neill v. Baker, 210 F.3d 41 (1st Cir. 2000) and Duhani v. Town of Grafton, 52 F. Supp. 3d 176 (D. Mass. 2014). However, neither of these cases supports the argument that an appeal to the Personnel Appeal Board would have been futile; rather, these cases focus on the requirement of a pretermination hearing for state employees. In fact, the plaintiffs in both of these cases first exhausted their respective administrative remedies under the relevant Massachusetts civil service protections. O’Neill, 210 F.3d at 45-46; Duhani, 52 F. Supp. 3d at 180-81.

Here, Renaud had pretermination protections available to him under the Merit System Act. In at least two ways, he had the ability to challenge his job abolition or layoff through the administrative process. For example, as § 36-4-38 provides, “[a]ny removal or separation of an employee from the classified service not otherwise provided for in this chapter shall be deemed to be a dismissal.” If Renaud felt that his job abolition or layoff was the result of wrongful action on the part of Defendants, thereby constituting a dismissal, he had the ability to challenge it through the administrative process, starting with an appeal to the DOA’s personnel administrator. See id. After challenging his situation with the DOA’s personnel administrator, if he remained dissatisfied, Renaud could have sought an appeal with the administrator of adjudication for the DOA. See id. From there, Renaud could have appealed to the Personnel
Appeal Board. See § 36-4-41. Alternatively, as previously discussed, Renaud had an entirely separate remedial course available to him: he could have challenged his predicament directly to the place he elected not to go prior to filing the instant lawsuit—the Personnel Appeal Board. See § 36-4-42 (providing a remedy for personnel action taken on the basis of a state employee’s political beliefs). Either of these options provided Renaud with an administrative remedy necessary to fulfill the pretermination requirements discussed in O’Neill, 210 F.3d 41 and Duhani, 52 F. Supp. 3d 176.

Addressing Renaud’s futility arguments together, the Court notes that it is true that the members of the Personnel Appeal Board are appointed by the Governor, see Tucker, 657 A.2d at 549; however, that fact alone does not invoke the futility exception. As applied by our Supreme Court, the futility exception covers the situations when an administrative remedy is inadequate because the agency is powerless to grant one. M.B.T. Constr. Corp., 528 A.2d at 337-38 (finding futility because the zoning board could not invalidate a zoning ordinance); Kingsley, 120 R.I. at 374, 388 A.2d at 359 (finding futility because the agency could not declare a statute unconstitutional). Here, as noted above, the Personnel Appeal Board had the power to grant Renaud an adequate remedy; yet, he elected not to seek it. See § 36-4-42; Disano, 1997 WL 839869, at *4; Romano, 1984 WL 559244, at *1-2. The Personnel Appeal Board is mandated by statute to hear the type of claim Renaud has alleged. See § 36-3-10(b). The futility exception is a limited one and considering our Supreme Court’s “strong preference for proceeding with an administrative procedure through judicial review as opposed to instituting a separate action,” Richardson, 947 A.2d at 259, this Court declines to apply it here.

In the case before the Court, there is no allegation that Renaud took any administrative action to challenge his layoff. Renaud had clear administrative remedies available to him with
the DOA’s personnel administrator or the Personnel Appeal Board, but did not pursue it. See §§ 36-4-40, 36-4-42. Therefore, Renaud has failed to exhaust his administrative remedies, and the Court finds that it lacks subject matter jurisdiction to hear his claim for wrongful termination. See R.I. Emp’t, 788 A.2d at 467; Almeida, 722 A.2d at 259; Jacob, 110 R.I. at 673, 296 A.2d at 463.

B

Constitutional Claims

In addition to asserting a claim for wrongful termination for his political affiliation, Renaud alleges a host of violations of his constitutional rights. At the outset, the Court re-iterates that its job in considering a motion to dismiss is to test the sufficiency of the complaint. R.I. Emp’t, 788 A.2d at 467. In doing so, the Court resolves all doubts in the plaintiff’s favor. Id. However, the plaintiff must still allege some “‘set of facts which might be proved in support of [his] claim.’” Id. (internal alterations omitted) (quoting St. James Condo Ass’n, 676 A.2d at 1346). When the plaintiff fails to do so, he has failed to state a claim for which relief can be granted, and the Court may accordingly dismiss. Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008).

Renaud has not alleged facts necessary to properly state a claim upon which relief can be granted. See id. Although the Court adheres to a liberal notice-pleading standard when reviewing a motion to dismiss for failure to state a claim, Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 422-23 (R.I. 2014), and the Court is instructed that “[a]ll pleadings shall be [] construed as to do substantial justice,” see Super. R. Civ. P. 8(f), here Renaud failed to allege facts that show a violation of his federal and state constitutional rights. The Court finds that the generalized list of constitutional rights Renaud provided in the introductory section of his
First Amended Complaint fails to state a claim for which the law provides relief. See Super. R. Civ. P. 12(b)(6). A broad-based conclusory assertion of federal and state constitutional violations, without more, is insufficient to state a claim for relief. See Doe ex rel. His Parents & Natural Guardians v. E. Greenwich Sch. Dep’t, 899 A.2d 1258, 1262 n.2 (R.I. 2006) (noting that “[a]llegations that are more in the nature of legal conclusions rather than factual assertions are not necessarily assumed to be true” and that “‘sweeping legal conclusions are not admitted’ for the purposes of reviewing a Super. R. Civ. P. 12(b)(6) motion”) (quoting Robert B. Kent et al., R.I. Civil Procedure § 12:9, III–44 (West 2006)). Therefore, “it appears to a certainty that [Renaud] will not be entitled to relief under any set of facts which might be proved in support of [his] claim.” R.I. Emp’t, 788 A.2d at 467 (quoting St. James Condo Ass’n, 676 A.2d at 1346).

Moreover, even when reviewing these allegations with the most liberal of eyes, the Court notes that the introductory allegations and Count II of the First Amended Complaint should also be dismissed for Renaud’s failure to his exhaust administrative remedies. Assuming he had alleged a set of facts that could have stated a claim under the law, he still failed to exhaust his administrative remedies. See R.I. Emp’t, 788 A.2d at 467; Almeida, 722 A.2d at 259. Under Count II and the introductory paragraph of his First Amended Complaint, any due process deficiency he has alleged with respect to his constitutionally protected interest in continued employment would have been cured by appealing to the Personnel Appeal Board as he was required to do. See § 36-4-42; Mikaelian, 501 A.2d at 725-26; see also Duhani, 52 F. Supp. 3d at 181-83. As belabored above, the array of allegations set forth in his First Amended Complaint regarding Renaud’s claim of wrongful termination should have been appealed to the Personnel Appeal Board. See Mikaelian, 501 A.2d at 725-26. Therefore, Count II of Renaud’s First
Amended Complaint, including the constitutional violations in the introductory paragraph, is dismissed. Palazzo, 944 A.2d at 149-50; R.I. Emp’t, 788 A.2d at 467; Super. R. Civ. P. 12(b)(6).

For purposes of clarity, at this juncture, the Court has dismissed both part 7(a) of Count I and Count II of Renaud’s First Amended Complaint for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted, respectively.

C

Civil Conspiracy

Rounding out the bevy of allegations included in Renaud's two-count First Amended Complaint is a claim of civil conspiracy. Renaud alleges that his layoff was the result of a civil conspiracy among all of the Defendants to deprive him of his statutory and constitutional rights. Defendants argue that this claim should be dismissed because, in order for the Court to find a conspiracy, there must first be a finding of an underlying tort. Defendants contend that the Court cannot make that initial finding and must therefore dismiss the conspiracy claim.

To the extent that such a claim needed to have been brought before the Personnel Appeal Board, this claim is dismissed. See R.I. Emp’t, 788 A.2d at 467; Almeida, 722 A.2d at 259; Mikaelian, 501 A.2d at 725-26. However, assuming this Court possessed subject matter jurisdiction to hear Renaud's civil conspiracy allegation, the Court finds that he has failed to state a claim for which relief can be granted.

Although Rhode Island law recognizes civil conspiracy as a valid claim for relief, “civil conspiracy is not an independent basis of liability. It is a means for establishing joint liability for other tortious conduct; therefore, it ‘requires a valid underlying intentional tort theory.’” Read & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004) (quoting Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268 (D.R.I. 2000)). Thus, to
survive a motion to dismiss, a plaintiff’s complaint must set forth some underlying intentional tort theory onto which a claim for civil conspiracy can attach. See id.

Here, Renaud’s First Amended Complaint does not meet that standard. Although Renaud asserts that Defendants wantonly discriminated against him based on his political affiliation, the underlying claims regarding wrongful termination were not brought at the administrative level with the Personnel Appeal Board. See § 36-4-42; Mikaelian, 501 A.2d at 725-26. With no underlying counts onto which a civil conspiracy claim can be layered, Renaud’s assertion of civil conspiracy is a claim for which the law provides no relief. See Super. R. Civ. P. 12(b)(6). With no underlying tort, there is no viable claim for civil conspiracy. See Read & Lundy, Inc., 840 A.2d at 1102. Therefore, the Court dismisses Renaud’s claim for civil conspiracy for failure to state a claim for which relief can be granted. See Palazzo, 944 A.2d at 149-50; R.I. Emp’t, 788 A.2d at 467; Super. R. Civ. P. 12(b)(6).

D

Remaining Claims

To the extent that Renaud’s First Amended Complaint contains any remaining allegations of employment discrimination beyond those previously addressed counts for wrongful termination, he had to have first sought relief with the Rhode Island Commission for Human Rights (Commission). Again, the Court notes that “[i]t is well settled that a plaintiff aggrieved by a state agency’s action first must exhaust administrative remedies before bringing a claim in court.” R.I. Emp’t, 788 A.2d at 467. This rule also applies in the context of the Fair Employment Practices Act (FEPA), as outlined in chapter 5 of Title 28 of our General Laws. FEPA “confers upon the [Commission] administrative jurisdiction to hear and resolve claims of unfair employment practices such as employment discrimination.” Paulo v. Cooley, Inc., 686 F.
Supp. 377, 382 (D.R.I. 1988). “Under [FEPA, complainants must exhaust their administrative remedies prior to commencing judicial action.” Barber v. Verizon New England, Inc., 2005 WL 3479834, at *2 (D.R.I. Dec. 20, 2005); Power v. City of Providence, 582 A.2d 895, 899 (R.I. 1990) (stating that “the ‘exhaustion’ doctrine would normally ban [the plaintiff’s] FEPA claim”) (citing Paulo, 686 F. Supp. at 382). To exhaust his administrative remedies, a plaintiff must “fil[e] a written charge detailing the allegedly discriminatory conduct, and submitting to Commission efforts to conciliate or settle the charge.” Barber, 2005 WL 3479834, at *2. A plaintiff may only seek judicial relief if, after filing a written charge with the Commission, the Commission allows him or her to opt out of the Commission’s informal efforts to settle the claim. Id.; see G.L. 1956 § 28-5-16 (providing that the Commission “shall attempt, by informal methods of conference, persuasion, and conciliation, to induce compliance with [FEPA]”).

However, Power instructs, this requirement may be circumvented if seeking relief with the Commission under FEPA would be futile. 582 A.2d at 899. This exception has been applied when the “[C]ommission would be unable to undertake its normal task of ‘conference, persuasion, and conciliation’ to reach a settlement” and the plaintiff’s case presents only a question of law with “no factual record to develop.” Id. Still, the general rule is “that the ‘exhaustion doctrine [] normally ban[s] [a plaintiff’s] FEPA claim,” id., and a failure to pursue administrative relief with the Commission may result in dismissal of that plaintiff’s claim. See, e.g., Mateo v. Davidson Media Grp. R.I. Stations, LLC, No. PC-2010-2433, 2013 WL 1880370, at *3 (R.I. Super. Apr. 30, 2013) (Stern, J.).

Here, to the extent he alleges employment discrimination beyond that based on political affiliation, Renaud’s remedy was with the Commission pursuant to FEPA. As noted above, Renaud’s First Amended Complaint mentions nothing of any efforts on his part to seek such
administrative relief prior to filing suit in this Court. His failure to exhaust administrative remedies with the Commission warrants dismissal of the allegations and claims arising under FEPA. See Paulo, 686 F. Supp. at 382. Seeking relief with the Commission would not have been futile, for doing so would have allowed for the Commission to develop a detailed, factual record in favor of reaching an informal solution to the discrimination Renaud allegedly encountered. See id. Therefore, to the extent that any claims regarding employment discrimination exist outside the context of his wrongful termination claim, the Court finds that Renaud failed to exhaust his administrative remedies with the Commission.

IV

Conclusion

After reviewing Renaud’s First Amended Complaint and “assum[ing] the allegations contained [therein] to be true and view[ing] the facts in the light most favorable to [him],” the Court grants Defendants’ Motion to Dismiss the First Amended Complaint. R.I. Emp’t, 788 A.2d at 467; Super. R. Civ. P. 12(b)(1), (6). The Court finds that it lacks subject matter jurisdiction to hear Renaud’s wrongful termination claim under Count I. See § 36-4-42; R.I. Emp’t, 788 A.2d at 467; Almeida, 722 A.2d at 259. Count II is also dismissed for failure to state a claim for which the law provides relief because Renaud failed to (a) properly allege facts that amount to a violation of any of the numerous constitutional amendments he cites and (b) assuming he stated such a claim, he failed to pursue it with the Personnel Appeal Board. See Palazzo, 944 A.2d at 149-50; R.I. Emp’t, 788 A.2d at 467; Super. R. Civ. P. 12(b)(6).

Furthermore, Renaud’s claim for civil conspiracy in parts 7(b) through (d) of Count I is dismissed for failure to state a claim upon which relief can be granted. See Palazzo, 944 A.2d at 149-50; Super. R. Civ. P. 12(b)(6). And, to the extent that the allegations included in the First
Amended Complaint amount to a claim for employment discrimination, those claims are also dismissed for lack of subject matter jurisdiction due to Renaud’s failure to exhaust his administrative remedies. See R.I. Emp’t, 788 A.2d at 467; Almeida, 722 A.2d at 259; Jacob, 110 R.I. at 673, 296 A.2d at 463.

For the foregoing reasons, the Court grants Defendants’ Motion to Dismiss Renaud’s First Amended Complaint. 3 Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.

3 Following the October 5, 2016 hearing on the instant Motion to Dismiss, Renaud filed a Motion to Amend the First Amended Complaint, a Motion to which Defendants objected. Along with his Motion to Amend, Renaud filed a Second Amended Complaint, which is identical to the First Amended Complaint but for one typographical correction in the introductory paragraph—specifically, he changed “Article II, Section 7” to “Article III, Section 7.” See Second Am. Compl. at 1. As previously noted in this Decision, there is no Article II, Section 7 in the Rhode Island Constitution. This Court is mindful of our Supreme Court’s instruction to “liberally allow amendments to the pleadings” under Rule 15. Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514, 530 (R.I. 2011) (quoting Medeiros v. Cornwall, 911 A.2d 251, 253 (R.I. 2006)). However, considering that the Second Amended Complaint is identical to the First Amended Complaint, but for a single typographical difference, the Court sees no reason why this Decision would not apply with the same force to the Second Amended Complaint. There is no substantive difference between the two pleadings that would cause this Court to reach a different outcome.
RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet


CASE NO: PC-2016-0910

COURT: Providence County Superior Court

DATE DECISION FILED: November 18, 2016

JUSTICE/MAGISTRATE: Silverstein, J.

ATTORNEYS:
For Plaintiff: Gerard M. DeCelles, Esq.
For Defendant: Chrisanne E. Wyrzykowski, Esq.
Jennifer S. Sternick, Esq.
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.                                                   SUPERIOR COURT

(FILED: December 7, 2016)

THE RETIREMENT BOARD OF THE
EMPLOYEES’ RETIREMENT SYSTEM
OF THE STATE OF RHODE ISLAND

v.

C.A. No. PC-2015-0203

FRED L. RANDALL

DECISION

LANPHEAR, J. This matter came on for trial before the Court in July 2016. Thereafter, the parties submitted memoranda in lieu of final statements. This matter is before the Court to determine whether Mr. Randall is entitled to any of his state pension benefits. If not, the Court is called upon to determine whether Diane Randall is entitled to any of his pension benefits as an “innocent spouse.”

The parties agreed to sever the issues so that the Court initially determines whether Mr. or Mrs. Randall is entitled to some or all of the pension payments, reserving their right to present additional evidence on the question of disposition of the pension contributions made if that remains an issue thereafter. Each party has rested on the initial question.

I

Findings of Fact

Mr. Randall, of Warwick, Rhode Island, worked for the State of Rhode Island as a contributing member of the Rhode Island State Employees’ Retirement System (ERSRI) continuously for approximately thirty-five years. In 1976, he began state employment as a cook’s helper in the Rhode Island Department of Mental Health, Rehabilitation and Hospitals. In
1978, he became a fiscal clerk at the Department of Computer Sciences at the University of Rhode Island (U.R.I.). In 1992 or 1993, he became a fiscal clerk in the Department of Chemistry at U.R.I. where he continued for about two years. He was then transferred to the Providence Extension of U.R.I. working in the Bursar’s Office as a fiscal clerk and a senior teller until 2011. He was earning between $50,000 and $52,000 per year.

Mr. Randall has been married to Diane Randall since 1975. During their forty-one year marriage, they had two children, now in their thirties and apparently living independently.

In 2012, Mr. Randall was charged with having embezzled monies from the state.\(^1\) In 2014, he pled no contest to embezzlement and was sentenced to twenty years at the Adult Correctional Institutions with thirty months to serve, the remaining time being suspended and running with probation. He was ordered to pay restitution of $200,000. Mr. Randall completed the incarceration and is now living with Mrs. Randall at their home.

Mr. Randall retired from state service in 2011 and received retirement benefits from March 2011 until March of 2015. The payments to him were about $4300 per month. In November of 2014 the payments declined to about $4000 per month and he became eligible for social security benefits. Per Mr. Karpinski, Executive Director of ERSRI’s, affidavit, Mr. Randall has already received pension payments totaling $185,750.46. According to the affidavit of Mr. Karpinski,\(^2\) if Mr. Randall were still receiving a pension, it would amount to $2564.27 per month.

Mr. Randall was very specific that he only took money from the state after 2004 until 2011. He did not take money before this time and did not admit to taking any money before this.

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\(^1\) *State v Randall*, Providence County Superior Court case number P2/12-2058.
\(^2\) At hearing, the parties agreed that this affidavit, attached to the Plaintiff’s Post-Trial Memorandum of Law, would have the weight of a full exhibit.
time. He was never disciplined at his extensive state employment for anything occurring before 2005 and specifically testified that no embezzlement occurred prior to receiving the new position in 2004. The money which Mr. Randall embezzled was money paid by students for tuition at U.R.I. He acknowledged that he violated the public trust entrusted upon him, and, by doing so, the state was obligated to credit the students with the funds, at a loss to the state.

Mr. Randall now has a significant conviction, is older and has health problems making it difficult to obtain new employment. He is still serving a suspended sentence and probation with about $200,000 still due in restitution. He has paid $150 per month since his release from incarceration this year.

Mrs. Randall remains married to Mr. Randall. They live with one another, though she now has separate accounts. Mr. Randall now receives $1476 per month in social security. Mrs. Randall makes about $6000 per year for her part time employment. In 2014, Mrs. Randall’s father passed away, leaving her a substantial inheritance. This allowed her to pay off the mortgage on their home and their credit card balance. She purchased a new car and renovated some of the home. She continues to have $180,000 in savings in her name and $100,000 in a retirement account in her name. She is searching for full-time employment. Mrs. Randall would occasionally gamble with her husband at Foxwoods Casino.

B

Credibility of the Witnesses

In State v Forbes, 925 A.2d 929 (R.I. 2007), our Supreme Court encouraged the trial courts to discuss the credibility of the witnesses. Mr. Randall was well-spoken, answered all questions directly and appeared contrite for his misdoing, particularly for how it harmed his family. He appeared prepared for his direct testimony and warily concerned when new topics
were raised on cross-examination. Obviously, his past wrongs give the Court significant concern for his credibility, though there were no clear inconsistencies in his testimony.

Mrs. Randall is an intelligent woman, anxious to hold her family together. Clearly displeased about what her husband did, she answered questions directly and attempted to be clear. Both spouses testified that Mrs. Randall never knew that Mr. Randall had embezzled or that he had used the significant amounts taken to pay for his chronic gambling. Each of the parties was consistent and firm in their testimony on direct examination and cross-examination. Moreover, each of the witnesses was consistent with one another, and no evidence was introduced which would contradict the testimony of either witness. They were frank about Mrs. Randall’s recent receipt of a significant bequest from her father’s estate. That being said, their testimony was obviously self-serving: The Court’s decision will affect the income to their household. Nevertheless, the Court found them somewhat credible, but anxious to protect their financial interests.

Mr. Randall claimed that the money that he took was used for gambling at the Foxwoods and Mohegan Sun Casinos in Connecticut. Mr. Randall claims that all of the funds were used for gambling and does not dispute the state’s calculations that he bet $250,000 during this time period. He claimed that there were no gifts or extravagant purchases. He testified he misled his wife regarding where he went at night and the source of his rewards card, which he did use for dinner and shows with his wife. If he won on any of his gambling ventures, he would spend it on a meal date or vacation with his wife, or gamble with it. Although he took gambling trips to Foxwoods Casino with his wife on several occasions, he claimed that she would only bet $20 to $30 of their own money on these ventures, using his wife’s rewards card, and the majority of the gambling was done without her knowledge in private trips to the casinos. Mr. Randall testified
he never informed his wife that he was converting state funds, and she knew nothing about the embezzlement until after his arrest.

Mr. and Mrs. Randall have been married for over forty years. They raised several children in a hard-working household and continued to enjoy each other’s company after the children had grown. It is reasonable for Mrs. Randall to have trusted Mr. Randall. Yet, as Mrs. Randall is an intelligent woman, it is difficult to comprehend how she would routinely use her own card for gambling, but never see Mr. Randall use a card when he gambled with her. Then, Mr. Randall would use a card, allegedly from a third party, to accept rewards. He claimed that he told his wife that the card was another woman’s card, and Mrs. Randall did not inquire further. Further, Mrs. Randall’s rewards card records indicated a loss of $35,000 over five years, though she earned less than $14,000 per year. Adding this component to Mr. Randall’s version of the shared card, it appears that Mrs. Randall may have been present during periods of significant gambling. On this issue, neither witness has significant credibility. Mrs. Randall appeared to have both intelligence and common sense; hence, it does not seem logical that she would not have inquired further about the source of these rewards. Still, there was no showing that she was complicit in the embezzlement, and it is not out of the norm for couples to gamble frequently. Mrs. Randall was never charged.

Not only was each of the witnesses’ testimony consistent with one another, but there was no evidence presented to the contrary. There was no proof, for example, that Mr. Randall took state funds prior to 2004 or that he spent the proceeds on other things. However, the Court recognizes that the state may be hard-pressed to find any proof of such.

Mr. and Mrs. Randall have established by a preponderance of the evidence that the embezzlement occurred only after 2004, that Mrs. Randall knew nothing about the
embezzlement until the arrest in 2014, and Mrs. Randall did not knowingly benefit from any of the proceeds of the embezzlement. She did benefit from his gambling as he used the rewards card for meals and hotel visits.

III

Analysis

G.L. 1956 § 36-10.1 is the Rhode Island Public Employee Pension Revocation and Reduction Act. Section 36-10.1-3(a) allows for immediate reduction or revocation of a public employee pension if the employee is convicted of a crime related to his public office or employment, as the conviction is "deemed to be a breach of the public officer's or public employee's contract with his or her employer." The Complaint herein requests full revocation pursuant to this section.

Mr. Randall

On March 2, 2015, another Justice of this Court entered an Order revoking Mr. Randall's pension after providing him with a hearing to show cause why his pension should not be revoked or reduced. As Mr. Randall was unsuccessful, it is inappropriate for this Court to reconsider the identical question. Moreover, Mr. Randall acknowledges the charge, that the state is due restitution of $200,000, the crime was in the course of his public employment, and he violated the terms of his employment contract.

Assuming, without finding, that the proceedings before the Court constituted supplementary show cause hearings, this Court now finds that the complete revocation of Mr. Randall's pension was appropriate. Pursuant to § 36-10.1-3(c)(2), the Court considers not only the period of dishonorable service, but whether the applicant was convicted, the severity of the
offense, the amount of the monetary loss suffered, the degree of public trust reposed in the applicant, and other factors.

Here, the only proof of the period of Mr. Randall’s dishonorable service is the testimony of Mr. Randall himself:

- He testified that his actions occurred only during the last seven years of his thirty-five year period of state employment.

- The severity of Mr. Randall’s acts was considerable. Not only did he take monies from the university, but the money was taken from students’ tuition payments. It is unclear whether they were credited with all of the amounts paid, whether it was the learning institution that was shortchanged for years, whether the university lost outside funding because of a shortage of real income, or whether classes were cancelled because of a loss of income. Nevertheless to reach the sum of $200,000, it is likely that there are numerous victims of Mr. Randall’s actions, and the university was substantially affected.

- The amount of the monetary loss, $200,000, is quite significant and substantial.

- Mr. Randall’s position involved the processing and securing of significant cash payments; hence, significant trust was bestowed upon him by his state employment.3 The Court also

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3 By statute, the Court is required to consider “[t]he degree of public trust reposed in the subject public official or public employee by virtue of his or her public office or public employment[.]” Sec. 36-10.1-3(c)(2)(iv). The statute does not focus on whether the office is a leadership position, an elected position, or highly paid. While some of those positions may have significant degrees of public trust allotted to them, all positions of public employment have been instilled with some degree of public trust by the government and its citizenry. To use a phrase most commonly credited to President Cleveland’s administration: “A public office is a public trust.” Mr. Randall’s position was not just a public office, but one which a prestigious university depended upon for handling cash payments by its students. Hence, it carried a high degree of public trust. There is no doubt that U.R.I.’s reputation and prestige is important, not only in attracting new students and obtaining additional funding, but for the success of its graduates and in attracting new professors. The need to properly credit tuition payments made by students and their families is of paramount importance to the university’s reputation.
considers that Mr. Randall demonstrated remorse, his family was significantly harmed by his arrest and conviction, he pled and cooperated and has already been sentenced.

Before leaving this issue, the Court notes that counsel for Mr. Randall emphasizes that Mr. Randall’s criminal conduct occurred only after 2004, and that he had a gambling addiction. The statute does not provide for a simple mathematical divvying up of an employee’s good service and bad service to determine the extent of the revocation—it compels this Court to weigh a variety of factors. The Court notes that proof before 2004 may be hard to come by but, of far more importance, is that Mr. Randall embezzled from students’ accounts, acknowledged doing so over a period of seven years, and absconded with a considerable amount of money.\footnote{Counsel’s reliance on Retirement Board of Employees’ Retirement System v. Azar, 721 A.2d 872 (R.I. 1998), is also misplaced. In Azar, the Superior Court awarded Mr. Azar and his creditors some of his pension, but the Supreme Court stated:}

\begin{quote} “Consequently, the trial justice was not required, as the board asserts, to revoke defendant’s entire pension simply because portions of his thirty-two years of public service were shown to be dishonorable. On the contrary, the trial justice was required to undertake PEPRRA’s statutorily prescribed, multi-factored analysis . . . Here, the trial justice did assay such an analysis. However, our review of PEPRRA’s five determinative factors—as applied to the circumstances of this case—causes us to conclude that the trial justice abused his discretion in allowing for the eventual reinstatement of defendant’s pension benefits. First, nearly all of defendant’s service as the city’s Director of Public Works was unequivocally dishonorable. The malfeasance in question was not an isolated, one-time transgression, but a multi-year, long-term course of conduct involving the loss of hundreds of thousands of public dollars pursuant to which defendant lined his own pockets with his ill-gotten gains. Second, the nature of defendant’s misconduct, namely, criminal racketeering, was very grave in relation to the relatively high degree of discretion and responsibility inherent in his public office. The defendant’s admission of his wrongdoing—a factor upon which the trial justice placed great weight—does not mitigate its severity. Third, the city suffered a substantial loss as a result of defendant’s conduct—approximately $435,000—while he personally profited from the bribes and other gratuities that were furnished to him. Fourth, the city and its taxpayers reposed a substantial quantum of trust in defendant. At a minimum, he was in a position to allow construction contractors to overcharge the city hundreds of thousands of dollars.”
\end{quote}
Considering these factors in total, the Court finds that the continued and permanent revocation of Mr. Randall’s pension benefits is appropriate, but allows Mr. Randall to retain the benefits he received prior to his conviction, during which period he was presumed to be not guilty.

Mrs. Randall

In the alternative, Mr. and Mrs. Randall claim Mrs. Randall should be compensated as an innocent spouse. Upon review of § 36-10.1-3(d) and Retirement Board of Employees’ Retirement System v. DiPrete, 845 A.2d 270 (R.I. 2004), this Court concludes that the following elements must be demonstrated prior to providing benefits to a spouse:

1. That the guilty spouse was a member of the state retirement system;
2. The spouse is an innocent person, Sec. 36-10.1-3(d).

If so, the Court then considers:

1. The financial needs and resources of the innocent spouse, DiPrete, 845 A.2d at 290, 293;
2. The award of benefits as “justice may require,” Sec. 36-10.1-3(d);
3. The spouse should not be penalized for remaining in the marriage, DiPrete, 845 A.2d at 293;

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“Finally, notwithstanding the enormity of his wrongdoing, defendant already has received substantial benefits from his pension. Specifically, defendant has received and benefited from pension payments in excess of $320,000 that were paid to him during the five-year period that the board’s unresolved PEPRRA suit has been pending in the courts.

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“It is this windfall—namely, the eventual reinstatement of Azar’s pension benefits—that we do reverse because we conclude that, given the egregious circumstances of defendant’s violation of his public trust and the hundreds of thousands of dollars worth of benefits he already has received to date and will receive in the future, it was an abuse of the trial justice’s discretion under these circumstances to order such a reinstatement.” Azar, 721 A.2d at 876-77.
4. Whether the innocent spouse has the ability to liquidate resources to support herself, id. at 294;

5. Any award is not dependent on the revocation or reduction from the guilty spouse, id. at 294, but the pension funds are “marital property,” id. at 290.

Clearly, Mr. Randall, the guilty spouse, was a member of the state retirement system and an employee of the state. That fact is not contested. The second element, that the spouse be “innocent,” is more problematic. While the parties in DiPrete acknowledged that Mrs. DiPrete was innocent, id. at 289, the state made no such concession here. The state demonstrated that Mrs. Randall played a far more active role, not in the actual taking but in the use of the funds for gambling rewards and perhaps for the gambling itself. As the term “innocent spouse” is used in a pension revocation statute, it should be construed in a civil context, rather than a criminal one. That is, it is not necessary that the spouse be charged and found guilty in order to establish her lack of innocence, but that Mrs. Randall, as the moving party, actually establish her innocence; hence, she has the burden of proof to establish her innocence and any other justification for the payment.

To be innocent, the spouse must establish that she is “free from guilt; free from legal fault.” Black’s Law Dictionary 792, (7th ed.). As indicated, she is free from guilt, but not necessarily free from fault as she not only gambled, but received compensation in the form of casino rewards for the large amounts gambled. Mrs. Randall’s receipt of some benefit from the illicit scheme, as minor as it may or may not be, necessarily factors into whatever discretion the Court may have in meting out an award as justice may require. Not only did she receive the benefits of reduced or free hotel rooms and meals, but, according to her version, she never verified that the source of these benefits were from another woman’s card, whose card Mr.
Randall never used to gamble, even when he was next to Mrs. Randall (though he was using the card for the rewards).

The statutory framework clearly establishes that an innocent spouse is not entitled to a set percentage of the pension. The factors which the Court must consider in determining the amount awarded to the spouse are set forth above. They are not necessarily focused on the duration of the wrongdoing as compared to the period of wrongdoing, as Mrs. Randall suggests.

The Court must first consider the financial needs and resources of the innocent spouse. As noted, Mrs. Randall now has significant financial resources. She appears to have paid off all of her debt (not Mr. Randall's debt for the restitution), and has significant funds in savings and retirement accounts. She was even able to set up substantial accounts for her grandchildren. She has modest needs, not only because she has paid off her debt but because her husband now has social security income, she will have social security income, she is working part-time while seeking full-time employment and, apart from the sporadic gambling, she appears to have lived modestly. She is not to be penalized for remaining in the marriage, but it should be noted that Mr. Randall will presumably receive the benefit of his own social security income (see 42 U.S.C. § 407), the home (G.L. 1956 § 9-26-4.1) and other property (Sec. 9-26-4). Mrs. Randall specifically testified concerning her expenses. The home expenses included taxes, utilities, sewer fees, cellphone, gas, groceries, water, health insurance, and home insurance. Those expenses totaled $1683.33 per month. Some of these bills should be shared by Mr. Randall, but his income is now limited to his social security income. The Court concludes that expenses of $1600 per month are reasonable and anticipated.

Unlike Mrs. DiPrete in DiPrete, Mrs. Randall is still active in the workplace and receives an income. While the Supreme Court found that Mrs. DiPrete did not retain control over assets
which the trial court said were available to her (DiPrete, 845 A.2d at 295), Mrs. Randall’s assets are savings and retirement accounts in her own name. Accordingly, her financial resources are ample and her financial needs are likely to be met.

Next, the Court considers an award of benefits as “justice may require.” Sec. 36-10.1-3(d). Two principles of family law are important in considering Mrs. Randall’s share. The first, as discussed in DiPrete, 845 A.2d at 291-93, is the economic partnership theory of marriage. In Allard v. Allard, 708 A.2d 554, 557 (R.I. 1998), the Court concluded that a disability pension that effectively functioned as a retirement plan was subject to distribution to each spouse in a divorce as it is, in essence, a forced savings account available to both parties at retirement. Hence, DiPrete noted, the non-employee spouse has a legal interest in the retirement benefits. DiPrete, 845 A.2d at 291.

Another principle of family law is that property received by one spouse through an inheritance is not considered as a joint marital asset to be divided by a divorce. G.L. 1956 § 15-5-16.1(b); Ruffel v. Ruffel, 900 A.2d 1178, 1188 (R.I. 2006). Nevertheless, § 36-10.1-3(d) directs that this Court consider the “financial needs and resources” of the innocent spouse. Hence, the Court will consider that Mrs. Randall has substantial assets and income so that her financial needs may be met, but that is not the only factor.

Recognizing the significant appropriation made from marital funds for retirement contributions over the years ($73,569.84 according to Mr. Karpinski’s affidavit) and that Mrs. Randall continually presumed that state pension money would be available to the couple after retirement, some pension payments should be awarded to Mrs. Randall. The State Retirement Board has argued that an award to her should be capped at 50% of what Mr. Randall would have received. Although this appears somewhat at odds with the directive in DiPrete to avoid
punishing the innocent spouse for staying in the marriage, the award to Mrs. Randall should be limited.

Mr. Randall's income is $1476 per month. Mrs. Randall's income is $541 per month now but may go up to $750 per month as her hours are increased. Therefore, the household income is $2017 to $2226 per month. The joint expenses are $1600 per month, as Mrs. Randall has eliminated most of the marital debt with her own assets. Mr. Randall has a restitution debt which he is paying off at $150 per month.\(^5\) His set payment is limited by his income. His ongoing obligation limits the family's income.

His pension check would have been $2564.27 per month.

If the Court were to focus only on making payments in an attempt to make the victim whole in a reasonable amount of time, Mr. Randall's restitution payments would be spread out over no more than ten years, for a monthly payment of about $1667. The goal is not to make the Randall family 100% whole, but also not to punish the innocent spouse for the wrongs of the guilty and to reasonably compensate her for her contributions and lost income expectation. Adding the $1667 obligation to the family cash flow would result in a net loss of $1200 per month.

While neither the pension statute nor DiPrete focus on the loss to a victim, the present financial condition of Mr. Randall limits the likelihood that U.R.I. will ever be made whole. Not only do Mr. and Mrs. Randall suffer from the loss of income, the victim does too.\(^6\) Justice

\(^5\) Although only Mr. Randall is responsible for the restitution payments, it is no doubt coming out of the household income and lessening the net income to the couple.

\(^6\) The Court is directed to apply its reasonable discretion. In doing so, it notes how unfair the restitution arrangement is: Only Mr. Randall is obligated to pay, based on his income, expenditures and assets, which are now limited. Mrs. Randall's income and assets and family expenditures are calculated into determining her share of his pension. Providing Mrs. Randall
requires that the Court give consideration to restoring the victim, if the felon is to be compensated at all—directly or indirectly. Sec. 36-10.1-3(c)(2)(iii)(v). Hence, while awarding additional funds, the Court will require that the victim be timely compensated as a condition of payments to the innocent spouse.

IV

Conclusion

Considering all of these factors as a whole, Mrs. Randall is awarded ongoing pension payments, retroactive from the date of this trial (July 7, 2016), of $350 per month. She is awarded ongoing pension payments, commencing on January 1, 2017, in the amount of $1667 per month, on the condition that all of these payments be forwarded promptly, or assigned in advance, to the victim’s restitution debt of her husband. These payments shall continue until December 31, 2026, on the condition that victim restitution payments are timely made (within twenty days of receipt of any pension payment) or assigned. Once the restitution obligations are fully satisfied or no longer outstanding, the pension payments to Mrs. Randall shall be reduced to $500 per month and paid directly to her.

Previously, the Court left open the issue of whether the contributions should be refunded. Within thirty days of the date of this Decision, Mr. Randall shall inform the Court, in writing, whether he continues to pursue this request. If he fails to do so, final judgment consistent with this Decision may enter upon application of the Plaintiff.

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with an increased benefit, which would improve Mr. Randall’s quality of life, is unfair unless the victim benefits at least in part.
TITIE OF CASE: The Retirement Board of the Employees' Retirement System of the State of Rhode Island v. Randall

CASE NO: PC-2015-0203

COURT: Providence County Superior Court

DATE DECISION FILED: December 7, 2016

JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:
For Plaintiff: Michael P. Robinson, Esq.
For Defendant: Mark A. Fay, Esq.
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.                                SUPERIOR COURT  

(FILED: January 12, 2017)                  

STEVEN M. LABRIE                                      C.A. No. PC-2015-5344

v.                                                   

STATE OF RHODE ISLAND DEPARTMENT
OF LABOR AND TRAINING and
TEAMSTERS LOCAL 251

DECISION

CARNES, J. The above-captioned matter is before the Court on an appeal of a decision of the State of Rhode Island Department of Labor and Training (DLT). The DLT found the Plaintiff/Appellant Steven M. Labrie (Mr. Labrie or Plaintiff/Appellant) eligible to receive payment for unused vacation time only for the year 2013, and not for the accumulation of time for the years 2008 through 2012, which Plaintiff/Appellant had originally sought. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

Plaintiff/Appellant is a former business agent with Teamsters Local 251 (Union or Local 251). He was employed by Local 251 from 1995 until 2013, serving first as a trustee, then as an assistant business agent, and finally from 2000 until 2013 as a business agent. He was defeated in his bid for reelection in October of 2013, and he thus separated from the Union when his term ended on December 31, 2013. He requested that he be paid for the vacation time that he did not use for the years 2008 through 2013. Plaintiff/Appellant maintains that he is entitled to be paid for
vacation time from all years that he did not use all of the vacation time that he accrued, such years being 2008 through 2013. He submitted a request that he be paid for his unused vacation time, which he believed at the time to be ninety-seven days. He later calculated that he had accumulated 122.5 days of vacation time. Plaintiff/Appellant asserts that under the vacation policy enacted in 2005, when vacation time is not “paid out” the following year, it accumulates until the employee ceases to be employed by the Union, at which time the employee must be paid for all unused vacation time.

However, the Union contends that pursuant to the Union policy in effect at the time Plaintiff/Appellant separated from Local 251, he was only entitled to be paid for unused vacation time accrued the prior year – 2013. The Union argues that the language in the 2005 amendments to the vacation time policy supports the proposition that while vacation time accumulates from year to year, vacation pay can only be distributed the year following the year in which it was earned.

Plaintiff/Appellant filed a complaint with the DLT on January 14, 2014. See Pl.’s Compl. He initially sought payment for ninety-seven unused vacation days. He subsequently amended his complaint to seek payment for 122.5 days. See Pl.’s Compl. ¶ 9.

A duly-noticed hearing was held pursuant to G.L. 1956 § 28-14-19. This hearing was conducted by the DLT over the course of two days: July 7 and August 25, 2014.

Plaintiff/Appellant first called Sharon Frye, the bookkeeper for Local 251. She testified that Mr. Joseph Bairos, who served as secretary-treasurer of Local 251, asked her to calculate the number of unused vacation hours that had been accrued by several former officers who were separated from the Union in 2013, including the Plaintiff/Appellant. Tr. 17-18, July 7, 2014 (Tr. I). Plaintiff/Appellant entered into evidence a document (Complainant’s Ex. 1) prepared by Ms.
Frye that calculated the amount of vacation time that the aforementioned officers had taken in the years 2009 through 2013. Mr. Bairos had requested that she do so because he had learned that one or more of the recently separated officers planned to seek payment for unused time for years prior to 2013. Tr. 1 at 17. Matthew Taibi, the secretary-treasurer of Local 251, thereafter acknowledged receiving a letter from Plaintiff/Appellant dated May 10, 2014 requesting documentation of the amount of vacation time he had taken from 2008 through 2013. Mr. Taibi testified that because he was aware the matter was in litigation, he forwarded the request to the legal counsel of the Union. Id. at 22.

Plaintiff/Appellant testified that he started working for Local 251 as an elected trustee in 1995. Id. at 26-27. He was appointed to the positon of assistant business agent in 1997, and he was elected to the position of business agent in October 2000. Id. at 27. Mr. Labrie testified that he received a salary during the time that he served as a business agent, and he was given a W2 for tax purposes each year. Id. at 27-28. Mr. Labrie identified a document that explained the vacation policy enacted in 2004 (Complainant’s Ex. 3), and he identified a document that explained the vacation policy that was enacted in 2005 (Complainant’s Ex. 4). Tr. 1 at 29-31. He explained that he understood the vacation policy enacted in 2005 provided “the option of getting paid out at the end of the year, or not getting paid out and carrying over until you leave office, for whenever you leave office it will be paid out.” Id. at 31. He recognized that the amount of vacation time that he took in 2013 was initially overreported by fourteen hours (two days), and he explained the discrepancy by stating that the other officers used two days of vacation time in 2013 to campaign for reelection, and he did not campaign because of “a disability as far as walking around[.]” Id. at 33. He further testified that after his term as business agent ended in December 2013, he attended a meeting of Local 251 on January 26, 2014, addressing the issue of unused vacation time of
Union officers. Id. at 33-34. It was determined that going forward, officers could no longer be paid for unused vacation time. Id. at 34-35.

In his original complaint, Plaintiff/Appellant was seeking to be paid for ninety-seven hours of unused vacation time, not including the aforementioned two days that were in dispute or the unused time for 2008. Id. at 38. He further testified that he used “[j]ust under three weeks” of vacation in 2008. Id. at 38-39. Addressing the issue of officers departing from the Union, he stated that before 2004, “elected officials would have, for every [year] of service they would get a week’s pay, vacation or week’s pay . . . when they left their office, when they left service, they would get one week’s vacation pay for every year of service.” Id. at 40-41. He confirmed that the policy for departing officers and their vacation time, as referenced above, changed in 2004 and again in 2005. Id. at 41.

Plaintiff/Appellant testified that employees of the Union with more than twenty-five years of service “are entitled to six weeks’ vacation,” and “that’s been going on a long time.” Id. at 46. According to Plaintiff/Appellant, whenever he took vacation time, he would receive the same paycheck that he would receive in other weeks, and he “didn’t get a separate line item for vacation that changed[.]” Id. at 51. He confirmed that the documentation from the Union (Resp’t’s Ex. 2) indicated that he took “twelve days and fourteen hours [of vacation] in 2013,” though he is disputing the fourteen hours. Tr. 1 at 54. He further confirmed that during 2013, for the weeks during which he used vacation time, he received his “regular paycheck[,] even though [he was] claiming it as a vacation day[.]” Id. at 55. Plaintiff/Appellant further testified that he was seeking to be paid for unused vacation time for the years 2009 through 2013. Id. at 59.

According to Plaintiff/Appellant, he was not seeking payment for any vacation time for the years 2005-2006 because he “didn’t carryover” any time at the end of those years. Id. He
further testified that at the end of 2007, he was “paid out” for the time he did not use. Id. According to Plaintiff/Appellant, he contacted Ms. Frye regarding the discrepancy between the time the Union believed he had taken in 2013 and the time he recalls having taken, and this discrepancy was due to an apparent misunderstanding regarding whether he had used two days of vacation for campaigning in October of that year. Id. at 74-75.

Joseph Bairos, who served as secretary-treasurer for Local 251 until December 31, 2013, also testified. Mr. Bairos explained that he and the other officers seeking election were charged fourteen hours of vacation time for campaigning, and he directed Ms. Frye to record that time for each officer. Id. at 78. He later learned that Plaintiff/Appellant was contesting that time, alleging that his disability caused him not to participate in campaigning. He agreed with Plaintiff/Appellant that he should not have been charged for the fourteen hours in dispute for 2013. Id.

Mr. Bairos confirmed that prior to 1995, officers “leaving the employ of Local 251” would receive “a week’s pay, a vacation pay for every year of service.” Id. at 79. He testified that after 1995 and prior to the changes that were made in 2004, the policy was that officers could carry forward up to one-half of the vacation time they received each year. Id. at 80. Then, in 2005, the vacation policy for officers of Local 251 was again changed to the policy that the parties agree was in effect at the time that Plaintiff/Appellant separated from the Union in 2013. Mr. Bairos testified that under this policy there were no limitations on the amount of unused vacation time that could be carried over, and that an officer could carry “up to your six weeks if you didn’t take any time, you could carry six weeks over.” Id. In response to questioning as to whether, under this policy, officers had the option of being paid for unused vacation time at the end of the year, he responded, “You could, but no one took it, they just kept carrying it over.” Id. at 81.
Mr. Bairos further testified that following his separation from the Union on December 31, 2013, he was paid for the unused vacation time that he accrued in 2013. Id. at 84. He confirmed that he was not paid for any unused vacation time for any previous years. Id. at 86-87. When asked if he sought to be paid for unused vacation time for previous years following his separation from the Union, Mr. Bairos responded that he did not:

"[A]t that particular time because we were still in the midst of a protest and we hadn't gotten a decision from the Department of Labor, the Federal Department of Labor, once we got that decision then I made a claim for those other years. Once they ruled that we would not get a re-election that (sic) I made the claim for the previous years." Id. at 87.

Mr. Bairos also testified that, in November 2013, he removed Ms. Linda Russolino from her position as an appointed business agent. Id. at 92-93. According to Mr. Bairos, she received, upon her separation, a check for her vacation time that she did not use in 2013, and she was not paid for any other unused vacation time. Id. at 93. The Hearing Officer inquired as to whether "she was only paid for those unused vacation days from 2013 because she didn't request the vacation, her other unused vacation days from those previous years," to which Mr. Bairos responded in the affirmative. Id. at 101. He elaborated that the issue of whether employees are entitled to be paid for unused vacation time from prior years "had never came up until 2013." Id. He could not recall any departing employee "who received a lump sum payment of vacation pay based on their accrued time going back, 5, 6, 7 years[.]" Id. at 102. Rather, he confirmed that "when people knew they were going to leave during the calendar year . . . . they would use up their time during the year and then leave at the end[.]" Id. at 102-03. Mr. Bairos testified that he did not make a claim for his unused vacation time at the same time as Mr. Labrie because he was contesting the results of the October 2013 election "hoping that it would get overturned," and, if it were, he "would still be an employee of the local carrying that time over." Id. at 103.
Mr. Jerry Blinkhorn, a former officer of Local 251, next testified. First elected to be a business agent in 1977, he later served as secretary-treasurer, a position in which he served until his retirement in 1995. Id. at 104. He explained that at the time of his retirement, an officer who retired from the Union would receive “[o]ne week’s pay for every year that we were there, [as] an officer.” Id. at 105. According to Mr. Blinkhorn, there was, at that time, no official policy regarding the carrying of vacation time. Id. Mr. Blinkhorn testified that on two occasions, once in 1990 and once in 1992, he received Temporary Disability Insurance (TDI) benefits when he was unable to work due to heart problems. He further testified that during the time he was collecting TDI benefits, he also received his regular salary from the Union. Id. at 105-06. According to Mr. Blinkhorn, when he retired from the Union, the time during which he was receiving TDI benefits was not deducted from his service time for purposes of calculating his severance pay. Id. at 106.

Mr. James Croce next testified for the Plaintiff/Appellant. In 2005, he was a vice-president at Local 251, and at that time, had held that position for less than one year. Id. at 109. He was at the September 2005 meeting at which the officers changed the vacation policy to that which was in effect when Mr. Labrie separated from the Union in 2013. Id. Mr. Croce further testified that prior to the aforementioned meeting in 2005, the policy of the Union was that officers could carry forward unused vacation time of up to one-half of the time to which they were entitled for a particular year. Id. at 110. He confirmed that the policy was changed in 2005 to allow Union officers to carry forward all unused vacation time. Id. at 111. Mr. Croce was also present at the January 2014 meeting at which it was decided that officers of the Union would no longer be allowed to carry forward unused vacation time. Id. at 112. According to Mr. Croce, Mr. Labrie inquired as to whether the Union planned to apply the new policy retroactively, and he (Mr. Labrie) was told that the Union did not have any such plan. Id.
On cross-examination, Mr. Croce confirmed that the position of vice-president was a part-time position, and that he became an assistant business agent (a full-time position) in April 2009, a position he held until December 31, 2013. Id. at 113-14. Following his separation from the Union, he received a payment for unused vacation time that he accrued in 2013. Id. at 114. He elaborated that on January 31, 2014, he received a payment for 116 hours of unused time from 2013. Id. at 115. In 2013, he was entitled to twenty-five vacation days per year, of which he took eight. Id. at 116. He confirmed that though he did not use all of his vacation time in either 2011 or 2012, he received payment in January 2014 only for his unused 2013 vacation time. Id. at 120. He further testified that he did not file a complaint regarding his not being paid for unused time from 2011 and 2012 because he “just didn’t feel like going through the process.” Id. at 121.

The next witness called by the Plaintiff/Appellant was Mr. James Boyajian, who had served Local 251 as a business agent and as president before retiring in December 1995. Tr. at 131, August 25, 2014 (Tr. II). He testified that on two occasions “in the 70’s maybe the early 80’s,” he received Workers’ Compensation benefits, and he also received his regular salary during that time. Id. at 135-36. Mr. Boyajian further testified that when he left the Union in December 1995, the Union “didn’t have anything in writing as far as vacation.” Id. at 136. However, his “understanding was that” upon separation from the Union, he “would get a week’s pay and I considered vacation or a week’s pay for every year I served. When I left I get 24 weeks’ pay” and “a Cadillac.” Id. at 136-37.

Local 251 then called Mr. Douglas Teoli, who served as an assistant business agent from 2003 or 2004 until 2013. Id. at 141-42. According to Mr. Teoli, when he sought approval for vacation time, he would submit the request either to Mr. Bairos (principal officer of Local 251) or to Ms. Frye (bookkeeper for Local 251). Id. at 143. He identified an exhibit presented by Local
251 as a vacation request form that he submitted on November 1, 2013 for vacation time that he was requesting for December 2013. Id. at 143-44. He further testified that subsequent to his vacation request, he became disabled, and his last day of work was December 13, 2013, after which he collected TDI benefits. Id. at 145. He confirmed that some of the time during which he was collecting TDI benefits overlapped with time for which he had originally requested vacation time. Id. at 148. Mr. Teoli also testified that Mr. Bairos informed him that he could not be paid for vacation time while collecting TDI benefits, as such a practice would be considered “double dipping.” Id. at 149. When asked if he was paid his regular salary during the time he was collecting TDI benefits, he responded, “I don’t think I did.” Id. at 150. After making inquiry to the new administration that took office at the beginning of the year, he did receive vacation pay in January 2014. Id. at 151. Mr. Teoli testified that he was present at the 2005 Union meeting at which the officers of Local 251 voted to modify the vacation pay policy to permit officers to carry forward, without limit, any unused vacation time they had not used by the end of the year. Id. at 153-54. When asked if he participated in the discussion of this change in policy, he responded, “No.” Id. at 154-55.

Ms. Frye, bookkeeper for Local 251, was the next witness called by Local 251. She testified that she had, at that time, been employed by Local 251 in that position for seventeen years—since June 1997. Id. at 160. She confirmed that she has worked as the bookkeeper under several administrations, including that of the current secretary-treasurer, Mr. Matthew Taibi. Id. She also worked as bookkeeper under the administrations of Mr. Joseph Bairos and Mr. Stuart Mundy. Id. She testified that her duties as bookkeeper include “[p]ayroll, disbursements, [and] record keeping.” Id. at 161. According to Ms. Frye, she also collects vacation requests after they have been approved by a principal officer, and she would “track what everybody’s got for
vacation and make sure at the end of the year everybody’s vacation pay is up to date or if they have extra what they are carrying over the next day [sic], if they are carrying over.” Id. She testified that in the seventeen years that she had (as of the time of the hearing) worked as a bookkeeper for Local 251, she had never observed any departing employee being paid for any vacation time other than that accrued in the previous year. Id. at 161-62.

According to Ms. Frye, Union records indicate that Mr. Teoli was collecting TDI benefits in the latter part of 2013. Id. at 162. She stated that he did not receive his regular salary during the last two weeks of 2013 because he received vacation pay. Id. Ms. Frye further testified that she is not aware of any employee receiving vacation pay and their regular salary for the same week. Id. at 164. She confirmed that prior to the aforementioned 2005 modifications, the policy allowed Union officers to be paid for unused vacation time up to a limit of one-half the officer’s vacation time for the year; that is, an employee entitled to thirty days of vacation could be paid for a maximum of fifteen days of unused time. Id. at 166.

Ms. Frye testified that during her time as bookkeeper for Local 251, she had, previous to the 2013 election in which Plaintiff/Appellant (and others) were removed from their positions, never been asked to calculate unused vacation time for any years other than the previous year. Id. at 176. She further testified that after the October 2013 election, Mr. Bairos, the departing secretary-treasurer, asked her to calculate the unused vacation time of the departing officers dating back to 2009. Id. According to Ms. Frye, “from 2005 up until the present,” she did not keep track of vacation time that officers did not use further back than the prior year. Id. at 177. She elaborated that the accumulated vacation time from prior years did not appear on any pay stubs, nor did it appear on annual statements. Id. Ms. Frye testified that when there was a payout of unused vacation time, the Union would calculate the amount to be paid out based on the salary
rate of the prior year. Id. at 178. She explained that she would use the amount that the person was paid at the beginning of the calendar year “before all the taxes were maximized.” Id. at 179.

Ms. Frye addressed the payout for unused vacation time that was paid to Mr. Teoli upon his separation from the Union at the end of 2013. She testified that although he had unused vacation time from 2009, 2010, 2011, and 2012, he only requested that he be paid for unused vacation time from 2013. Id. at 181-82. She confirmed that he did not request that he be paid for any time prior to 2013, and that she had never processed a payment for anyone for unused vacation time that was accrued prior to the previous year. Id. at 183.

With respect to the payment for unused vacation time that was paid to Ms. Linda Russolino following her separation from the Union in November 2013, Ms. Frye explained the Union paid Ms. Russolino for her thirteen-and-a-half days of unused vacation time accrued in 2013 following said separation. Id. at 184-85. She confirmed that Ms. Russolino did not use all of the vacation time that she accrued in the years 2009, 2010, 2011, and 2012. Ms. Frye confirmed that the Union did not pay Ms. Russolino for any unused time for those years, nor did Ms. Russolino ask to be paid for such time. Id. at 185-86. She elaborated that Mr. Bairos, principal officer at the time, did not direct her to make a payment for that unused time. Id. at 186.

Ms. Frye confirmed that prior to November 2013, Ms. Russolino worked for Local 251 as an assistant business agent, a position that is appointed by the principal officer (in Local 251, the secretary-treasurer). Id. at 188-89. Officers in those positions could be terminated at any time, as opposed to business agents, who are elected to a three-year term. Id. at 190. She testified that while she does not recall paying employees of Local 251 vacation pay and their regular salary, retiring employees were permitted to use vacation time at the end of their time with the Union. That is, Ms. Frye acknowledged that an employee scheduled to retire on December 31 could, if he
or she had sufficient unused vacation time, cease working months in advance of that date and use his or her unused vacation time in order to continue to be paid by the Union through their scheduled retirement date. Id. at 192.

Ms. Frye confirmed that Mr. Teoli, one of the officers who separated from the Union on December 31, 2013, received TDI benefits for some of December 2013. Id. at 193. She also confirmed that under the vacation policy approved on February 29, 2004, departing officers would, upon separation from the Union, receive payment for unused vacation time up to a limit of one-half of their accrued vacation time. Id. at 197. She testified that though she did not see the specific record of the September 25, 2005 meeting at which a modification to the vacation policy was approved, she was aware that the Union’s policy regarding unused vacation time did change in 2005. According to Ms. Frye, the policy of being paid for unused time only applied to officers, and she and others who were “part of the office staff” did not have that option, as they had to use all vacation time or carry it into the following year. Id. at 205-06.

Ms. Frye also noted that Mr. Labrie was the first employee of Local 251 to request payment for unused vacation time “for prior years” during the time she has been employed by the Union. Id. at 212. She became aware that Mr. Labrie was seeking to be paid for unused vacation time for years prior to 2013 when Mr. Taibi (the newly elected secretary treasurer) asked her to retrieve the records for Mr. Labrie’s prior vacation accrual. Id. at 212-13.

Mr. Taibi, who succeeded Mr. Bairos as principal officer of the Union in January 2014, testified that shortly after he took office as secretary-treasurer on January 1, 2014, he became aware of the Plaintiff/Appellant’s request for payment for unused vacation time for prior years. Id. at 218. According to Mr. Taibi, after consulting with Ms. Frye and Mr. Teoli, he determined that Mr. Labrie was entitled to be paid for unused vacation time accrued in 2013. Id. at 219. At
the request of Local 251’s counsel, Mr. Taibi sent Plaintiff/Appellant a letter offering to pay him for his unused vacation time that accrued in 2013. Id. at 220.

Mr. Taibi testified that he spoke to Ms. Frye and Mr. Gursky regarding the request from Mr. Labrie, and he examined the records of the other officers who had separated from the Union at the end of 2013. Id. at 222-23. He also examined applicable Rhode Island law, specifically § 28-14-4, which governs payment due employees upon separation from their employer. Id. at 224. He explained that his intent was to be consistent in addressing payouts to departing officers. Id. at 225. Mr. Taibi acknowledged that the policy approved in September 2005 was applicable to those officers who separated from the Union at the end of 2013. Id. at 229-30. He testified that regarding unused vacation time, his understanding was that “assistant business agents, business agents and the secretary-treasurer can carryover their vacation time from year to year until they leave employment . . . or be paid out for unused vacation time the following year. So each year they face the option of carrying over their vacation or being paid out.” Id. at 232.

Mr. Taibi testified that he was present at the January 26, 2014 meeting at which Local 251 modified its vacation policy so that “officers, agents and local employees could no longer be paid out for unused accrued vacation pay, except where applicable by law.” Id. at 235. According to Mr. Taibi, the reason for the modification was that “our executive board had established a policy for ourselves that was actually very clear . . . that there would not be a payout.” Id. He confirmed that the “current policy” did not allow for officers to be paid for unused vacation time, while conversely, the “old policy” did allow for such payment. Id. at 236. Mr. Taibi reiterated that it was his understanding that the policy in effect at the time Plaintiff/Appellant separated from employment with the Union, an officer or business agent could “carryover vacation from year to year, or . . . be paid out the following year.” Id. at 238.
Subsequent to the above testimony which was heard by the DLT on July 7 and August 25, 2014, the parties each submitted memoranda in support of their respective interpretations of the vacation policy of Local 251. Mr. Labrie argued that under the terms of the vacation policy in effect when he separated from the Union in December 2013, he was entitled to be paid for all unused vacation time for the years 2008-2013. Conversely, the Union argued that he was only entitled to be paid for unused vacation time earned in 2013.

The Hearing Officer rendered a decision on October 1, 2015. In her decision, the Hearing Officer determined that Mr. Labrie was only entitled to vacation pay for 2013, though he had unused vacation time for the years 2008 through 2012. Pl.’s Ex. 1. She ordered Local 251 to pay to Mr. Labrie $5577.99 plus interest in the amount of $1227.16 for a total of $6805.15. Id. The Hearing Officer also ordered that Local 251 pay a civil penalty of $5000 for a violation of § 28-14-8 (an employer cannot impose condition on wages not in dispute), the proceeds of such funds to be submitted in two separate checks payable in the amount of $2500 to Mr. Labrie and $2500 to the DLT. See Order dated October 1, 2015.

Finally, the Hearing Officer awarded Plaintiff/Appellant “reasonable attorney’s fees” and directed that counsel for Plaintiff/Appellant submit an accounting for the fees claimed. Id. However, while the Plaintiff/Appellant sought attorney’s fees of $19,773.50 and $80.65 for out-of-pocket expenses (for a total of $19,854.15), the Hearing Officer chose to award $10,000. Pl.’s Ex. B. Though she did not award Plaintiff/Appellant the full amount he sought to be paid for his unused vacation time, she nonetheless found he was entitled to attorney’s fees, and she explained her conclusion in her “Decision Addendum Regarding the Award of Attorneys’ Fees” rendered on November 13, 2015. She noted that

“the Union offered several procedural arguments as to why the Department should not even hear Mr. Labrie’s case. Consequently,
these arguments had to be addressed first before any consideration was given to the substantive argument concerning vacation pay. The Department considered the Union’s procedural arguments and found them all to be without merit. If the Department had found merit in any one of the Union’s procedural arguments, Mr. Labrie’s claim would have ended there, without any discussion of the substantive claim.” Decision Addendum at 4.

She also noted that “the Department determined that Mr. Labrie was entitled to more vacation days from 2013 than Local 251 submitted.” Id. She therefore concluded that Mr. Labrie was a prevailing party and thus entitled to an award of reasonable attorney’s fees. Id. at 5.

II

Standard of Review

The review of a decision by a state agency by this Court is governed by the Administrative Procedures Act. Section 42–35–15(g) of the Act provides that:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;
“(2) In excess of the statutory authority of the agency;
“(3) Made upon unlawful procedure;
“(4) Affected by other error or law;
“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

This section precludes a reviewing court from substituting its judgment for that of the agency in regard to the credibility of witnesses or the weight of the evidence concerning questions of fact. Costa v. Registrar of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988). The court’s

It is well settled that “‘deference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency . . . even when the agency’s interpretation is not the only permissible interpretation that could be applied.’” *Id.* at 97 (quoting *Pawtucket Power Assocs. Ltd. P’ship v. City of Pawtucket*, 622 A.2d 452, 456-57 (R.I. 1993)); see also *Unistrut Corp. v. State Dep’t of Labor and Training*, 922 A.2d 93, 99 (R.I. 2007) (quoting *Arnold v. R.I. Dep’t of Labor and Training Bd. of Review*, 822 A.2d 164, 169 (R.I. 2003)) (“‘[W]hen the administration of a statute has been entrusted to a governmental agency, deference is due to that agency’s interpretation of an ambiguous statute unless such interpretation is clearly erroneous or unauthorized.’”).

“If competent evidence exists in the record considered as a whole, the court is required to uphold the agency’s conclusions. However, it may reverse, modify, or remand the agency’s decision if the decision is violative of constitutional or statutory provisions, is in excess of the statutory authority of the agency, is made upon unlawful procedure, is affected by other errors of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary or capricious and is therefore characterized by an abuse of discretion.” *Barrington Sch. Comm. v. R.I. State Labor Relations Bd.*, 608 A.2d 1126, 1138 (R.I. 1992) (citing § 42-35-15(g)).
III

DLT Hearing

Section 28-14-4(b) of the Rhode Island General Laws provides that when “an employee separates or is separated from the payroll of an employer after completing at least one year of service, any vacation pay accrued or awarded by . . . written or verbal company policy, or any other . . . . agreement between employer and employee shall become wages and payable in full or on a prorated basis with all other due wages on the next regular payday for the employee.” Plaintiff/Appellant thus argues that the Union must pay his unused vacation time as “wages.” Conversely, Local 251 argues that the policy in effect at the time provided employees with the option of receiving payment for unused vacation time at the end of the year or carrying the time forward the following year. According to the Union’s position, such time that is carried into the following year can be used as vacation “time” but is no longer redeemable for vacation “pay” upon separation.

The vacation policy of Local 251 has undergone several alterations since the time that Mr. Labrie commenced his employment with said Union. The 2004 policy required those employees subject to its provisions to “use or lose” at least one-half of their allotted vacation time. Such employees were permitted to carry forward a maximum of one-half of their vacation time each year. See Tr. I at 29-30 (Testimony of Mr. Labrie) (Complainant’s Ex. 3); see also Tr. I at 79-80 (Testimony of Mr. Bairos). The 2005 policy (which all parties agree applies to Plaintiff/Appellant) gives covered employees two options: carry unused vacation time from year to year or be paid for unused vacation time the following year. See id. at 30-32, 60-62 (Testimony of Mr. Labrie); see also id. at 80-81 (Testimony of Mr. Bairos). The 2014 policy (enacted shortly after Plaintiff/Appellant terminated on December 31, 2013) requires covered employees to “use or
lose” all vacation time each year; that is, vacation time that was not used in any given year could not be carried to the next year, and employees also could not be “paid out” by the Union for any unused time. Mr. Labrie specifically testified that he attended the January 2014 meeting at which the current policy was approved in order to inquire as to whether the new policy was to be applied retroactively to his case. He was satisfied to learn that the Union had no intention of retroactively applying the new policy. See id. at 34-35 (Testimony of Mr. Labrie). Mr. Croce testified that the vacation policy was modified at a January 2014 Union meeting. His testimony confirmed that of Mr. Labrie. See id. at 111-12. The Union has not challenged that the policy enacted in 2005 is applicable to Mr. Labrie.1

Local 251 argues that the Hearing Officer was correct in finding that the Union policy at issue was “unambiguous and . . . [therefore] Mr. Labrie is entitled to vacation pay for year 2013 only.” Decision at. 7. Conversely, Plaintiff/Appellant argues that he is entitled to be paid for all unused vacation time accrued in the years 2008-2013. Id. at 1-2.

The parties agree that the 2005 vacation policy is binding upon them, and therefore, the Hearing Officer analyzed the policy pursuant to our law of contracts. Id. at 7. It is well settled in Rhode Island that if the language of a contract is “found to be unambiguous . . . the task of judicial construction is at an end and the parties are bound by the plain and ordinary meaning of the terms of the contract.” Zarrella v. Minnesota Mut. Life Ins. Co., 824 A.2d 1249, 1259 (R.I. 2003) (citing Malo v. Aetna Cas. and Sur. Co., 459 A.2d 954, 956 (R.I. 1983)). When

1 As a preliminary matter, this Court notes that Local 251, at the commencement of this litigation, contested the jurisdiction of this Court, asserting that federal labor law preempts state jurisdiction. However, the Union did not, in its Memorandum of May 23, 2016 in support of the decision of the DLT, contest that the DLT has jurisdiction over this dispute. Plaintiff similarly did not, in his Reply Memorandum of June 28, 2016, assert that the DLT lacks jurisdiction over this dispute. Therefore, this Court concludes the parties have conceded that the DLT and this Court can properly exercise jurisdiction. See generally Peloquin v. Haven Health Ctr. of Greenville, LLC, 61 A.3d 419 (R.I. 2013) (argument not presented is deemed to be waived).
determining if a “contract is ambiguous, the court should read the contract ‘in its entirety, giving words their plain, ordinary, and usual meaning.’” Young v. Warwick Rollermagic Skating Ctr., Inc., 973 A.2d 553, 558 (R.I. 2009) (quoting Mallane v. Holyoke Mut. Ins. Co. in Salem, 658 A.2d 18, 20 (R.I. 1995)).

IV

Union Vacation Policy Applicable to Mr. Labrie

The vacation policy that was in effect when Mr. Labrie separated from the Union specifically provides that officers of the Union “shall be allowed to carry over the vacation time from year to year or be paid out for unused vacation time the following year.” See Pl.’s Ex. 4.2 In her decision, the Hearing Officer emphasized that the word “or” indicated that Union officers had two options regarding vacation pay. The parties agree that the second option permits such officers to be paid for their unused time at the end of each year. The Union asserts that if an officer is not paid for unused vacation time for the previous year, he or she may carry forward that vacation time, but he or she loses the right to be paid for that time. The Hearing Officer agreed with the interpretation of the Union, which had argued that the interpretation advanced by Mr. Labrie would cause the word “or” to be without meaning. Decision at 7.

Mr. Labrie, however, argues that his interpretation does not negate the disjunctive word “or” upon which the Hearing Officer seemed to rely in her decision. In the years 2005 and 2006, Mr. Labrie used all of the vacation time to which he was entitled. He did not do so in 2007. He elected to be paid for the time at the end of that year, and he therefore did not “carry forward” any time for the years 2005-2007. Tr. I at 59-60. He now seeks to be paid for the years in which he

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2 The exact policy provision applicable to Mr. Labrie, enacted September 25, 2005, in its entirety reads: “Assistant Business Agents, Business Agents, and the Secretary-Treasurer shall be allowed to carry over the vacation time from year to year until they leave employment with the Local Union or be paid out for unused vacation time the following year.” (emphasis added).
did not use all of the vacation time to which he was entitled and was not “paid out” at the end of that year (2008-2013). See Pl.’s Mem. and Pl.’s Ex. 1.

As noted above, the Union argues that the DLT correctly found the applicable vacation policy to be unambiguous in that it provided two options for officers such as Mr. Labrie regarding vacation time that they did not use in a given year, and that when Mr. Labrie did not choose to be paid for that time at the end of a year, he could carry forward that time, but he no longer had the right to be paid for that time. The Union further argues that such a finding is entitled to deference, and that the decision of the DLT must be upheld where there is “any legally competent evidence therein to support the agency’s decision.” Barrington Sch. Comm., 608 A.2d at 1138 (citing Blue Cross & Blue Shield v. Caldarone, 520 A.2d 969, 972 (R.I. 1987); Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977)).

This Court is mindful of the deference that must be given to the findings of an administrative agency. When reviewing such a decision, a “trial justice ‘shall not substitute [his or her] judgment for that of the agency as to the weight of the evidence on questions of fact.’ Rather, the trial justice must uphold the agency’s conclusions when they are supported by legally competent evidence on the record.” Interstate Navigation Co. v. Div. of Pub. Utils., 824 A.2d 1282, 1286 (R.I. 2003) (quoting Rocha v. State Pub. Utils. Comm’n, 694 A.2d 722, 725 (R.I. 1997) (internal quotations omitted)).

However, this deference is applicable to questions of fact. It is well settled under Rhode Island law that “[a]lthough this Court affords the factual findings of an administrative agency great deference, questions of law—including statutory interpretation—are reviewed de novo.” McAninch v. State of R.I. Dep’t of Labor and Training, 64 A.3d 84, 86 (R.I. 2013) (quoting Iselin v. Ret. Bd. of the Emps.’ Ret. Sys. of R.I., 943 A.2d 1045, 1049 (R.I. 2008)).
Our neighboring jurisdiction recently addressed a case similar to that of Mr. Labrie. Chapter 149, § 148 of the Massachusetts General Laws Annotated (M.G.L.A.) (§ 148 or Wage Act) provides in pertinent part that “any employee leaving his employment shall be paid in full on the following regular pay day” and that “‘wages’ shall include any holiday or vacation payments due an employee under an oral or written agreement.” In Elec. Data Sys. Corp. v. Attorney Gen., 907 N.E.2d 635 (Mass. 2009), the highest Court in Massachusetts held that the Attorney General properly interpreted the Wage Act in finding that a separated employee was entitled to be paid for accrued vacation time after his separation from employment.

In the Elec. Data Sys. Corp. case, the employer had enacted a policy similar to that enacted by Local 251 after Mr. Labrie terminated employment. That is, employees were not permitted to carry forward unused vacation time, and vacation time earned in any year was “to be used by December 31 of that year or lost.” Id. at 637 (emphasis added). However, the court held that though employees were not permitted to be paid for unused time at the end of a year, employees terminated during the year that had used less vacation time than that to which they were entitled must be paid for that time. Id. at 641-42 (emphasis added).

The case before this Court differs in that the Union policy in effect when Mr. Labrie left the employ of Local 251 permitted officers to be paid for unused vacation time upon separation from the Union. However, Elec. Data Sys. Corp. did hold that unused vacation time must be paid as wages due upon the termination of an employee. Id. The parties’ dispute centers on whether departing employees may be paid for unused time for years other than the “previous year” to that in which the employee is making the claim for payment.

Our statute regarding wages due a separating employee provides that:

“[W]henever an employee separates or is separated from the payroll of an employer after completing at least one year of

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service, any vacation pay accrued or awarded by collective bargaining, written or verbal company policy, or any other written or verbal agreement between employer and employee shall become wages and payable in full or on a prorated basis with all other due wages on the next regular payday for the employee.” Sec. 28-14-4(b)

As noted above, the applicable Massachusetts statute provides that “wages shall include any holiday or vacation payments due an employee under an oral or written agreement.” M.G.L.A. 149 § 148. Our statute contains similarly strong language providing that upon separation of an employee, vacation pay that the employee has accrued, but has not used, “shall become wages[.]” See § 28-14-4(b).

While not controlling in our jurisdiction, the decision in Elec. Data Sys. Corp. is persuasive in the present case due to the similarity of the Rhode Island statute to the corresponding Massachusetts statute. Additionally, there is considerable support for the conclusion that under Rhode Island law (and that of most United States jurisdictions), unused vacation time, in the event an employee terminates his or her employment with an employer, shall be payable as wages. See Mass. v. Morash, 490 U.S. 107, 109-10, 109 S.Ct. 1668, 1670 (1989). The Supreme Court in Morash found:

“Under the Massachusetts law, an employer is required to pay a discharged employee his full wages, including holiday or vacation payments, on the date of discharge. Similar wage payment statutes have been enacted by 47 other States, the District of Columbia, and the United States, and over half of these include vacation pay.” Id.

Section 28-14-4(b), the governing statute in Rhode Island, provides that when “an employee separates or is separated from the payroll of an employer after completing at least one year of service, any vacation pay accrued or awarded by . . . written or verbal company policy . . . shall become wages and payable . . . with all other due wages on the next regular payday for the employee.” As noted above, “questions of law—including statutory interpretation—are
reviewed de novo” by this Court when reviewing the decision of an agency. McAninch, 64 A.3d at 86 (quoting Iselin, 943 A.2d at 1049).

Mr. Labrie was an officer of the Union covered by a “written company policy” which gave officers the option of carrying forward unused vacation time or being paid at the end of the year for such time. Section 28-14-4 clearly states that vacation “pay” is payable upon separation from employment. The Union attempts to evade this mandate by arguing that the Union policy distinguishes between vacation “time” and vacation “pay,” and while vacation “time” can be carried forward from year to year, vacation “pay” can only be paid for the previous year. However, the applicable statute does not make any distinction between vacation “time” and vacation “pay.” See 3 Sutherland Statutes and Statutory Construction § 46.4 (7th ed. 2009) (“Courts cannot insert words into a statute where the language, taken as a whole, is clear and unambiguous[.]”). This Court is not persuaded that such a distinction is permitted under Rhode Island law, as this Court is not aware of any legal precedent for such a distinction.

The DLT’s finding—that Mr. Labrie was not entitled to be paid for unused vacation time for the years 2008 through 2012—was clearly erroneous and an abuse of discretion. The finding of the DLT was violative of statutory provisions and thus in excess of the statutory authority of the agency. The Court therefore reverses the decision of the DLT to deny Mr. Labrie payment for unused vacation time for the years 2008 through 2012. The Court finds Mr. Labrie is entitled to such time.

V

Attorney’s Fees

Plaintiff/Appellant also seeks an award of attorney’s fees pursuant to the statute governing the powers and duties of the Director of the DLT—Section 28-14-19(c). The statute provides, in
pertinent part, that pursuant to a favorable judgment for a complaining party that asserts that he or she is owed unpaid wages, "the order may direct payment of reasonable attorneys' fees and costs to the complaining party."

In determining "reasonable" attorney's fees, the Hearing Officer was guided by Rule 1.5 of Article V of the Rules of Professional Conduct of our Supreme Court. This Rule provides that:

"factors to be considered in determining the reasonableness of a fee include the following:
“(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
“(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
“(3) the fee customarily charged in the locality for similar legal services;
“(4) the amount involved and the results obtained;
“(5) the time limitations imposed by the client or by the circumstances;
“(6) the nature and length of the professional relationship with the client;
“(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
“(8) whether the fee is fixed or contingent." Rule 1.5 of Article V of the Rhode Island Supreme Court Rules of Professional Conduct

Here, the DLT found that Mr. Labrie was entitled to reasonable attorney's fees. See Decision Addendum. She noted that while this case did not involve a novel issue of law, it was more complicated than a standard non-payment of wages case because the parties had differing interpretations of the applicable vacation policy. Id. at 2. The case apparently did not require the attorney to decline other employment, as it necessitated 63.40 hours over the course of approximately sixteen months, an average of less than one hour per week. Id. Two attorneys worked on behalf of Plaintiff/Appellant; one billed at $350 per hour, and the other billed at $250 per hour. Additionally, the firm retained by Plaintiff/Appellant assigned two paralegals to this
case, and both billed at $105 per hour. Id. The Hearing Officer found that the time logs submitted by counsel for Plaintiff/Appellant were sufficiently detailed, and she rejected the assertion of the Union that they were “vague.” Id. She also rejected the argument of the Union that the aforementioned rates were “excessive” for an administrative hearing, and she specifically found that the DLT “has consistently accepted comparable hourly rates” in prior hearings. Id. at 3. While she found that Mr. Labrie was entitled to be paid for vacation time only for the year 2013, and not for the years 2008-2012 as he had requested, she rejected the Union’s assertion that Plaintiff/Appellant did not “prevail on any significant claim.” Id. at 3-4. In her decision, the Hearing Officer addressed the Union’s assertions that the DLT did not have jurisdiction over this matter, and she found their arguments to be without merit. Decision at 4-5. In her decision regarding fees, she noted that had she found merit in any of the procedural arguments of the Union, “Mr. Labrie’s claim would have ended there, without any discussion of the substantive claim.” Decision Addendum at 4. She also noted that “the Department determined that Mr. Labrie was entitled to more vacation days from 2013 than Local 251 submitted.” Id. She found that the decisions in favor of Mr. Labrie were “not insignificant.” Id. She determined that given the assertion of Plaintiff/Appellant’s counsel that it worked on this matter for 63.40 hours over the course of approximately sixteen months, “it is reasonable to conclude that this case did not impose great time limitations on the firm’s schedule and other commitments.” Id. She also found that counsel for Plaintiff/Appellant “was highly professional and able [in] his representation of Mr. Labrie throughout the course of this matter. The rates of the attorneys and the paralegals associated with this case were fixed – based on experience and skill set.” Id.

However, the Hearing Officer, after rejecting the argument of Local 251 that the fees submitted were “excessive” and noting that the DLT had “consistently accepted comparable
hourly rates” for attorneys and paralegals for services performed pursuant to an administrative hearing, id. at 3, determined that the amount requested, $19,773.50, was “unreasonable.” Id. at 5. She instead awarded attorney’s fees in the amount of $10,000. Id. She made this determination despite the fact that she did not question any of the accounting entries submitted by Plaintiff/Appellant’s counsel. Id. at 2-3.

Section 28-14-19(c) provides that “[t]he order shall . . . direct payment of any wages and/or benefits found to be due and/or award such other appropriate relief or penalties authorized under chapter 28-12 and/or 28-14, and the order may direct payment of reasonable attorneys’ fees and costs to the complaining party.” Whether the Plaintiff/Appellant’s being only partially successful in his claim before the DLT motivated the reduction in the award of attorney’s fees from the requested $19,773.50 to $10,000, this Court can only speculate. However, this Court finds nothing in the record before it that warrants such a reduction. Accordingly, the Court cannot uphold the finding that the amount requested was unreasonable.

The Court recognizes that “courts will uphold administrative decisions . . . as long as the administrative interpreters have acted within their authority to make such decisions and their decisions were rational, logical, and supported by substantial evidence.” Goncalves v. NMU Pension Trust, 818 A.2d 678, 683 (R.I. 2003) (citing Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998)). Here, the Hearing Officer acknowledged that the billing rates submitted were in accord with “consistently accepted . . . hourly rates” that the DLT had approved in administrative hearings. Decision Addendum at 3. She did not question any of the accounting entries submitted by Plaintiff/Appellant’s counsel. Id. at 2-3. Therefore, the reduction of attorney’s fees was not “rational, logical, and supported by substantial evidence.” Goncalves, 818 A.2d at 683 (citing Doyle, 144 F.3d at 184) (further citations omitted).
This Court finds that the Hearing Officer’s decision—that the amount of attorney’s fees requested by counsel for Plaintiff/Appellant was unreasonable—is arbitrary and an abuse of discretion. The Court thus grants the request of counsel for Plaintiff/Appellant for attorney’s fees in the amount of $19,773.50.

VI
Conclusion

For the reasons stated above, this Court reverses that portion of the decision of the DLT denying Mr. Labrie payment for unused vacation time for the years 2008 through 2012. The Court finds the policy interpretation of DLT to be contrary to the plain meaning of the applicable statutes and relevant case law. Therefore, the Court finds the decision of the DLT is not supported by the reliable, probative, and substantial evidence on the record, and is an abuse of discretion, clearly erroneous, and affected by error of law. Substantial rights of the Plaintiff/Appellant have been prejudiced. The Union is therefore ordered to pay Plaintiff/Appellant the value of his unused vacation time for the years 2008 through 2013. Additionally, the Court finds that Mr. Labrie ought to have prevailed on all of his claims before the DLT, and the request of counsel for Plaintiff/Appellant for attorney’s fees was not unreasonable. The Court therefore grants the request for attorney’s fees in the amount of $19,773.50. Counsel shall prepare appropriate orders for entry.
RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet


CASE NO: PC-2015-5344

COURT: Providence County Superior Court

DATE DECISION FILED: January 12, 2017

JUSTICE/MAGISTRATE: Carnes, J.

ATTORNEYS:

For Plaintiff: Joseph F. Penza, Jr., Esq.

For Defendant: Bernard P. Healy, Esq.
Marc B. Gursky, Esq.
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.                     SUPERIOR COURT

(FILED: February 2, 2017)

WARWICK SCHOOL DEPARTMENT, :
by and through its Superintendent Philip :
Thornton and WARWICK SCHOOL :
COMMITTEE, by and through its :
Members, BETHANY FURTADO, :
EUGENE NADEAU, M. TERRI :
MEDEIROS, JENNIFER AHEARN and :
KAREN BACHUS :

v. :

C.A. NO. KC-2016-0783

RHODE ISLAND STATE LABOR :
RELATIONS BOARD, by and through :
its Chairman, WALTER J. LANNI, and :
it Members, ALBERT APONTE :
CARDONA, SCOTT G. DUHAMEL, :
ARONDA R. KIRBY, FRANK J. :
MONTANARO, MARCIA B. REBACK :
and HARRY J. WINTHROP; and :
WARWICK TEACHERS’ UNION, AFT, :
LOCAL 915 :

DECISION

GALLO, J. Before the Court is an appeal by the Warwick School Committee (the School Committee) of a decision of the Rhode Island State Labor Relations Board (the Board) finding that the School Committee had committed an unfair labor practice and ordering, among other things, that it cease and desist from refusing to arbitrate certain grievances and that the School Committee abide by all provisions of the expired collective bargaining agreement (CBA) “until such time as a new [CBA] has been either
negotiated or litigated to finality.” (Am. Decision 13, Appellee Ex. A.) For the following reasons, the Court reverses the Board’s decision.

I

Facts and Travel

The facts are not in dispute in this matter. The School Committee and the Warwick Teachers’ Union, AFT, Local 915 (the Union) initially negotiated a CBA that ran from September 1, 2012 until August 31, 2014. (Stip. of Facts ¶ 1, Appellee Ex. B.) On its expiration, the parties agreed to an extension of the CBA to August 31, 2015. Id. at ¶ 2. However, negotiations for a successor CBA for the school year beginning in September 2015 stalled, and the School Committee requested interest arbitration. Id. at ¶¶ 5, 7. Arbitration commenced on December 16, 2015 and is currently ongoing. See Am. Decision 3, Appellee Ex. A.

On September 14, 2015 and October 6, 2015, the Union filed grievances pursuant to the grievance procedure in the expired CBA. (Stip. of Facts ¶ 9, Appellee Ex. B.) The grievance filed on September 14, 2015 related to duty assignments for homeroom teachers for the 2015-2016 school year. Id. at ¶ 12. The grievance filed on October 6, 2015 related to a teacher’s suspension for cause. Id. at ¶ 13. Discussions to resolve the grievances failed to achieve a resolution. Consequently, the Union filed for arbitration in accordance with the expired CBA. The School Committee refused to participate in grievance arbitration, relying on the fact that its obligation to arbitrate ended with the expiration of the CBA. Id. at ¶¶ 15, 16.

The Union responded by filing an unfair labor practice charge with the Board on December 7, 2015. On January 9, 2016, the Board issued a complaint alleging that the
School Committee violated G.L. 1956 § 28-7-13 when it refused to arbitrate the grievances. The School Committee denied the charge, and the matter was submitted to the Board on the parties’ stipulated facts and memoranda.

On June 21, 2016, the Board issued its decision (Decision), finding that the School Committee’s refusal to proceed to grievance arbitration amounted to an unfair labor practice in violation of the Rhode Island State Labor Relations Act. (Decision 11, Appellant Ex. 8.) The Board concluded that a “[u]nilateral departure from the terms of an expired Collective Bargaining Agreement, prior to the exhaustion of all available statutory dispute resolution procedures violates the duty under R.I.G.L. 28-7-13 (6) and (10) to bargain in good faith.” Id. at 13. The Board ordered the School Committee to “cease and desist from refusing to participate in the processing of grievances, including proceeding to arbitration.” Id.

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1 Section 28-7-13 provides in relevant part as follows:

“It shall be an unfair labor practice for an employer to:

\ldots

“(6) Refuse to bargain collectively with the representatives of employees, subject to the provisions of §§ 28-7-14—28-7-19, except that the refusal to bargain collectively with any representative is not, unless a certification with respect to the representative is in effect under §§ 28-7-14—28-7-19, an unfair labor practice in any case where any other representative, other than a company union, has made a claim that it represents a majority of the employees in a conflicting bargaining unit.

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“(10) Do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by § 28-7-12.” Sec. 28-7-13(6), (10).
The next day, the Union filed a motion to amend the Decision, to which the School Committee objected. Without further hearing, the Board approved the Union’s motion to modify the Decision and amended the Decision (Amended Decision) to add the following paragraph:

“3) The Employer is hereby ordered to maintain all the terms and conditions of employment set forth in the Collective Bargaining Agreement until such time as a new Collective Bargaining Agreement has been either negotiated or litigated to finality.” (Am. Decision 13, Appellee Ex. A.)

On August 3, 2016, the School Committee appealed the Board’s Amended Decision to this Court. The School Committee also filed a motion to stay the implementation of the Amended Decision pending appeal. On August 16, 2016, this Court granted the motion to stay to the extent that it may be read to restrict the School Committee in respect to the layoff of teachers for decrease in pupil population under G.L. 1956 §16-13-6.

II

Standard of Review

This Court reviews appeals of administrative decisions pursuant to G.L. 1956 § 42-35-15, the Administrative Procedures Act (APA). Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007). Section 42-35-15 provides that the Court may

“affirm the decision of the agency or remand the case for further proceedings, or . . . reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;
“(2) In excess of the statutory authority of the agency;

“(3) Made upon unlawful procedure;

“(4) Affected by other error or law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Section 42-35-15(g).

Upon review of an administrative agency appeal, the Superior Court “reviews the record to determine whether legally competent evidence exists to support the findings.” Champlin’s Realty Assocs. v. Tikoian, 989 A.2d 427, 437 (R.I. 2010) (quoting Sartor v. Coastal Res. Mgmt. Council, 542 A.2d 1077, 1082-83 (R.I. 1988)). “Legally competent evidence” has been defined as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.” Reilly Elec. Contractors, Inc. v. State Dep’t of Labor & Training ex rel. Orefice, 46 A.3d 840, 844 (R.I. 2012) (quoting Foster-Glocester Reg’l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1012 (R.I. 2004)) (internal quotation marks and citation omitted).

650 A.2d 479, 485 (R.I. 1994)). The APA restricts the Superior Court’s review of administrative decisions to questions of law. Reilly Elec. Contractors, 46 A.3d at 844. The Superior Court may only vacate an agency decision “‘if it is clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record.’” Id. (quoting Auto Body Ass’n, 996 A.2d at 95) (internal quotation marks and citation omitted).

III

Analysis

The School Committee’s position is that the Board did not have the authority to rule on the issue of arbitrability, and it has no obligation to arbitrate grievances after the expiration of the CBA. The Union argues that whether parties are bound to arbitrate presents a question for the Board and that the School Committee’s unilateral refusal to arbitrate the grievances in question amounted to a departure from the terms of an expired contract prior to the exhaustion of the statutory dispute resolution process and, thus, violated the Labor Relations Act as interpreted by the Board in a number of its prior decisions. See R.I. State Labor Relations Bd. v. Warwick Sch. Comm., No. ULP-4647 (RISLRB Nov. 10, 1992); R.I. State Labor Relations Bd. v. Town of N. Kingstown, No. ULP-6071 (RISLRB May 7, 2014); R.I. State Labor Relations Bd. v. City of Pawtucket, No. ULP-6142 (RISLRB Mar. 30, 2015).

The long-established policy of the Board (which the Board refers to as the “static status quo” rule) prohibits public sector employees, such as the School Committee, from departing from the terms of an expired CBA “prior to the exhaustion of all available statutory dispute resolution procedures.” (Am. Decision 10, Appellee Ex. A.) Rhode

The School Committee’s appeal is focused not so much on the Board’s static status quo rule, generally, as it is on the Board’s determination that its refusal to arbitrate the subject grievances amounted to an unfair labor practice and the Board’s order that, as a remedy, it proceed with arbitration. The School Committee argues, citing Litton Fin. Printing Div. v. N.L.R.B., 501 U.S. 190, 205-06, 210 (1991), that the Union’s grievances involve conduct that occurred after the CBA expired, and, as such, the School Committee is not subject to the expired CBA’s arbitration clause. The School Committee also relies on Providence Teachers’ Union v. Providence Sch. Bd. for its contention that it is not bound by the general arbitration clause in the expired CBA with respect to grievances filed after the contract’s expiration that do not deal with disputes that arose under the
contract or rights that accrued or vested under the contract. See 689 A.2d 388, 393 (R.I. 1997) (citing Litton, 501 U.S. at 206).

In Litton, the union filed an unfair labor practice charge when the employer, Litton, refused to submit to arbitration to resolve grievances regarding layoffs made after the contract expired. 501 U.S. at 194-95. The National Labor Relations Board (NLRB) found that Litton’s “wholesale repudiation” of its obligation to arbitrate grievances after the expiration of the CBA amounted to an unfair labor practice. Id. at 195. However, the NLRB did not order arbitration as a remedy, concluding that the grievances in issue were based on conduct (layoffs) which occurred after the contract expired and therefore were not arbitrable. Id. at 196. It instead ordered Litton to process the grievances through the grievance process and bargain with the union over the layoffs. Id. at 196-97. The NLRB also provided a limited backpay remedy. Id. at 197.

The Supreme Court, in Litton, specifically did not address the NLRB’s determination that Litton had committed an unfair labor practice. Id. at 196-97. The Court’s review was limited to whether the layoff grievances were arbitrable. Id. at 196. The Court, citing with favor past decisions of the NLRB, noted that arbitration clauses are excluded from the Katz prohibition on unilateral changes. Id. at 192-93. The Court held the obligation to arbitrate a grievance survives expiration of a CBA only where the grievance arises under the contract. Id. at 205. The Court reasoned that

“[a] postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.” Id. at 205-06.
The litton Court went on to conclude that the layoffs which followed expiration of the CBA did not infringe rights which accrued or vested under the contract. Id. at 210. The Court pointed out that “[t]he layoffs took place almost one year after the Agreement had expired[,]” and, the Court explained, the grievances did not “involve rights which accrued or vested under the Agreement, or rights which carried over after expiration of the Agreement, not as legally imposed terms and conditions of employment but as continuing obligations under the contract.” Id. at 209. Thus, the dispute over the layoffs was held to be not arbitrable. Id. at 210. The Court, in litton, emphasized that the prohibition against unilateral changes arises by operation of law, viz., the statutory mandate to bargain in good faith, whereas “[n]o obligation to arbitrate . . . arises [] by operation of law,” but rather, “[t]he law compels a party to submit his grievance to arbitration only if he has contracted to do so.” Id. at 200 (internal quotation marks and citation omitted).

In the case at bar, the Union filed both grievances after the expiration of the CBA, which expired in August 2015. (Stip. of Facts ¶ 2, Appellee Ex. B.) In September 2015, the Union filed a grievance in response to the School Committee’s duty assignments for homeroom teachers for the 2015-2016 school year. Id. at ¶12. The School Committee’s action was forward-looking and applied to the school year that followed the expiration of the CBA. See id. In October 2015, the Union filed a grievance regarding a teacher’s suspension for cause that had occurred after the CBA expired. Id. at ¶ 13. Accordingly,

2 The National Labor Relations Act states that “[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . .” 29 U.S.C. § 158(a)(5). The Rhode Island Labor Relations Act mirrors the federal law, providing that “[i]t shall be an unfair labor practice for an employer to . . . [r]efuse to bargain collectively with the representatives of employees . . . .” Sec. 28-7-13(6).
both grievances dealt with conduct that occurred after the CBA expired and neither grievance addressed a dispute that arose out of the CBA or involved rights that accrued under the CBA. See Litton, 501 U.S. at 205-06; see also Providence Teachers’ Union, 689 A.2d at 392-93 (declining to compel arbitration pursuant to a general arbitration clause in an expired CBA where the dispute “neither arose during the term of the contract nor involved a right that accrued or vested under the contract”).

In Providence Teachers’ Union, our Supreme Court found that an arbitration clause in an expired contract did not apply to a grievance regarding safety standards in a teacher’s science classroom as the “dispute arose after expiration of the contract and did not involve a right that accrued or vested under the expired contract.” 689 A.2d at 393. As did the Court in Providence Teachers’ Union, this Court “reject[s] the proposition that a general arbitration clause in an expired contract represents a valid mechanism for resolving a dispute that neither arose during the term of the contract nor involved a right that accrued or vested under the contract.” Id. at 392-93. Thus, the grievances are not arbitrable and the Board erred in ordering arbitration. See id, at 393; see also Litton, 501 U.S. at 205-06.

As noted above, the NLRB, in Litton, though refusing to order the employer to arbitration, nonetheless held Litton’s “wholesale repudiation” of its obligation to process grievances to be an unfair labor practice. 501 U.S. at 195. Here, however, there is simply no evidence in the record to support a finding that the School Committee committed an unfair labor practice. After their contract expired, the Union filed grievances according to the expired contract’s grievance procedure. (Stip. of Facts ¶ 9, Appellee Ex. B.) The grievances related to duty assignments for homeroom teachers and
a teacher’s suspension. Id. at ¶¶ 12, 13. The School Committee took part in the grievance procedures outlined in the expired contract. Id. at ¶ 10. When the parties could not come to an agreement, the School Committee declined to proceed to arbitration as the contract had expired. Id. at ¶ 11.

Unlike in Litton, where the employer refused to discuss or participate in any grievance process with the union regarding the layoffs, here, the School Committee did engage with the Union regarding the two grievances filed after the expiration of the contract. See 501 U.S. at 194-95. There is simply no evidence in the record to support a finding of bad faith bargaining in violation of § 28-7-13(6) and (10). Under the circumstances, the Board erred in concluding that the School Committee committed an unfair labor practice.

The School Committee also finds fault with that portion of the Board’s Amended Decision which enjoins the School Committee to “maintain all the terms and conditions of employment set forth in the Collective Bargaining Agreement until such time as a new Collective Bargaining Agreement has been either negotiated or litigated to finality.” (Am. Decision 13, Appellant Ex. A.)

The Board is a creature of statute. See § 28-7-4. Its jurisdiction was invoked in this case by the filing of an unfair labor practice charge which specifically alleged that the School Committee refused to arbitrate the grievances referred to above. See § 28-7-21. The charge was never amended to incorporate any other allegedly prohibited acts. See Am. Decision 13, Findings of Fact at ¶ 20, Appellant Ex. A. The Court recognizes the Board has some latitude with respect to the relief it may afford on finding an unfair
labor practice. However, it appears to the Court that under the circumstances present here, the added third paragraph of the Board’s Amended Order, which enjoins any change to the expired CBA “until such time as a new [CBA] has been either negotiated or litigated to finality,” is overbroad to the point of being arbitrary. The determination of whether a particular change to terms of an expired CBA is permissible should be made on a case by case basis, and should include consideration of whether the change involves a mandatory subject of bargaining as opposed to a management right or, in the public sector context, a non-delegable duty. See Town of N. Kingstown v. Int’l Ass’n of Firefighters, 107 A.3d 304, 318 (R.I. 2015) (finding that the town’s decision to reorganize the lengths of the firefighters’ work shifts was a management right, and, as such, the town was “not required to bargain with the union regarding th[e] decision”); see also Vose v. R.I. Bhd. of Corr. Officers, 587 A.2d 913, 915 (R.I. 1991) (“[S]tatutory powers and obligations cannot be contractually abdicated.”). The Board issued its Amended Decision in this case on the Union’s motion without further hearing. The School Committee, it appears, was provided no opportunity to present for the Board’s consideration the particulars of any proposed departures from the terms of the expired CBA, along with its reasons why it should not be constrained by the Board’s status quo rule. In doing so, the Board acted arbitrarily and erroneously.

IV

Conclusion

After review of the entire record, this Court finds the Amended Decision of the Board was clearly erroneous based on the evidence of record. Substantial rights of the

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3 Section 28-7-9(b)(4) provides that the Board “is empowered to order complete relief upon a finding of any unfair labor practice.” Sec. 28-7-9(b)(4).
School Committee have been prejudiced. Accordingly, the Amended Decision of the Board is reversed. Counsel shall submit the appropriate judgment for entry.

CASE NO: KC-2016-0783

COURT: Kent County Superior Court

DATE DECISION FILED: February 2, 2017

JUSTICE/MAGISTRATE: Gallo, J.

ATTORNEYS:

For Plaintiff: Andrew Henneous, Esq.

For Defendant: Margaret L. Hogan, Esq.
Jeffrey W. Kasle, Esq.
"I get high with a little help from my friends"
—The Beatles, 1967

LICHT, J. Over fifty years ago, pop culture addressed the use of marijuana in our society. Within the past decade, the General Assembly legalized the use of medical marijuana, and it became lawful to sell Rocky Mountain High cannabis in Colorado. Last fall, the voters of our neighbor, Massachusetts, authorized the legal possession and sale of marijuana. Today, the debate rages in Rhode Island political circles over legalizing the recreational use of “pot.” Until recently, Rhode Island courts have dealt with the subject solely from the perspective of the criminal law. However, our civil jurisprudence will undoubtedly face an onslaught of litigation concerning the lawful use of marijuana. A colleague recently analyzed the zoning law of a town to determine if growing marijuana is agriculture. Carlson v. Zoning Bd. of Review of South Kingstown, No. WC-2014-0557, 2016 WL 7035233 (R.I. Super. Nov. 25, 2016). We read of towns enacting zoning ordinances outlawing the cultivation of medical marijuana, which
ordinances will most certainly be challenged. See, e.g., Ter Beek v. City of Wyoming, 846 N.W.2d 531 (Mich. 2014).

While the legal use of marijuana, whether medicinal or recreational, makes for interesting political and philosophical discourse from law review articles to the dinner table, a Superior Court justice cannot participate in that debate. Consequently, this Court’s challenge is limited to discerning the intent of the General Assembly in enacting the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act (the Hawkins-Slater Act), G.L. 1956 §§ 21-28.6-1 et seq. To adequately perform its task, this Court must wade into the weeds of the law of private rights of action, federal preemption, and statutory interpretation. Hopefully, it will not write out of key or analyze out of tune.

Plaintiff Christine Callaghan (Plaintiff) has brought this action against Defendants Darlington Fabrics Corporation (Darlington) and the Moore Company (together, Defendants), alleging employment discrimination with respect to hiring for an internship position because she held a medical marijuana card. Defendants have moved for summary judgment on all three counts under Superior Court Rules of Civil Procedure 56; Plaintiff has filed a cross-motion for summary judgment on Counts I and III, and otherwise opposes Defendants’ motion on Count II. For the reasons stated below, the Court grants Plaintiff’s cross-motion and denies the Defendants’ motion.

I

Facts and Travel

Most of the facts in this case are undisputed. In June 2014, Plaintiff, then a Master’s student studying textiles at the University of Rhode Island, sought an internship as a requirement of her program. Compl. ¶¶ 7, 11-12. Her professor referred her to Darlington, a division of the
Moore Company. Compl. ¶¶ 4, 13. Plaintiff met with Darlington Human Resources Coordinator Karen McGrath on June 30, 2014.Defs.' Mem. 3. At this meeting, Plaintiff signed Darlington's Fitness for Duty Statement, acknowledging she would have to take a drug test prior to being hired. Id. at 3-4. During this meeting, Plaintiff also disclosed that she held a medical marijuana card, authorized by the Hawkins-Slater Act. Id. at 4. The interview concluded shortly thereafter.

On the morning of July 2, 2014, Ms. McGrath and a colleague, Ms. Linda Ann Morales, had a conference call with Plaintiff. Id. Ms. McGrath asked Plaintiff if she was currently using medical marijuana, to which Plaintiff responded affirmatively. Id. Plaintiff also indicated that as a result, she would test positive on her pre-employment drug screening. Id. Ms. McGrath responded by informing Plaintiff that a positive test would “prevent the Company from hiring her.” Id. Plaintiff informed Ms. McGrath that she was allergic to many other painkillers and that she would neither use marijuana in or bring it to the workplace. Defs.’ Answers to Interrog. 3.

That afternoon, Ms. McGrath and Ms. Morales called Plaintiff to inform her that Darlington was “unable to hire her.” Defs.’ Mem. 5. According to Darlington,

“Because Ms. Callaghan put the Corporation on notice that she was currently using marijuana, would not stop using marijuana while employed by the Company, and could not pass the required pre-employment drug test, and thus could not comply with the Corporation’s drug-free workplace policy, the Corporation did not hire her.” Defs.’ Answers to Interrog. 7.

Plaintiff filed a three-count complaint on November 12, 2014. Count I seeks a declaration that the “failure to hire a prospective employee based on his or her status as a medical marijuana card holder and user is a violation of the” Hawkins-Slater Act. Compl. ¶ 29. Counts II and III seek damages: Count II alleges Defendants’ conduct violated the Rhode Island Civil Rights Act (RICRA), G.L. 1956 §§ 42-112-1 et seq.; Count III alleges violations of the Hawkins-Slater Act due to employment discrimination.

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II

Standard of Review

“Summary judgment is ‘a drastic remedy,’ and a motion for summary judgment should be dealt with cautiously.” Estate of Giuliano v. Giuliano, 949 A.2d 386, 390 (R.I. 2008) (citation omitted). On a motion for summary judgment, the movant must “establish that there exists no genuine dispute with respect to the material facts of the case.” Id. at 391. This Court can grant summary judgment only if it concludes, “after viewing the evidence in the light most favorable to the nonmoving party, that there is no genuine issue of material fact to be decided and that the moving party is entitled to judgment as a matter of law.” Lacey v. Reitsma, 899 A.2d 455, 457 (R.I. 2006).

III

Analysis

Because Count I, the declaratory judgment request, and Count III, the Hawkins-Slater Act claim, both deal with the Hawkins-Slater Act, the Court will address those first. The Court deals with Count III initially as the reasoning therein informs the analysis of Count I. After those counts, the Court will move to Count II, the RICRA claim.

A

Count III: Employment Discrimination under the Hawkins-Slater Act

First, the Court must determine whether the Hawkins-Slater Act provides a private right of action through which Plaintiff can seek relief. Section 21-28.6-4(d)\(^1\) of the Hawkins-Slater Act provides: “No school, employer, or landlord may refuse to enroll, employ, or lease to, or

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\(^1\) P.L. 2016, ch. 142, art. 14, § 1, shifted the sections of the Hawkins-Slater Act. In 2012, at the time of the incident at issue, this provision was at § 21-28.6-4(c). Additionally, P.L. 2014, ch. 515, § 2 amended this subsection in ways not germane to this case. The Court will refer to this provision as § 21-28.6-4(d) throughout this decision.
otherwise penalize, a person solely for his or her status as a cardholder.” Plaintiff contends that
she was not hired because she was a cardholder, and she contends that this prohibition against
discriminatory hiring practices should apply to her. Despite this direct prohibition, the statute
fails to provide an express private right of action. Thus the first of many questions this Court
must tackle is whether the General Assembly intended § 21-28.6-4(d) to be enforceable or not.
To do so, the Court must turn to statutory interpretation, as the intent of the Legislature is not
obvious. “‘In matters of statutory interpretation [the Court’s] ultimate goal is to give effect to the
purpose of the act as intended by the Legislature.’” Whittemore v. Thompson, 139 A.3d 530, 540
(R.I. 2012)). To discern that purpose, however, the Court must resolve several conflicting
jurisprudential principles.

1

Contradictory Canons

On the one hand, “[i]t is well settled in this jurisdiction that when the language of a
statute is unambiguous and expresses a clear and sensible meaning, this Court must interpret the
statute literally and must give the words of the statute their plain and obvious meaning.” Bandoni
cause of action [for damages], such a right cannot be inferred.’” Stebbins v. Wells, 818 A.2d
711, 716 (R.I. 2003); but see Bandoni, 715 A.2d at 585 (denying a private right of action “where
our Legislature has neither by express terms nor by implication provided” for one). Our Supreme
Court has routinely refused to imply a private right of action. E.g., Great Am. E & S Ins. Co. v.
End Zone Pub & Grill of Narragansett, Inc., 45 A.3d 571, 575 (R.I. 2012) (no private right of
action under § 27-9.1-4, the Unfair Claims Settlement Practices Act); Tarzia v. State, 44 A.3d

Since the Hawkins-Slater Act does not contain an express private right of action, at first glance it appears that the aforementioned cases would militate against implying a private right of action under the Hawkins-Slater Act. However, there is another principle which cuts strongly the other way: that the Court “will not ascribe to the General Assembly an intent to enact legislation which is devoid of any purpose, inefficacious, or nugatory.” Kingsley v. Miller, 120 R.I. 372, 376, 388 A.2d 357, 360 (1978). This canon of interpretation has long been recognized in Rhode Island. See Mowry v. Staples, 1 R.I. 10, 16 (1835); see also Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987); State v. Gonsalves, 476 A.2d 108, 111 (R.I. 1984); Carrillo v. Rohrer, 448 A.2d 6
1282, 1285 (R.I. 1982); Town of Scituate v. O’Rourke, 103 R.I. 499, 509, 239 A.2d 176, 182 (1968); Long v. Fugere, 56 R.I. 137, 142 (1936). In each of the private cause of action cases listed earlier, refusing to recognize a private right of action did not result in the statute being inefficacious.

To see whether these two tenets can comfortably coexist here, it is instructive to examine these prior cases that have declined to recognize a private right of action by implication. The cases can generally be placed in one of four categories: those (1) imposing civil penalties, (2) authorizing government enforcement, (3) directing government action, or (4) stating policy considerations. The Court examines each in turn.

In Tarzia, the plaintiff sued the state for, inter alia, violations of § 12-1-12(a), “which governs the destruction or sealing of records of people who have been acquitted or otherwise exonerated.” Tarzia, 44 A.3d at 1254. The plaintiff “argue[d] that although the only remedy explicitly included in the sealing statute [was] a monetary fine, there exist[ed] other causes of action available to him.” Id. at 1257. The Court held that “the Legislature specifically limited the remedy for the violation of the statute to a monetary fine demonstrat[ing] ‘that the [L]egislature provided precisely the redress it considered appropriate.’” Id. (quoting Sterling Suffolk Racecourse Ltd. P’ship v. Burrillville Racing Ass’n, Inc., 989 F.2d 1266, 1270 (1st Cir. 1993)). Thus, in Tarzia, there was clearly nothing nugatory about § 12-1-12(a)—the statute made a particular action subject to a civil penalty, enforceable by the designated government agency.

Several of the other listed cases stem from similar circumstances. In Stebbins, a “buyer attempted to allege a private cause of action for damages against defendants for their asserted violations of [Chapter 20.8 of Title 5’s] disclosure provisions.” Stebbins, 818 A.2d at 715. However, the court held that the $100 civil penalty was the “particular enforcement provision”
the Legislature had contemplated. Id. at 716. In Pontbriand, the statute in question had “three express remedies for its enforcement,” including a $1000 civil fine and, potentially, dismissal from state employment. Pontbriand, 699 A.2d at 868. Finally, in Great American, a violation of the unfair insurance claim practice the statute prohibited was punishable by a substantial fine, see G.L. 1956 § 27-9.1-6, determined by the director of business regulation. Great Am. E & S Ins. Co., 45 A.3d at 575. Thus, these statutes were not superfluous by virtue of their express enforcement mechanisms—just not the private one the plaintiffs in each case desired.

Similar to instances where the statute provided for a civil fine are cases where the statute enables or empowers a government agency to take some action. In In re John, for instance, at issue was § 15-7-7, which provided that, if certain facts were found, a “court shall, upon a petition duly filed after notice to the parent and hearing thereon, terminate any and all legal rights of the parent to the child.” A woman sought to use this statute to terminate her former husband’s parental rights. In re John, 605 A.2d at 487. However, the Court held that “[t]he state needs a method to terminate the parental rights of unfit or unable parents,” and that “[t]ermination of parental rights in these instances achieves the purpose of § 15-7-7, which is to allow the state to make the children available for adoption.” Id. Likewise, in Waterman Lake, a citizens’ group attempted to privately enforce the Fresh Water Wetlands Act. Waterman Lake, 420 A.2d at 55. However, the Court “conclude[d] that all enforcement powers [were] vested in the director,” who had “broad powers to remedy any violation of the wetlands act.” Id. at 57. Therefore, the statutes at issue had purpose and effect. Like those cases where the statute at issue provided for a civil fine, these statutes enable the government to take action. Thus, in all of these

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2 Furthermore, the act under examination in Great American explicitly stated that it created no private right of action. Great Am. E & S Ins. Co., 45 A.3d at 575.
cases, there was no concern that the statutory language would be meaningless were no private right of action implied—the statute allowed the government to take action instead.

Other cases are linked by a different thread. In these instances, the statute at issue is directed at the government, not a private actor, and instructs it to take or not take some action. For instance, in Cummings, the statute in question provided that town tax assessors must certify revaluations, and must do so by a particular date. Cummings, 761 A.2d at 685. The plaintiff there availed herself of the two-step appeals process provided for by § 44-5-26, claiming that because the certification was not done pursuant to the statute, she was entitled to a full refund of her property tax payment. Id. at 682. However, the Court held that “the Legislature did not provide a remedy to taxpayers in plaintiff’s position.” Id. at 685. While it was clear that there was a “remedy available for relief from an alleged illegal assessment of taxes,” it was of no benefit to plaintiff. Id. The Court found the certifications there “directory, not mandatory.” Id. at 686; see also id. at 687 (Flanders, J., concurring) (“[F]or the reasons given by the Court, I do not believe that the challenged revaluation and tax assessment certifications were illegal . . .”). Unlike a mandatory statute, “[t]he violation of a directory statute is attended with no consequences, since there is a permissive element.” 1A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 25:3, at 583 (7th ed. 2009). Thus, as a directory statute, the legislature meant it only as “a guide for the conduct of orderly business and procedure,” id., and so failure to comport with it did “not eviscerate the goals, requirements, and mandates” of the statutory scheme, West v. McDonald, 18 A.3d 526, 535 (R.I. 2011).

In a somewhat similar way, the statutes in Bandoni, implementing the Victim’s Bill of Rights, and Accent Store Design, requiring payment bonds on public works projects, were held to imply no private right of action. The Supreme Court did not address the argument in either
case that failure to recognize a private right of action would render the respective statutes nugatory. However, in both instances, the statute at issue provided instructions to government officials in how they were to carry out their duties. For instance, in Bandoni, the Victim’s Bill of Rights provided victims the ability to be informed of the right to restitution, to have the right to address the court upon plea negotiation and at pretrial conferences, and that civil judgments shall be automatically entered when restitution is ordered. Bandoni, 715 A.2d at 584. While the Supreme Court held there was no implied private right of action for violation of those rights, the lack of the private right of action did not render those provisions illusory. Instead, they were directions to the coordinate branches of government on how to operate. Cf. Town of Tiverton v. Fraternal Order of Police, Lodge No. 23, 118 R.I. 160, 164, 372 A.2d 1273, 1275 (1977) ("[W]e recognize the general distinction between statutes aimed at public officers and those directed towards private individuals."). In much the same way, the Rhode Island public works bonding statute instructs the executive branch and municipalities to obtain bonds on public works projects. Sec. 37-13-14. Thus, the statute, which was at issue in Accent Store Design, was another directing the effective and efficient flow of government.

Finally, there is one last context where the Supreme Court has declined to recognize a private right of action: when dealing with prefatory or policy language. See 73 Am. Jur. 2d Statutes § 101 (2012) ("While a declaration of policy or a preamble may be used as a tool of statutory construction, it may not be used to create an ambiguity in an otherwise unambiguous statute."). Thus, in Heritage Healthcare, the Court found that the phrase "lowest possible price" in an insurance charter was "prefatory in nature and [did] not create any substantive private right." Heritage Healthcare, 14 A.3d at 938. According to the Court, the words were "a statement of policy," used "to clarify other substantive provisions" of the statute. Id. at 939. Thus, the
phrase "lowest possible price" was not useless—it was there to provide context and clarity for the remainder of the statute.

Thus, when the Supreme Court has declined to recognize an implied private right of action in the past, the statute being examined was not inefficacious, and therefore there was no conflict between the presumption against implied private rights of action and the presumption against nugatory enactments. The question remains, then, as to how § 21-28.6-4(d) fares under such an analysis.

As an initial matter, while the Hawkins-Slater Act does provide for civil enforcement of some of its provisions, see, e.g., § 21-28.6-7(c), there are no listed penalties for violations of § 21-28.6-4(d). Similarly, while the Department of Health is empowered to issue identification cards, see § 21-28.6-6, and while the Departments of Health and Business Regulation are authorized to regulate compassion centers, see § 21-28.6-12, no state department is given authority to administer § 21-28.6-4(d). No portion of the Hawkins-Slater Act authorizes, for instance, any department to intervene on behalf of a tenant who was refused a lease, a student who was declined enrollment, or an employee who was denied employment.

Furthermore, while many of the other provisions in § 21-28.6-4 are directed at public officials or the manner in which government operates, § 21-28.6-4(d) in particular is not. For instance, § 21-28.6-4(a) provides that qualifying cardholders “shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana.” This subsection of the statute, much as in the vein of the one in Bandoni, is directed at the coordinate branches of government and dictating how they should treat cardholders. Similarly, § 21-28.6-4(k) states that “[a]ny interest in, or right
to, property that is possessed, owned, or used in connection with the medical use of marijuana, or acts incidental to such use, shall not be forfeited.”

In fact, all of the subsections in § 21-28.6-4 are directed at modifying or changing the official status of marijuana and cardholders with respect to various government programs and obligations—all except one, that is. Section 21-28.6-4(d) is not directed at government behavior. It does not focus on the rights and responsibilities of state and local government vis-à-vis the individual. Instead, it is concerned with schools, employers, and landlords, a target far broader than the government. Thus, the logic that saved the statutes in Bandoni and Accent Store Design from meaninglessness cannot do likewise for § 21-28.6-4(d).

If § 21-28.6-4(d) is not part of some overarching regulatory scheme, and if it is not a declaration of procedure or instructions to other government officials, might it be simply a statement of policy, as in Heritage Healthcare? It is unlikely. The statutory language at issue in Heritage Healthcare was, in its context, clearly a “statement of policy.” Heritage Healthcare, 14 A.3d at 939. The public law subsections at issue began with the phrases “[t]he purpose of the fund” and “[t]he general assembly declares that.” P.L. 2003, ch. 410, § 3(a), (f). The language used there explicitly denotes a “declaration of policy.” See id. (quoting Ill. Indep. Tel. Ass’n v. Ill. Commerce Comm’n, 539 N.E.2d 717, 726 (Ill. Ct. App. 1989)). Contrariwise, the language of § 21-28.6-4(d) is a directive, not a policy statement. Additionally, it is in § 21-28.6-4, titled “Protocols for the medical use of marijuana,” and is surrounded by other sections that provide for specific directives, not mere policy gestures. To read § 21-28.6-4(d) as a general policy statement would ignore its position in the text and the forceful language it employs.

None of our Supreme Court’s aforementioned precedents, which denied implied private right of action but found other ways to make a statute efficacious, can breathe life into § 21-28.6-
4(d). Thus, without a private right of action, § 21-28.6-4(d) would be meaningless. The Court is hesitant, then, to apply one presumption—that against implied rights of action—that would directly collide with another—that against nugatory enactments.

Another presumption that often appears in cases dealing with implied private rights of action is that “a statute that establishes rights not recognized by law is subject to strict construction.” Accent Store Design, 674 A.2d at 1226; see also Bandoni, 715 A.2d at 584; In re John, 605 A.2d at 488. To that end, Defendants contend that the Hawkins-Slater Act “abrogates an employer’s common law right to employ individuals ‘at will’” and therefore should be construed strictly. Defs.’ Mem. 21. This argument, however, must be juxtaposed with § 21-28.6-13, which states in full: “This chapter shall be liberally construed so as to effectuate the purposes thereof.” This language is unambiguous, direct, and to the point. Regardless of whether § 21-28.6-4(d) is in derogation of the common law, the judiciary has been explicitly instructed to interpret it liberally, thereby disturbing any case law to the contrary. O’Connell v. Walmsley, 156 A.3d 422, 477 n.4 (R.I. 2017) (observing that even if a statute “operates in derogation of the common law, [the Court’s] task of strict statutory construction must give way to the clear intent of the General Assembly”).

Sometimes our Supreme Court has ruminated over implied private rights of action articulating the principle that “[t]he General Assembly could easily have exercised its power to create a cause of action, . . . but it chose not to do so.” Accent Store Design, 674 A.2d at 1226; see also Bandoni, 715 A.2d at 584-85; In re John, 605 A.2d at 488. While such a notion presents a powerful argument, it is also “presumed that the General Assembly knows the ‘state of existing relevant law when it enacts or amends a statute.’” Ret. Bd. of Emps.’ Ret. Sys. of R.I. v. DiPrete, 845 A.2d 270, 287 (R.I. 2004) (quoting Smith v. Ret. Bd. of the Emps.’ Ret. Sys. of R.I., 656

It is precisely in the civil rights context where courts have been most open to implying private rights of action—including Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 (Title IX). See Cannon v. Univ. of Chicago, 441 U.S. 677, 696 (1979); see also 45B Am. Jur. 2d Job Discrimination § 1843 (2012) ("[A] cause of action may be implied where a statute defines an unfair employment practice but does not provide an express method of redress."). Given this principle, it is more understandable why the General Assembly may not have explicitly provided a private right of action. The state of the law naturally includes an awareness of "judicial interpretation." First Fed. Sav. & Loan Ass’n of Providence v. Langton, 105 R.I. 236, 245, 251 A.2d 170, 176 (1969); see also Horn (Sutell, J., dissenting) at 300 (observing RICRA drafters "must have been aware of the precedents interpreting the federal statute") (quoting Rathbun v. Autozone, Inc., 361 F.3d 62, 67 (1st Cir. 2004))). Thus, it is reasonable to conclude that the General Assembly, when passing § 21-28.6-4(d), understood that private rights of action are more commonly implied in the employment discrimination context.

Ultimately, then, the presumptions that have guided previous analyses of whether to recognize a private right of action all are undercut when applied to § 21-28.6-4(d). The reflexive reaction against implied private rights of action butts up against the presumption that the Legislature would not enact a nugatory statute. The assumption that the Legislature would simply add a private right of action if that was their intent is weakened by the subject matter of the statute itself. And the rule construing statutes in derogation of the common law narrowly is explicitly countermanded by the liberal construction mandate of § 21-28.6-13.
Giving Effect

Having survived the gauntlet of presumptions with only one clear directive—to read the Hawkins-Slater Act liberally—the Court, then must “interpret the statute [the General Assembly] has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

This Court “begin[s] with the language of the statute itself.” Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 16 (1979) [hereinafter TAMA]. As the Court has mentioned, § 21-28.6-4(d) provided: “No school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder.” There is another portion of the Hawkins-Slater Act, however, that is also relevant to this inquiry. Section 21-28.6-7(b)(2) states that “[n]othing in this chapter shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.” (Emphasis added.) This intriguing provision is the only other portion of the Hawkins-Slater Act that references employers.

“It is a well-settled principle of statutory interpretation that an isolated part of a particular statute cannot be viewed in a vacuum; rather, each word and phrase must be considered in the context of the entire statutory provision.” Power Test Realty Co. Ltd. P’ship v. Coit, 134 A.3d 1213, 1221 (R.I. 2016). “It is also a canon of statutory construction that the Legislature is presumed to have intended each word or provision of a statute to express a significant meaning, and the court will give effect to every word, clause, or sentence, whenever possible.” State v. Bryant, 670 A.2d 776, 779 (R.I. 1996). This Court finds it crucial that the statute does not say that nothing within the chapter would require an employer to accommodate the medical use of
marijuana entirely. Instead, it cabins that proscription to use “in any workplace.” Sec. 21-28.6-7(b)(2). The natural conclusion is that the General Assembly contemplated that the statute would, in some way, require employers to accommodate the medical use of marijuana outside the workplace. This provision undermines Defendants’ contention that its actions did not violate the Hawkins-Slater Act because its refusal to hire Plaintiff was based not on her cardholder status, but her use of marijuana outside the workplace that prevented her from passing a drug test.

Plaintiff urges this Court to apply the factors the United States Supreme Court analyzed in Cannon. Pl.’s Mem. 18-21. There, the Supreme Court analyzed § 901(a) of Title IX, which stated, in pertinent part, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Cannon, 441 U.S. at 681-82. The Court proceeded to analyze the statute under the four-factor test laid out in Cort v. Ash, 422 U.S. 66 (1975). As the United States Supreme Court has subsequently made clear, the factors in Cort were not meant to supplant the intent of the Legislature. TAMA, 444 U.S. at 23. However, “the first three factors discussed in Cort—the language and focus of the statute, its legislative history, and its purpose—are ones traditionally relied upon in determining legislative intent.” Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979). This Court’s current mission is to determine legislative intent, and so comparison with Cannon, while not dispositive, could be fruitful.

The language of § 21-28.6-4(d) is quite similar to the “‘rights-creating’ language so critical to the [United States Supreme] Court’s analysis in Cannon.” Alexander, 532 U.S. at 279. The structure is the same: “§ 601 decrees that ‘[n]o person . . . shall . . . be subjected to
discrimination,” id. (quoting 42 U.S.C. § 2000d), while § 21-28.6-4(d) decrees that “no . . . employer . . . may 3 refuse to . . . employ . . . a person solely for his or her status as a cardholder.” The General Assembly drafted § 21-28.6-4(d) “with an unmistakable focus on the benefited class.” Cannon, 441 U.S. at 691. “[T]he right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action.” Id. at 690 n.13. Looked through this lens, implication of a private right of action appears appropriate.

The Court is mindful of the general—and rightful—reluctance of courts to imply private rights of action. However, the Court also believes that there is only one sensible interpretation of § 21-28.6-4(d). The Hawkins-Slater Act must have an implied private right of action. Without one, § 21-28.6-4(d) would be meaningless. The Act provides no “particular remedy or remedies” such that the “court must be chary of reading others into” the statute. TAMA, 444 U.S. at 20. The statute is not “phrased as a directive to . . . agencies engaged in the disbursement of public funds.” Alexander, 532 U.S. at 286 (quoting Univs. Research Ass’n, Inc. v. Coutu, 450 U.S. 754, 772 (1981)). And other provisions of the Hawkins-Slater Act reinforce the notion that the General Assembly expected § 21-28.6-4(d) to be enforced. Given the above, and the context of the provision—an anti-discrimination statute—this Court finds that there is an implied private right of action for violations of § 21-28.6-4(d).

3 While the distinction between “may” and “shall” is sometimes consequential, see Singer & Singer, supra, § 25:4, the Court is not concerned with the difference here. This section is prohibitory, and so employers are prohibited from discrimination. Cf. Cabana v. Littler, 612 A.2d 678, 683 (R.I. 1992) (“Negative words in a grant of power should never be construed as directory . . . .”).
Scope of § 21-28.6-4(d)

Having determined there is an implied private right of action, the Court is faced with yet another question. Section 21-28.6-4(d) prohibits employers from refusing to employ “a person solely for his or her status as a cardholder.” Defendants persistently argue that they did not refuse to hire Plaintiff because of her status as a cardholder, but because of her inability to “pass a mandatory pre-employment drug screen.” Defs.’ Mem. 25-26. At oral arguments for both their Super. R. Civ. P. 12(b)(6) motion to dismiss and Super. R. Civ. P. 56 motion for summary judgment, Defendants continually made the incredulous argument that the General Assembly was making a distinction between cardholders and users of medical marijuana. Defendants would have the Court believe that a patient cardholder might never use medical marijuana.⁴

Again, Defendants’ argument requires the Court to delve into the statutory language. While Defendants would again have the Court interpret the Hawkins-Slater Act narrowly because it “is in derogation of an employer’s common law right to employ individuals ‘at will,’” id. at 25, the Court will not do so. As explained above, the General Assembly explicitly instructed the courts to construe the Hawkins-Slater Act broadly. Sec. 21-28.6-13. The Court initially notes that despite Defendants’ insistence that the protections only apply to cardholders and not the medical use of marijuana, § 21-28.6-4(d) falls within subsection four, titled “[p]rotections for the medical use of marijuana.” Admittedly, “headings and notes are not binding, may not be used to create an ambiguity, and do not control an act’s meaning by injecting a legislative intent or purpose not otherwise expressed in the law’s body.” Singer & Singer, supra, § 47:14. However, such a meaning is expressed in the body.

⁴ The Court recognizes that caregivers and cultivators are also cardholders and that they might not use medical marijuana. However, the instant matter involves a patient cardholder. Regardless, this distinction made by Defendants is discussed below.
Also relevant is Section 21-28.6-4(a), which provides that “[a] qualifying patient 
cardholder who has in his or her possession a registry identification card shall not be . . . denied
any right or privilege . . . for the medical use of marijuana.” Employment is neither a right nor a
privilege in the legal sense. However, the protection provided by § 21-28.6-4(d) is. Thus, reading
the two statutes together, this Court gleans that the Hawkins-Slater Act provides that employers
cannot refuse to employ a person for his or her status as a cardholder, and that that right may not
be denied for the medical use of marijuana. The statutory scheme is premised on the idea that
“State law should make a distinction between the medical and nonmedical use of marijuana.”
Sec. 21-28.6-2(5). If the Court were to interpret § 21-28.6-4(d) as narrowly as Defendants
propose, Plaintiff and other medical marijuana users would be lumped together with nonmedical
users of marijuana. The protections that § 21-28.6-4(d) affords would be illusory—every medical
marijuana patient could be screened out by a facially-neutral drug test. In fact, this practice
would place a patient who, by virtue of his or her condition, has to use medical marijuana once
or twice a week in a worse position than a recreational user. The recreational user could cease
smoking long enough to pass the drug test and get hired, and subsequently not be subject to
future drug tests, allowing him or her to smoke recreationally to his or her heart’s content. The
medical user, however, would not be able to cease for long enough to pass the drug test, even
though his or her use is necessary to “treat[] or alleviat[e] pain, nausea, and other symptoms
associated with certain debilitating medical conditions.” Sec. 21-28.6-2(1).

Defendants argue that there are other non-patient individuals who hold cards. They aver
that since § 21-28.6-4(d)’s protections extend to people who do not use medical marijuana, the
Court should not read the section so broadly. This argument is not convincing. First, it is absurd
to think that the General Assembly wished to extend less protection to those suffering with

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debilitating medical conditions and who are the focus of the Hawkins-Slater Act. Second, this argument ignores the legislative history. When the Hawkins-Slater Act was initially passed, the statute did not use the term “cardholder”—instead, it specifically called out registered qualifying patients and registered primary caregivers separately. P.L. 2005, ch. 442, § 1 (then codified at § 21-28.6-4(b)). The General Assembly changed the term to cardholder, broadening the protections, but still encompassing the original scope of registered qualifying patients. See P.L. 2009, ch. 16, § 1.

Defendants finally contend that the Hawkins-Slater Act does not, and should not be interpreted to, require employers to accommodate medical marijuana use. Defendants emphasize that their manufacturing facility has dangerous equipment and couch their concern as one of workplace safety. They suggest that if this Court were to rule in favor of Plaintiff, an employer would have to accommodate “an employee who shows up to work in the morning under the influence after spending the entire night—or possibly the entire weekend—ingesting medical marijuana, simply because they used the drug outside the physical workplace.” Defs.’ Mem. 32. This argument utterly ignores the plain words of the General Assembly, which has explicitly contemplated this scenario. The Hawkins-Slater Act shall not permit “[a]ny person to undertake any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice.” Sec. 21-28.6-7(a)(1). If an employee came to work under the influence, and unable to perform his or her duties in a competent manner, the employer would thus not have to tolerate such behavior.

Regardless, this Court agrees that Defendants are not required to make any accommodations for Plaintiff as they are defined in the employment discrimination context. They do not need to make existing facilities readily accessible. Sec. 42-87-1.1(4)(i). They do not
need to restructure jobs, modify work schedules, reassign to a vacant position, or acquire or modify devices or examinations. Sec. 42-87-1.1(4)(ii). They do not even need to alter their existing drug and alcohol policy, which prohibits “the illegal use, sale or possession of drugs or alcohol on company property.” While that policy provides that “all new applicants who are being considered for employment will be tested for drug or chemical use,” it does not state that a positive result of such test will be cause for withdrawal of the job offer.\(^5\) Ex. 1 to Defs.’ Ex. C.

4

**Application to the Instant Case**

Ultimately, having found that the Hawkins-Slater Act can theoretically support Plaintiff’s action, the final question is whether the facts entitle Plaintiff to summary judgment. Unlike the questions of statutory interpretation the Court has faced thus far, the facts at issue in this case are relatively straightforward. Plaintiff was denied the opportunity to apply for a job with Defendants because she believed she could not pass the pre-employment drug test. Plaintiff did inform Defendants that she was a medical marijuana cardholder and that she would obey state law and not bring marijuana into the workplace. Defendants do not contest that they denied her employment based on the fact that she could not pass the drug screening. Therefore, Defendants have violated the Hawkins-Slater Act. As a result, the Court grants Plaintiff’s motion for summary judgment and correspondingly denies Defendants’ motion.

B

**Count I: Declaratory Judgment**

Plaintiff also asks for a declaratory judgment that “failure to hire a prospective employee based on his or her status as a medical marijuana card holder and user is a violation of the Act.”

\(^5\) The Fitness for Duty Statement signed by Plaintiff also does not state the penalty for failing the drug test. Ex. 2 to Defs.’ Ex. C.
Compl. ¶ 29. Defendants argue that it is inappropriate to use the Declaratory Judgment Act to circumvent the lack of a private right of action, pointing to Pontbriand, 699 A.2d at 868.

As in any case that comes before this Court, “the party seeking declaratory relief must present the court with an actual controversy.” Providence Teachers Union v. Napolitano, 690 A.2d 855, 856 (R.I. 1997). Even in declaratory judgment actions, “trial justices may not dispense with the traditional rules prohibiting them from rendering advisory opinions.” Id. Thus, to the extent that Plaintiff seeks a generalized construction of the statute, see Defs.’ Mem. 37, removed from the facts in this particular case, the Court cannot render such an opinion. To do so would be to “‘sit like a kadi under a tree dispensing justice.’” Sullivan v. Chafee, 703 A.2d 748, 753 (R.I. 1997) (quoting Terminiello v. City of Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting)).

The Court, in accordance with its liberal pleading rules, will read Count I to request a declaration specific to Plaintiff and to the facts in the case at hand. Given that Count I is a declaration under the Hawkins-Slater Act, however, all the discussions in Part A, supra, apply here—it is an application of the same law to the same facts. Therefore, for the same reasons articulated in Part A3, the Court grants Plaintiff’s motion for summary judgment and denies Defendants’ motion with respect to Count I as well.

C

Count II: RICRA

1

Disability

Count II alleges unlawful discrimination under RICRA, which prohibits, inter alia, discrimination based on disability in the making and enforcement of contracts. Sec. 42-112-1(a).
RICRA is expansive, and "provides broad protection against all forms of discrimination in all phases of employment." *Ward v. City of Pawtucket Police Dep’t*, 639 A.2d 1379, 1381 (R.I. 1994). Here, there is no question a private right of action exists. Sec. 42-112-2. While Defendants move for summary judgment on Count II, Plaintiff does not. Defendants have an array of arguments against the applicability of RICRA to Plaintiff’s claim, which the Court will consider in turn.

First, Defendants contend that "[a]ctive drug use is not a disability under the RICRA.” Defs.’ Mem. 7. For purposes of RICRA, “[t]he term ‘disability’ has the same meaning as that term is defined in § 42-87-1.” Sec. 42-112-1(d). Defendants would limit RICRA’s disability coverage to anyone who is protected by the federal Americans with Disabilities Act (ADA). Defs.’ Mem. 7. RICRA’s definition of disability is broader than that, however. While including those covered by the ADA, § 42-87-1(1)(iv), Chapter 87 also defines disability as “[a] physical or mental impairment that substantially limits one or more . . . major life activities,” if there is a “record of such impairment.” Sec. 42-87-1(1)(i)-(ii). Plaintiff is a medical marijuana cardholder. In order to qualify for such a card, Plaintiff must have a “debilitating medical condition.” Sec. 21-28.6-3(10) (2013).6

A “debilitating medical condition” under the Hawkins-Slater Act must necessarily "substantially limit[] one or more . . . major life activities” under § 42-87-1. The examples of conditions which automatically qualify as debilitating medical conditions are severe: cancer, glaucoma, HIV/AIDS, and Hepatitis C. Sec. 21-28.6-3(3)(i) (2013).7 All of these diseases impair "the operation of a major bodily function," such as the immune system, normal cell growth, or the like. See § 42-87-1(5). Further, all of the symptoms which would qualify a cardholder are

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6 This section is now at § 21-28.6-3(18).
7 This section is now at § 21-28.6-3(5)(i). Post-traumatic stress disorder has since been added to this list.
also severe: “wasting syndrome; severe, debilitating, chronic pain; severe nausea; seizures; . . . or severe and persistent muscle spasms.” Sec. 21-28.6-3(3)(ii) (2013). Again, these would all naturally substantially limit a major life activity. Even just a plain reading of the terms, without reference to the definitions, makes it clear—“debilitating medical condition” connotes disability on its own. See Merriam-Webster’s Collegiate Dictionary 296 (Frederick C. Mish et al. eds., 10th ed. 2001) (equating debilitate with weaken or enfeeble).

Thus, Plaintiff is disabled under the terms of RICRA. Her status as a medical marijuana cardholder signaled that to Defendants—she could not have obtained such a card without a debilitating medical condition that would cause her to be disabled.

2

Illegal Drug Use

However, the Court’s dalliance with the RICRPDA is not over. Defendants point to § 42-87-1(6), which defines a “qualified individual.” Defendants embrace sub-subsection (v), which states that “[a] qualified individual with a disability shall not include any . . . applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.” Plaintiff’s drug use is legal under Rhode Island law, but illegal under federal law. The Court, however, does not have to determine to which body of law the General Assembly was referring. Assuming arguendo that Plaintiff is engaged in illegal drug use, this provision is not applicable to RICRA. While the term “qualified individual” is used throughout Chapter 42-87, those words do not appear anywhere within § 42-112-1. None of the definitions incorporated in § 42-112-1(d) reference qualified individuals. Had the Legislature wanted to incorporate the restrictions of that language into § 42-112-1, they could have easily done so. In fact, the General Assembly incorporated a limited set of terms from §§ 42-87-1 and 42-87-1.1; however, they did

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8 This section is now at § 21-28.6-3(5)(ii).
not include “qualified individual.” Sec. 42-112-1(d).9 “[I]t is not within the province of this court to insert in a statute words or language that does not appear therein except in those cases where it is plainly evident from the statute itself that the legislature intended that the statute contain such provisions.” New England Die Co. v. Gen. Prods. Co., 92 R.I. 292, 298, 168 A.2d 150, 154 (1961). Furthermore, per the maxim expressio unius est exclusion alterius, the Court infers that in explicitly including certain definitions from Chapter 42-87, the General Assembly intended to exclude all others. See Gorman v. Gorman, 883 A.2d 732, 738 n.9 (R.I. 2005).

3

Basis for Termination

Having determined that marijuana users are not precluded from making a claim under RICRA, and that Plaintiff had a disability, the Court is now faced with Defendants’ next contention: that Defendants’ decision not to hire Plaintiff was based solely on her use of marijuana, not her underlying disability. This distinction breaks down upon further examination. Defendants essentially ask this Court to completely separate the medical condition from the treatment, which would circumvent the broad intent of RICRA. However, the only reason a given patient cardholder uses marijuana is to treat his or her disability. This policy prevents the hiring of individuals suffering disabilities best treated by medical marijuana.

Defendants, nevertheless, assert that Plaintiff never informed them of her underlying condition. Thus, contend Defendants, Darlington “was not aware of her migraine condition when it decided not to hire her.” Defs.’ Mem. 11. While Plaintiff is uncertain as to whether she informed Defendants of her condition, there is no dispute that Defendants knew she possessed a medical marijuana card and was thus disabled. It is irrelevant that Defendants did not know her

9 The Court also observes that the same analysis applies to RIFPA. See § 28-5-6(5) (importing the definition of disability, but not qualified individual).
precise disability. It is sufficient to show that Defendants discriminated against a class of
disabled people—namely, those people with disabilities best treated by medical marijuana.

This framing of the disability also disposes of Defendants’ next contention—that RICRA
does not allow for a “mixed motives” analysis of discrimination, but instead requires “but-for”
causation. Here, but for Plaintiff’s disability—which her physician has determined should be
treated by medical marijuana—Plaintiff seemingly would have been hired for the internship
position. The Court need not address whether a mixed-motives analysis is required, as there is
but-for causation.\textsuperscript{10}

\section{Disparate Impact}

Next, Defendants contend that their enforcement of a neutral Alcohol and Drug Policy
“cannot be the basis of a disparate treatment discrimination claim.”\textsuperscript{11} Defs.’ Mem. 14. Under a
Title VII analysis, there are two types of federal employment discrimination cases: disparate-
Comm’n for Human Rights}, 484 A.2d 893, 898 (R.I. 1984)). Assuming, without deciding, that
Defendants are correct in that the facts here do not support a disparate-treatment case, such

\textsuperscript{10} The Court notes that the case Defendants cite in support of the argument that a mixed-
motives analysis should not be conducted under RICRA does not sweep as broadly as they imply. \textit{Dwyer v. Sperian Eye \\& Face Protection, Inc.}, Civil No. 10-cv-255-JD, 2012 WL 16463,
at *5 (D.R.I. Jan. 3, 2012) (“Dwyer does not show that this is a mixed motive case . . . . Even if
mixed motive were an issue in this case, however, Dwyer makes no developed argument that the
Rhode Island Supreme Court would analyze mixed-motive age discrimination claims . . . . In the
absence of a developed argument, the court will not consider Dwyer’s theory.”).

\textsuperscript{11} The Court pauses to note the slightly unusual nature of Count II, in that it is a RICRA
action for employment discrimination brought without an accompanying RIFEA claim. The
Rhode Island Supreme Court, when analyzing RICRA alongside RIFEA, has looked “to the
federal interpretations of Title VII of the Civil Rights Act of 1964.” \textit{Casey v. Town of
Portsmouth}, 861 A.2d 1032, 1036 (R.I. 2004). Thus, despite the fact that there “is a significant
functional distinction between the two statutory means of redress provided under” RIFEA and
RICRA, \textit{Horn}, 927 A.2d at 301 (Suttell, J., dissenting), when analyzing theories of
discrimination, the Court applies a Title VII analysis.
reasoning only eliminates the first theory of discrimination. Instead, while Defendants may have a facially-neutral policy, RICRA is concerned with “the consequences of employment practices, not simply the motivation.” Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). A disparate-impact claim “does not require discriminatory intent.” Lewis v. City of Chicago, Ill., 560 U.S. 205, 215 (2010). Thus, the argument that Defendants had no discriminatory intent does not foreclose Plaintiff’s RICRA claim under a Title VII analysis.

Even so, Defendants pose the question: does RICRA prevent disability-based discrimination when the reasonable accommodation involves use of medical marijuana? As discussed earlier, unlike RICRPDA, RICRA’s scope is not limited to “qualified individuals,” which exempts from its scope those engaged in the illegal use of drugs. RICRA does look to § 42-87-1.1 to define a “reasonable accommodation.” Sec. 42-112-1(d). Given that “qualified individual” is neither included in § 42-112-1(d), nor in the definition of “reasonable accommodation” in § 42-87-1.1(4), this Court will not judicially insert the term into the statute. In fact, the definition of reasonable accommodation refers not to qualified individuals, but to the broader superset of all “individuals with disabilities.” Sec. 42-87-1.1(4)(i)-(iv).

The Court, also, has difficulty imagining what reasonable accommodation is required. The term encompasses either a modification of facilities, equipment, work schedule or conditions, or the like. Sec. 42-87-1.1(4). While the definition also uses the term “policies,” the Court believes that refers to workplace policies and not hiring policies. However, as previously discussed, the written drug screening policy does not state the consequence of failing the drug test. Thus, changing the unwritten practice not to automatically disqualify a cardholder who tests

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12 Defendants contend that Plaintiff failed to plead a cause of action for failure to accommodate. First, such a cause of action would more appropriately be brought in a RIFEPA action. See G.L. 1956 § 28-5-7. Regardless, since Plaintiff “pled a number of facts relevant” to a failure to accommodate, “[t]his was sufficient to preserve the argument.” Reeves ex rel. Reeves v. Jewel Food Stores, Inc., 759 F.3d 698, 701 (7th Cir. 2014).
positive for marijuana would be deemed a reasonable accommodation. RICRA, therefore, poses no obstacle. The duties that RICRA imposes for employers to institute reasonable accommodations, if any, are thus not limited by the restrictions in § 42-87-1(6)(v).

Thus, with respect to Count II, the Court finds that RICRA can support a cause of action under the facts alleged here, and that Plaintiff has properly stated a claim.

D

Federal Preemption

The final arrow in Defendants' quiver is federal preemption. Defendants argue that even if the Hawkins-Slater Act or RICRA entitles Plaintiff to relief, such an action cannot be maintained due to preemption by the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801 et seq. It is without question that federal law can preempt state law. The crucial inquiry is whether or not it, in fact, does in this case. The Court notes that only § 21-28.6-4(d) is at issue in this analysis; "if this section were declared invalid, it does not follow that the remainder must fall because this section is not indispensable to the other parts of the act." Chartier Real Estate Co. v. Chafee, 101 R.I. 544, 556, 225 A.2d 766, 773 (1967). Indeed, the General Assembly has provided for the severability of the statute. Sec. 21-28.6-10.

"The Supremacy Clause of the United States Constitution, Article VI, clause 2, preempts or invalidates state law that interferes or conflicts with any federal law." Verizon New England Inc. v. R.I. Pub. Utils. Comm'n, 822 A.2d 187, 192 (R.I. 2003). In general, there are three types of preemption: express preemption, field preemption, and conflict preemption. Id. The CSA describes how it should be interpreted with regard to state law:

"No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would
otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.” 21 U.S.C. § 903.

How § 903 fits into the standard tripartite delineation of preemption is, on a plain reading, unclear; it is an express clause, but speaks of fields and conflicts as well. See People v. Crouse, 388 P.3d 39, 44 (Colo. 2017) (Gabriel, J., dissenting). The United States Supreme Court, however, has distinguished a similar provision “indicating that a provision of state law would only be invalidated upon a ‘direct and positive conflict’ with [federal law]” from an “express pre-emption provision.” Wyeth v. Levine, 555 U.S. 555, 567 (2009). Such a distinction indicates this is not a traditional express preemption clause. Additionally, Congress did not choose to completely occupy the field—it instead chose to only preempt state laws that could not consistently stand with the CSA. Thus, field preemption is not implicated. See Verizon New England, 822 A.2d at 193 (“In § 251 Congress specifically refused to preclude state regulations . . . that provide access to networks, are consistent with § 251, and do not ‘substantially prevent implementation of the requirements of this section and the purposes of this part.’ As a result, there is no field preemption.”) (quoting 47 U.S.C. § 251(d)(3)(C)).

The Court is left to analyze conflict preemption, which comports nicely with the language of § 903. Conflict preemption requires there to be a “positive conflict” between state and federal law such that they “cannot consistently stand together.” The question is, then, does the protection Rhode Island affords employees come into such a positive conflict? One way for conflict preemption to arise would be if it were impossible for an employer to comply with both the CSA and the Hawkins-Slater Act or RICRA. Id. (Conflict preemption exists when “‘compliance with both federal and state regulations is a physical impossibility . . . .’”) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963))). There is no physical
impossibility here. As detailed above, the Hawkins-Slater Act does not require “[a]n employer to accommodate the medical use of marijuana in any workplace.” Sec. 21-28.6-7(b)(2). Marijuana need not enter the employer’s premises. Indeed, this is all that is required to maintain a drug-free workplace. See 41 U.S.C. § 8101(a)(5) (defining “drug-free workplace” as “a site of an entity . . . at which employees of the entity are prohibited from engaging” in federally-prohibited uses of controlled substances). What an employee does on his or her off time does not impose any responsibility on the employer.

The other instance in which conflict preemption can arise is when a state law “creates an unacceptable ‘obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Wyeth, 555 U.S. at 563-64 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). It is important to remember that there is a presumption against preemption, however, in cases involving powers traditionally delegated to the states. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (“So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”). Employment law and anti-discrimination law are examples of two such delegated powers. See Gary v. Air Group, Inc., 397 F.3d 183, 190 (3d Cir. 2005) (observing that preemption is disfavored “in the employment law context which falls ‘squarely within the traditional police powers of the states’” (quoting Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1259 (11th Cir. 2003) (citation omitted))); Kroske v. U.S. Bank Corp., 432 F.3d 976, 981 (9th Cir. 2005) (describing “the State’s historic police powers to prohibit discrimination on specified grounds”).

Ultimately, this Court finds the purpose of the CSA—the “illegal importation, manufacture, distribution, and possession and improper use of controlled substances”—to be
quite distant from the realm of employment and anti-discrimination law. 21 U.S.C. § 801(2). The CSA is concerned with stopping the illegal trafficking and use of controlled substances. To read the CSA as preempting either the Hawkins-Slater Act or RICRA would imply that anyone who employs someone that violates federal law is thereby frustrating the purpose of that law. The connection must, at some point, be deemed too attenuated. Cf. Wyeth, 555 U.S. at 583 (Thomas, J., dissenting) ("Because implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution, I concur only in the judgment."). It may be that Congress does wish to preempt laws such as the Hawkins-Slater Act or RICRA with respect to employment discrimination, but if they do so, they have not expressed that intent in the CSA. 13

One last consideration reassures the Court in finding that the CSA does not preempt Rhode Island law in this narrow question. "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'” Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166-67 (1989) (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984)). Congress is definitely aware of the existence of various states’ medical marijuana schemes. Indeed, over the past several years, Congress has passed an amendment to various omnibus spending bills preventing the funds appropriated therein to the Department of Justice to be used to prevent any of a number of listed states, including Rhode Island, “from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537. It would be easy to overstate the importance of this enactment. It has not repealed or modified the CSA itself. It was not

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13 Again, the Court is focused solely on § 21-28.6-4(d) within the Hawkins-Slater Act. Whether the CSA might preempt other parts of the Act is not before the Court.
contemporaneous with the passage of the CSA. However, it is a direct and unambiguous indication that Congress has decided to tolerate the tension, at least for now, between the federal and state regimes. See Bonito Boats, 489 U.S. at 166-67. Congress seems to want, as Justice Brandeis said, the States to be the laboratories of democracy with respect to medical marijuana. See 161 Cong. Rec. H3746 (daily ed. June 2, 2015) (statement of Rep. Cohen).

IV

Conclusion

The Court finds that there is an implied cause of action under the Hawkins-Slater Act, and further finds that there is no genuine issue of material fact with respect to the counts regarding that effect. Thus, the Court grants Plaintiff’s Motion for Summary Judgment on Counts I and III. Correspondingly, Defendants’ motion, regarding Counts I and III, is denied. Furthermore, for the reasons stated above, Defendants’ Motion for Summary Judgment is also denied for Count II. Counsel shall enter an appropriate order for entry.
RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet


CASE NO: C.A. No. PC 2014-5680

COURT: Providence County Superior Court

DATE DECISION FILED: May 23, 2017

JUSTICE/MAGISTRATE: Licht, J.

ATTORNEYS:

For Plaintiff: Carly Beauvais Iafrate, Esq.

For Defendant: Timothy C. Cavazza, Esq.; Meghan E. Siket, Esq.
United States Court of Appeals
For the First Circuit

No. 15-2232

TAYMARI DELGADO ECHEVARRÍA,

Plaintiff, Appellant,

v.

ASTRAZENECA PHARMACEUTICAL LP; AstraZeneca LP,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Pedro A. Delgado-Hernández, U.S. District Judge]

Before

Thompson, Dyk,* and Kayatta,
Circuit Judges.

Vilma Maria Dapena Rodriguez for appellant. Lourdes C. Hernández-Venegas, with whom Elizabeth Pérez-Lleras and Schuster Aguiló LLC were on brief, for appellees.

May 2, 2017

* Of the Federal Circuit, sitting by designation.
THOMPSON, Circuit Judge. The plaintiff, Taymari Delgado Ecvhevarria (Delgado), appeals from the entry of summary judgment in favor of her former employer, AstraZeneca Pharmaceutical LP (AstraZeneca). 1 Although Delgado labors mightily to demonstrate the existence of a litany of genuine disputes of material fact, her inability to do so with respect to each of the essential elements of her claims compels us to affirm.

BACKSTORY

Consistent with Delgado's effort to show the existence of a host of factual disputes in this case, each party's brief provides an in-depth discussion of the facts. We prefer to take a different tack: briefly sketching here the general background and setting forth in detail only those facts that are relevant to our disposition of this appeal, augmenting this background as necessary in the pages that follow. As in all other summary-judgment cases, we view the facts (and all reasonable inferences that can be drawn from them) in the light most favorable to Delgado, the nonmovant. See Garmon v. Nat'l R.R. Passenger Corp., 844 F.3d 307, 312 (1st Cir. 2016).

In 2001, AstraZeneca hired Delgado to work as a Pharmaceutical Sales Specialist (PSS). She was promoted to a

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1 Delgado sued AstraZeneca Pharmaceutical LP and AstraZeneca LP. Taking our cue from Delgado's complaint, we refer to both entities collectively as "AstraZeneca."
Hospital Specialist in 2009. With the new position came a new supervisor, Maribel Martínez (Martínez).

In November 2010, Delgado sought treatment for depression and anxiety with Dr. Jorge A. Sánchez Cruz (Sánchez), a psychiatrist. Nearly one year later, Delgado learned that she had a pituitary microadenoma (a small brain tumor, in layman’s terms). Delgado informed Martínez of the tumor and the two biopsy procedures that flowed from this diagnosis, but did not disclose her depression or anxiety.

On December 12, 2011, Sánchez diagnosed Delgado with severe depression and extreme anxiety, and he recommended that she refrain from working. Later that day, Delgado emailed an AstraZeneca occupational health nurse in order to get the ball rolling on her application for benefits under the company's short-term disability (STD) policy. Initially, AstraZeneca denied

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2 A quick primer on that policy: It "provides full or partial income replacement for eligible employees during brief periods of disability," including "disability due to . . . mental illness," provided that the employee submits "the medical information necessary to substantiate the [benefits] claim" to the company's Corporate Health Services department (CHS). CHS is tasked with approving or disapproving a request for benefits and, in the event of approval, determining how long benefits will be paid. The policy also declares that "[t]he maximum period of time for which STD benefits are payable is 26 weeks for any single period of disability." After this 26-week window closes, the employee may be eligible for long-term disability (LTD) benefits or an "unpaid extended disability leave." However, CHS can terminate benefits prior to the expiration of the 26-week period where, among other scenarios, it determines that the employee is no longer disabled or the employee fails to submit the necessary supporting
Delgado's request for STD benefits because CHS determined that she had not submitted the necessary documentation. In response, Sánchez provided additional paperwork on Delgado's behalf in which he estimated that she needed to be out on leave for about five months until May 2012.

AstraZeneca subsequently awarded Delgado STD benefits (retroactive to December 12, 2011) until January 22, 2012. The record does not reflect the reason that AstraZeneca did not grant Delgado STD benefits until May, as Sánchez requested. AstraZeneca periodically extended her benefits on several occasions. Delgado received treatment in a hospital on an outpatient basis sometime in late January or early February, and her benefits were extended until February 12. Delgado's benefits were then extended again until March 4, and once more until March 11.

In two treatment records that Sánchez submitted to AstraZeneca on Delgado's behalf — one dated February 22 and the other dated March 8 — Sánchez described Delgado as "[m]ildly [i]ll." On March 11, AstraZeneca terminated Delgado's STD benefits because she failed to submit what it viewed as adequate documentation. The policy warns that, if "benefits are suspended or denied and the employee does not return to work, the employee may be considered to have abandoned the employee's job and be subject to immediate termination from employment."

3 From here on out, all specified dates are from the year 2012 unless otherwise noted.
documentation of her disability. Five days later, Michael Cohran (Cohran), the then Senior Employment Practices Partner in the Human Resources department at AstraZeneca, sent a letter to Delgado instructing her to return to work by March 22 and informing her that, if she failed to do so, AstraZeneca would presume that she resigned from her employment with the company. In response, Sánchez requested that AstraZeneca continue Delgado's medical leave until March 30.

When Delgado did not return to work on March 22, Cohran called her, put pressure on her to resign, offered her a severance package, and suggested that, once she took care of her health, she reapply for her position with AstraZeneca in six months if her position was still open. The conversation was an upsetting one for Delgado; she became "pretty hysterical," began to cry, was unable to finish the call, and suffered a "relapse" of her condition as a result. One week after Cohran's phone call with Delgado, Sánchez submitted additional documentation in support of his request that AstraZeneca continue Delgado's medical leave; Sánchez characterized Delgado as "[s]everely [i]ll" in this paperwork. AstraZeneca then extended Delgado's STD benefits until April 29.

By letter dated May 7, AstraZeneca informed Delgado that her STD benefits terminated on April 30. Cohran sent another letter to Delgado on May 14 informing her that, if she did not
return to work on May 17, AstraZeneca would presume that she resigned from the company.

Delgado did not return to work on May 17. Instead, Sánchez faxed additional documentation to AstraZeneca on Delgado's behalf that day. In one section of AstraZeneca's leave form, Sánchez related that Delgado's medical condition commenced in 2009 and would probably last "more than a year." In another section of the same form, Sánchez requested additional leave for Delgado and indicated that she was "unable to work at this time"; additionally, in response to a question on the form calling for an "estimate [of] the beginning and ending dates for the period of incapacity," Sánchez entered: "12 months." An AstraZeneca occupational health

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4 We note that the record is not crystal clear on when Sánchez faxed this documentation to AstraZeneca. Although a form that Sánchez faxed to AstraZeneca is dated May 14 and Sánchez testified in his deposition that he "submitted [the form] on behalf of [Delgado] on May 14," Delgado states in her opening brief to this court that Sánchez sent the form to AstraZeneca "[o]n May 17." Additionally, as far as we can tell, the record does not reflect precisely when on May 17 Sánchez faxed this documentation to AstraZeneca. The closest we can come to pinpointing that time is to note that, at 2:07 p.m., an AstraZeneca occupational health nurse sent Cohran an email explaining that she had reviewed the form and determined that it did not support reinstating Delgado's benefits. Given the manner in which we resolve this appeal, we need not grapple with any uncertainty of when AstraZeneca received the documentation.

5 Sánchez later testified at his deposition that this entry was meant to convey his estimate "that [it] would have been May 14, 2013, at a minimum, before . . . Delgado would be able to work" and that his "expectation was for her to . . . resolve her problems and be able to return to work in 12 months."
nurse told Cohran via email on May 17 that she reviewed this form the same day that it was faxed to the company, determined it did not support reinstating Delgado's STD benefits, and left Delgado a voicemail later that day. AstraZeneca did not follow up with Delgado's psychiatrist that day or at any point thereafter.

Rather, on May 18, Cohran sent Delgado yet another letter. This letter reiterated that Delgado had been required to return to work the day before or else "be presumed to have resigned [her] employment with AstraZeneca" and confirmed that she had neither reported to work as instructed nor contacted her supervisor. The letter indicated that Delgado's "termination effective date [was] July 19." The letter also noted another update; that, "due to a recent reorganization in field sales, we are making a non-negotiable offer of severance to you." Finally, on July 17, with no other communications passing between AstraZeneca and Delgado in the interim, Cohran sent Delgado one more letter that informed her: "As outlined in my letter dated May 18, 2012, due to a recent reorganization in field sales your position was eliminated . . . ." The July 17 letter also reminded Delgado of the effective date of her termination two days later and the severance-package offer.

Delgado did not accept AstraZeneca's offer. Instead, in February 2013, she initiated this action against her former employer, alleging a host of claims under federal and Puerto Rico
law. In particular, Delgado alleged that AstraZeneca violated the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, by discriminating against her on account of her disability, failing to reasonably accommodate that disability, failing to engage in an interactive process to discuss reasonable accommodations, and retaliating against her for engaging in protected activity under the ADA. Delgado also alleged that AstraZeneca violated several provisions of Puerto Rico law, including Law 44, Article 1802, and Law 80.\(^6\) The district court entered summary judgment in AstraZeneca's favor. Delgado timely appealed.

**STANDARD OF REVIEW**

We review the entry of summary judgment de novo. *Ortiz-Martínez v. Fresenius Health Partners, PR, LLC*, No. 16-1453, 2017 WL 1291193, at *4 (1st Cir. Apr. 7, 2017); *Garmon*, 844 F.3d at 312. Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Ameen v. Amphenol Printed Circuits*,

\(^6\) Delgado also asserted claims of hostile-work environment, interference with and retaliation for requesting leave under the Family and Medical Leave Act (FMLA), see 29 U.S.C. §§ 2601-2654, age discrimination in violation of the Age Discrimination in Employment Act (ADEA), see id. §§ 621-634, and Puerto Rico's Law 100, as well as a claim for violation of Puerto Rico's Act No. 115. Because Delgado either withdrew these claims at the district-court level or has not addressed the district court's entry of summary judgment on these claims in her briefing before this court, however, we need not discuss these claims or the facts giving rise to them.
Inc., 777 F.3d 63, 68 (1st Cir. 2015). We are free to affirm the entry of summary judgment "on any basis apparent in the record." Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 86 (1st Cir. 2012) (quoting Chiang v. Verizon New Eng. Inc., 595 F.3d 26, 34 (1st Cir. 2010)).

ANALYSIS

On appeal, Delgado argues that the district court erred in entering summary judgment for AstraZeneca on both her ADA claims and Puerto Rico law claims. We address her ADA claims first and then turn to her remaining claims.

A. ADA Claims

Delgado's complaint asserted that AstraZeneca violated the ADA in several respects. Those claims can be classified into one of two general categories: disability discrimination and retaliation. We address each category in turn.

1. ADA Disability-Discrimination Claim

To withstand summary judgment on an ADA disability-discrimination claim, Delgado needs to show the existence of a genuine dispute of material fact as to all three elements of her prima facie case: (1) that she is disabled under the ADA; (2) that she "is qualified to perform the essential functions of [her] job with or without reasonable accommodation"; and (3) that she "was discharged or otherwise adversely affected in whole or in part because of [her] disability." Jones, 696 F.3d at 87. In this
case, the district court assumed, without deciding, that Delgado was disabled under the ADA on account of her depression and anxiety, and we do the same. Delgado and AstraZeneca spar over the remaining elements.

We narrow our focus to the qualified-individual element, which imposes a burden on Delgado to show: (1) "that she possesses the requisite skill, experience, education and other job-related requirements for the position"; and (2) "that she is able to perform the essential functions of the position with or without reasonable accommodation." Mulloy v. Acushnet Co., 460 F.3d 141, 147 (1st Cir. 2006). AstraZeneca does not dispute that Delgado satisfies this first requirement — her qualification for the position — and Delgado does not contend that she was able to perform the essential functions of her position without a reasonable accommodation.7 Thus, the scope of our inquiry shrinks further still; we need only address whether Delgado has shown a genuine dispute of material fact that she was able to perform the essential functions of her position with a reasonable accommodation. See id.

The ADA compels an employer "to make 'reasonable accommodations to the known physical or mental limitations of an

7 Indeed, she concedes in her reply brief that she "was unable to work at the time she was on leave, and at the time she requested an extension of her leave."
otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on [its] operation of the business." "Ortiz-Martinez, 2017 WL 1291193, at *4 (quoting 42 U.S.C. § 12112(b)(5)(A)); see also U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 393 (2002) (explaining that the ADA "prohibits an employer from discriminating against an 'individual with a disability' who, with 'reasonable accommodation,' can perform the essential functions of the job" (quoting § 12112(a), (b))). The plaintiff bears the burden of showing the existence of a reasonable accommodation. See Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258 (1st Cir. 2001). To satisfy that burden, "a plaintiff needs to show not only that [(1)] the proposed accommodation would enable her to perform the essential functions of her job, but also that, [(2)] at least on the face of things, it is feasible for the employer under the circumstances."8 Id. at 259; see also Jones, 696 F.3d at 90; Freadman, 484 F.3d at 103; Mulloy, 460 F.3d at 148. We have referred to the second aspect of this burden as an obligation to show that the requested accommodation is " facially reasonable." Reed, 244 F.3d at 260.

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8 We have also recognized that "[a] plaintiff may sometimes be able to establish the reasonableness of a proposed accommodation by showing it is a method of accommodation that is feasible in the run of cases," although we also added that "this will not always be so." Reed, 244 F.3d at 259 n.5.
Delgado argues that her May 17 request for an additional twelve months of leave was a reasonable accommodation.\(^9\) The district court thought otherwise, concluding that, in essence, Delgado was seeking indefinite leave — an accommodation that is not reasonable under the ADA.\(^10\) See Fiumara v. President & Fellows of Harvard Coll., 327 F. App'x 212, 213 (1st Cir. 2009); Watkins v. J & S Oil Co., 164 F.3d 55, 62 (1st Cir. 1998); see also Robert v. Bd. of Cnty. Comm'rs of Brown Cnty., 691 F.3d 1211, 1218-19 (10th Cir. 2012). Having set the stage, we now provide our take.

First things first: All agree that a leave of absence or a leave extension can constitute a reasonable accommodation

\(^9\) The record is unclear on whether Delgado was seeking paid or unpaid leave. At oral argument, Delgado's counsel suggested that her client was seeking paid leave, although she also seemed to suggest that Delgado had made payroll contributions to the source of the funds that would be used to pay for that leave. Given this lurking uncertainty about the true nature of the leave requested, we assume, favorably to Delgado, that she requested unpaid leave.

\(^10\) As Delgado points out, the district court erroneously stated in its decision that Sánchez "asserted that the expected duration of [Delgado's] need for additional leave was for more than a year." Actually, Sánchez had indicated on the form he faxed to AstraZeneca that the "[p]robable duration of [Delgado's] condition" was "more than one year." (Emphasis added.) In a separate section of the form asking for an "estimate [of] the beginning and ending dates for the period of [Delgado's] incapacity," Sánchez wrote "12 months." (Emphasis added.) So, Sánchez did not indicate that Delgado needed additional leave for more than one year. But, as we view things, the district court's mistake is immaterial. Cf. Jones, 696 F.3d at 88 ("While we agree with Jones that several of the 'facts' stated in the district court's opinion are mistaken, none of those facts is material to our analysis.").
under the ADA "in some circumstances." García-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000); see also Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir. 1998). And, to be sure, "[w]hether [a] leave request is reasonable turns on the facts of the case." García-Ayala, 212 F.3d at 647 (alterations in original) (quoting Criado, 145 F.3d at 443). But the fact-intensive nature of the reasonable-accommodation inquiry does not insulate disability-discrimination cases from summary judgment. To the contrary, a plaintiff must show, even at the summary-judgment stage, that the requested accommodation is facially reasonable. See Reed, 244 F.3d at 259-60. And, where a plaintiff fails to show facial reasonableness, summary judgment for the defendant is appropriate. See, e.g., Jones, 696 F.3d at 91. So it is here.

The combined effect of two aspects of this case convince us that Delgado has failed to show that her request for twelve more months of leave was a reasonable accommodation. First, it seems doubtful that Delgado shouldered her burden of showing that the requested accommodation would have enabled her to perform the essential functions of her position. Second, Delgado has not shown that additional leave for this duration is a facially reasonable accommodation, either in the circumstances of her particular case, Reed, 244 F.3d at 259, or "in the run of cases," id. at 259 n.5.
On appeal, Delgado disputes both of these conclusions, but to no avail.

a. Effectiveness of Accommodation

Delgado seems to assert that Sánchez informed AstraZeneca that the requested additional twelve months "would have improved [Delgado's] condition and [that] she would have been able to return to work."11 Upon closer inspection, however, this claim is dubious.

For starters, Delgado relies, at least in part, on Sánchez's deposition testimony to support her assertion. This is problematic. Even if Sánchez opined during his deposition in 2014 that Delgado would have been able to return to work after twelve more months of leave, "[t]he facts relevant to a determination of whether a medical leave is a reasonable accommodation are the facts

11 Relatedly, Delgado's brief appears to suggest that the request for twelve additional months of leave was reasonable simply because Sánchez specified this number and his past treatment of Delgado "was effective." This suggestion (to the extent Delgado intended to make it) is a nonstarter. As we explained in Reed, an employee cannot establish the reasonableness of the requested accommodation simply by showing that the accommodation will be effective (i.e., that it will allow the employee to perform the essential functions of her position); instead, a plaintiff must also show that the accommodation is facially reasonable. See 244 F.3d at 259-60 (rejecting EEOC's argument that "the only burden a plaintiff has on proving reasonable accommodation is to show that the accommodation would effectively enable her to perform her job" because "proving an accommodation's effectiveness is part of the plaintiff's burden[,] but it is not the whole" and adopting instead a two-pronged burden requiring plaintiff to show both an accommodation's effectiveness and its facial reasonableness).
available to the decision-maker at the time of the employment decision." Amadio v. Ford Motor Co., 238 F.3d 919, 928 (7th Cir. 2001); cf. Jones, 696 F.3d at 90-91 (explaining that "'[o]ne element in the reasonableness equation is the likelihood of success'" and concluding that employee failed to show that requested accommodation — an extension of time to take a test — was reasonable because he "did not show any reason for the employer to conclude he would pass the exam if given yet another opportunity to take it" (quoting Evans v. Fed. Express Corp., 133 F.3d 137, 140 (1st Cir. 1998))); Henry v. United Bank, 686 F.3d 50, 60 (1st Cir. 2012) (affirming entry of summary judgment on failure-to-accommodate claim brought under analogous state law because, "as of the date of her termination, the plaintiff . . . had given the bank neither a relative time frame for her anticipated recovery nor any indication of when or whether she would ever be able to return to her credit analyst position in the future"). With one possible exception discussed below, Delgado has pointed us to no evidence in this record suggesting that Sánchez communicated his one-year-to-recover opinion to AstraZeneca in 2012, "[a]nd we will not become archeologists, devoting scarce judge-time to dig through the record in the hopes of finding something [Delgado] should have found." Belsito Commc'ns, Inc. v. Decker, 845 F.3d 13, 22 (1st Cir. 2016).
The closest thing in this record to evidence that Sánchez informed AstraZeneca that the requested twelve additional months of leave would likely enable Delgado to return to work appears to be an entry in the form Sánchez faxed to AstraZeneca on May 17. Delgado seizes upon this entry, but it's hardly the golden ticket that she thinks it is.

In the space on the form calling for an "estimate [of] the beginning and ending dates for the period of incapacity," Sánchez wrote: "12 months." That's all. As far as we can tell, Delgado evidently believes that, because (1) the form calls for an estimate of the ending date of the period of incapacity and (2) Sánchez wrote twelve months in response, (3) the implication is that, after the twelve months elapsed, Delgado would be ready to return to work.

Although we are duty-bound at this juncture to view the facts in the light most favorable to Delgado and to draw all the reasonable inferences that can be drawn from those facts in her favor, we are leery to conclude that the form could be reasonably understood to have conveyed to AstraZeneca that the proposed accommodation of an additional twelve months of leave would allow Delgado to return to work able to perform the essential functions of her position. Read literally, this single entry on the form says no such thing. But, even if we accepted Delgado's argument that Sánchez impliedly suggested by this entry that Delgado would
return to work after twelve additional months of leave and that AstraZeneca should have understood as much by reading between the lines, Delgado has not told us whether Sánchez submitted any supporting medical documentation when he faxed the form to AstraZeneca—let alone that any such documentation supported what Delgado views as Sánchez's implicit assertion that she would have been able to return to work after twelve more months of leave.\(^{12}\)

This barren record strikes us as a rather meager attempt, in the circumstances of this case, to demonstrate that the requested accommodation would have been effective. Nonetheless, given our obligation to view the evidence in the light most favorable to Delgado, we assume that she has met her burden on this score.

b. Facial Reasonableness

There is an even larger flaw in Delgado's case: She has failed to show that her proposed accommodation of an additional twelve months—a lengthy period—of leave is a facially

\(^{12}\) We note that, in addition to the form that Sánchez signed on May 14 and faxed to AstraZeneca on May 17, Delgado submitted two pages of Sánchez's treatment records, dated May 10, as a separate exhibit to support her opposition to AstraZeneca's motion for summary judgment. It is not clear whether these records accompanied the form that Sánchez faxed to AstraZeneca. Even if they did, however, we see nothing in these two pages of medical records that contains any suggestion that Delgado would be able to return to work in twelve months' time. The AstraZeneca occupational health nurse who reviewed whatever documents Sánchez faxed to AstraZeneca concluded that the documentation did not support reinstatement of Delgado's STD benefits, and Delgado has not pointed us to anything specific in the record to rebut that assessment.
reasonable accommodation. For starters, the sheer length of the delay, when coupled with her prior five-month leave from December 2011 to May 2012, jumps off the page. Courts confronted with similar requests — even ones for half the amount of time that Delgado requested — have concluded that such requests are not facially reasonable. See, e.g., Hwang v. Kan. State Univ., 753 F.3d 1159, 1162-63 (10th Cir. 2014) (Gorsuch, J.); see also Luke v. Bd. of Trustees of Fla. A & M Univ., No. 15-13995, 2016 WL 7404677, at *3 (11th Cir. Dec. 22, 2016) (holding that request for additional leave, after employee had already received nine months of leave, was unreasonable-accommodation request where employee would remain unable to perform essential function for another six months); Stallings v. Detroit Pub. Schs., 658 F. App'x 221, 226-27 (6th Cir. 2016) (holding that teacher's request for four months' leave was not a reasonable accommodation); Epps v. City of Pine Lawn, 353 F.3d 588, 593 n.5 (8th Cir. 2003) (concluding that employee failed to show that requested accommodation of six months of leave was reasonable); cf. Larson v. United Nat. Foods W., Inc., 518 F. App'x 589, 591 (9th Cir. 2013) ("[A]n indefinite, but at least six-month long, leave of absence to permit [the employee] to fulfill the [substance-abuse professional's] treatment recommendations so that he might eventually be physically qualified under the DOT regulations is not a reasonable accommodation."); Byrne v. Avon Prods., Inc., 328 F.3d 379, 380-
81 (7th Cir. 2003) (suggesting that two months employee spent away from work for treatment for mental difficulties would not qualify as reasonable accommodation because "[i]nability to work for a multi-month period removes a person from the class protected by the ADA").

Our newest judicial superior, Justice Gorsuch, then writing for the Tenth Circuit in Hwang, nicely captured the dilemma that lengthy leave requests pose for employers:

By her own admission, [the plaintiff] couldn't work at any point or in any manner for a period spanning more than six months. It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions — and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation. After all, reasonable accommodations — typically things like adding ramps or allowing more flexible working hours — are all about enabling employees to work, not to not work.

. . . .

. . . [I]t's difficult to conceive how an employee's absence for six months — an absence in which she could not work from home, part-time, or in any way in any place — could be consistent with discharging the essential functions of most any job in the national economy today. Even if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a reasonable accommodation.
753 F.3d at 1161-62 (internal citations omitted). Compliance with a request for a lengthy period of leave imposes obvious burdens on an employer, not the least of which entails somehow covering the absent employee's job responsibilities during the employee's extended leave. Delgado's facial-reasonableness showing must take these obvious burdens into account. See Reed, 244 F.3d at 259-60 ("[T]he difficulty of providing plaintiff's proposed accommodation will often be relevant . . . to the reasonableness of the accommodation . . . . Plaintiff will often need to take such difficulties into account in proving whether the accommodation is facially practicable . . . ."). She has not done so.

In an attempt to show that her requested accommodation was facially reasonable, Delgado points out that, under AstraZeneca's leave policy, employees are entitled to exhaust 26 weeks of STD leave and then also to receive LTD benefits after

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13 Hwang was a Rehabilitation Act case, not an ADA case. See 753 F.3d at 1161. This matters not at all, however, because "[t]he same standards . . . apply to [failure-to-accommodate] claims under the ADA and under the Rehabilitation Act." Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 11 n.1 (1st Cir. 2004).

14 Importantly, this does not mean that a plaintiff must show the absence of an undue hardship. The burden to show undue hardship always remains with the employer. Reed, 244 F.3d at 258. But "where[, as here,] the costs of an accommodation are relatively obvious — where they really are what they appear to be on the face of things — plaintiff's burden and defendant's burden may in application be quite similar, even to the extent of being mirror images." Id. at 260.
that. This is true as far as it goes, but it doesn't take Delgado very far. After all, employees are entitled to benefits only if they have sufficiently documented the need for them to the satisfaction of CHS. AstraZeneca determined that Delgado's May 17 request for leave was not adequately supported by the provided documentation, and Delgado did not challenge that determination through the internal, company appeals procedure outlined in AstraZeneca's STD policy. So, notwithstanding the theoretical availability of benefits under AstraZeneca's policy, Delgado has not shown that, "under the circumstances" of this case, Reed, 244 F.3d at 259, her request for an additional twelve months of leave was facially reasonable.

Undaunted, Delgado claims that our decision in Garcia-Ayala supports the reasonableness of her request for extended STD leave. She is mistaken. As an initial matter, Delgado misapprehends the precise accommodation request at issue in Garcia-Ayala. Contrary to her assertion that we held that a

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15 We note that each written notice that AstraZeneca sent Delgado explaining that her STD benefits had been terminated clearly informed her of the company's appeals process. For example, the May 7 letter informed Delgado that, "[i]f you disagree with this decision, you may file an appeal with the Administrator of the STD policy . . . or AstraZeneca STD Administrative Committee," and provided her with contact information for those entities. There is nothing in the record to suggest that Delgado ever utilized this appeals procedure. Similarly, the record does not reflect whether Delgado ever pressed an ERISA claim for benefits under either the STD or LTD plans; she presses no such claim in the case before us.
"request for leave up to 17 months did not constitute an undue burden," the only leave request at issue in that case was the plaintiff's request for an additional two months of leave from the date of the request. García-Ayala, 212 F.3d at 647. We reversed the entry of summary judgment for the employer in that case because the district court improperly "applied per se rules — rather than an individualized assessment of the facts." Id. at 647. And the employee had demonstrated, in the circumstances of that case, that "the requested accommodation of a few additional months of unsalaried leave, with the job functions being satisfactorily performed in the meantime, [was] reasonable." Id. at 649. She pointed to evidence that showed that the employer was able to fill the employee's "position with individuals hired from temporary agencies" and "had no business need . . . to replace [the employee] with an in-house hire, and hence would not have suffered had it waited for several more months until [the employee's] return." Id. at 648. Moreover, "the employer did not contest the reasonableness of the accommodation except to embrace a per se

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16 In her reply brief, Delgado asserts that the leave request was for five additional months. But this assertion, too, is incorrect. We plainly stated in García-Ayala that "the leave that García requested on June 10 was for less than two months." 212 F.3d at 647. We then noted that "[t]he district court viewed the request as being for five months" and explained in dictum that, "[e]ven if the request were for an additional five months of unpaid leave," the result would not change. Id.
rule that any leave beyond its one-year reservation period was too long." *Id.* at 649.

In this case, Delgado's request for *twelve months* of leave — on top of the five months already taken — is very different. Our holding in *Garcia-Ayala* was driven by the particular facts of that case. See *id.* at 650 ("We add that our analysis, while applicable to these facts, may not be applicable in other cases."). Indeed, we acknowledged that, "on different facts, a request for an extended leave could indeed be too long to be a reasonable accommodation and no reasonable factfinder could conclude otherwise." *Id.* at 649. This coda seems tailor-made for this case, where Delgado's leave request was for a far lengthier period of time, and her attempt to overcome the relatively obvious burdens associated with such a leave request is woefully deficient. In these circumstances, Delgado has failed to shoulder her burden of showing facial reasonableness, and no reasonable factfinder could conclude that Delgado's leave request was reasonable.

Finally, Delgado points out that AstraZeneca has failed to offer any evidence or argument that her request for an additional *twelve months* of leave would have imposed an undue hardship on it.\(^{17}\) But this is beside the point here. Because

\(^{17}\) In a single sentence in connection with this argument, Delgado stated that an AstraZeneca employee testified during a deposition "that the accounts of plaintiff's new assigned territory were already being visited by other [Pharmaceutical
Delgado failed to shoulder her burden to identify a reasonable accommodation, we need not consider the question of undue hardship. See Mulloy, 460 F.3d at 154 n.7.

We add that, as was true in García-Ayala, our conclusion today is a narrow one. Although we have previously suggested that "there may be requested leaves so lengthy or open-ended as to be an unreasonable accommodation in any situation," García-Ayala, 212 F.3d at 648, we need not — and therefore do not — decide that a request for a similarly lengthy period of leave will be an unreasonable accommodation in every case. It suffices to say that, in these circumstances, Delgado failed to shoulder her burden of showing that a request for twelve more months of leave was facially reasonable.

There is one loose end to tie up. Delgado also contends that AstraZeneca violated the ADA when it failed to engage in an interactive process after she requested the additional twelve months of leave. And, true enough, "[a]n employee's request for

Sales Specialists]." To the extent that Delgado intended this one-line observation to be part of her effort to show that the requested accommodation was facially reasonable in these circumstances (as opposed to part of her misguided effort to criticize AstraZeneca for its failure to put forth evidence of undue hardship), it is far too undeveloped to warrant our consideration. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (warning litigants that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

Delgado also raises a procedural objection to the district court's consideration of this claim in the first place. Because
accommodation sometimes creates a duty on the part of the employer to engage in an interactive process," \cite{Ortiz-Martinez} at *4 (internal quotation marks omitted) (quoting \textit{EOC v. Kohl's Dep't Stores, Inc.}, 774 F.3d 127, 132 (1st Cir. 2014)), though the specifics of what process is required "var[y] depending on the circumstances of each case," \textit{id}. But Delgado's contention need not detain us long. Where, as here, the employee fails to satisfy her burden of showing that a reasonable accommodation existed, the employee cannot maintain a claim for failure to engage in an interactive process. \textit{See Lang v. Wal-Mart Stores E., L.P.}, 813 F.3d 447, 456 (1st Cir. 2016) ("[T]he 'omission' of an interactive process 'is of no moment if the record forecloses a

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AstraZeneca failed to address this claim in its initial memorandum in support of its motion for summary judgment, Delgado protests, the district court should not have considered its argument — raised for the first time in its reply — that it was entitled to summary judgment on this claim. Although it's true that courts routinely preclude a litigant from raising new arguments in a reply brief, this rule is not inflexible; courts retain discretion to excuse parties from procedural gaffes such as this. \textit{Cf. United States v. Torres-Rosario}, 658 F.3d 110, 116 (1st Cir. 2011) (recognizing that "courts may excuse waivers and disregard stipulations where justice so requires"). And we discern no abuse of discretion here. Delgado's complaint set forth seven separately titled causes of action, and failure to engage in an interactive process was not one of them. Instead, that claim comprised two paragraphs within her first cause of action, which she labeled "ADA and Law No. 44 (Disability Discrimination - Wrongful Termination & Failure to Accommodate)." In these circumstances, the district court was not obligated to deem AstraZeneca's initial oversight inexcusable. Moreover, Delgado was permitted to file a sur-reply in which she both asked the district court to refuse to consider AstraZeneca's new argument and attacked the merits of that argument.
\end{quote}

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finding' that the employee could do the essential 'duties of the job, with or without reasonable accommodation,' – which, for reasons already given, is the case here." (citation omitted) (quoting Kvorjak v. Maine, 259 F.3d 48, 53 (1st Cir. 2001))). So we say no more about this claim.

That's that for Delgado's ADA disability-discrimination claim. Because Delgado failed to argue that she was able to perform the essential functions of her position without accommodation and failed to show that her requested accommodation of twelve more months of leave is facially reasonable, she is unable to establish a genuine dispute of material fact as to the qualified-individual element of her prima facie case. See Mulloy, 460 F.3d at 154. Therefore, AstraZeneca was entitled to summary judgment on Delgado's ADA disability-discrimination claim.

2. ADA Retaliation Claim

In addition to her ADA disability-discrimination claim, Delgado also asserts that AstraZeneca violated the ADA by retaliating against her because she engaged in protected activity. It is well settled that "[a]n ADA plaintiff may assert a claim for retaliation even if she fails to succeed on a disability[dis]crimination] claim." Freadman, 484 F.3d at 106.

Because Delgado's retaliation claim is premised on circumstantial evidence, the familiar burden-shifting analysis applies. See Collazo-Rosado v. Univ. of P.R., 765 F.3d 86, 92
(1st Cir. 2014). To establish a prima facie case of retaliation under the ADA, "a plaintiff must show that (1) she engaged in protected conduct, (2) she suffered an adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse employment action." Freadman, 484 F.3d at 106. If Delgado succeeds in making this prima facie showing, the burden then shifts to AstraZeneca "to offer a legitimate, nonretaliatory reason for [its] actions." Collazo-Rosado, 765 F.3d at 92. If AstraZeneca meets its burden, the burden shifts back to Delgado "to show that the [articulated] reason was mere pretext." Id. Delgado "bears the ultimate burden to create a plausible inference that the employer had a retaliatory motive." Carreras v. Sajo, García & Partners, 596 F.3d 25, 36 (1st Cir. 2010). And, as we have repeatedly explained, "[e]ven in employment discrimination cases where elusive concepts such as motive or intent are at issue, summary judgment is appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Ameen, 777 F.3d at 68 (quoting Benoit v. Technical Mfg. Corp., 331 F.3d 166, 173 (1st Cir. 2003)); see also Vega-Colón v. Wyeth Pharm., 625 F.3d 22, 31 (1st Cir. 2010).

Delgado claims on appeal (as she did below) that her May 17 request for an additional twelve months of leave was protected
activity. The district court accepted (and AstraZeneca did not contest) Delgado's position that this leave request constituted protected activity, but it concluded that Delgado failed to establish a causal connection between the request for leave and the adverse employment action (Delgado's termination). In the district court's view, Delgado was terminated on May 14 when Cohran sent a letter to Delgado instructing her to return to work three days later or else be presumed to have resigned from her employment. Because the May 17 additional-leave request postdated Delgado's termination, the court reasoned, Delgado could not establish the causal-connection element of her prima facie case. On appeal, the parties stake out competing positions in favor of and against the district court's conclusion.

We need not enter this fray, however. Instead, we assume without deciding that Delgado established her prima facie case of retaliation. See, e.g., Collazo-Rosado, 765 F.3d at 93 (employing similar approach); Carreras, 596 F.3d at 36 (same). And we readily conclude that AstraZeneca has met its burden of offering a legitimate, nondiscriminatory reason for Delgado's termination. In fact, it offers two such reasons: "that Delgado was terminated

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In addition to the leave request, Delgado identified below other activity — namely, an internal complaint of discrimination that she lodged with AstraZeneca on December 12, 2011 — that served as a basis of her retaliation claim. Because Delgado eschews any reliance on this activity on appeal, we need not consider it.
after her . . . position was eliminated and [that] she went on STD leave from which she did not return once it expired." AstraZeneca repeatedly informed Delgado that she would be presumed to have resigned from her employment with AstraZeneca if she failed to return to work after her STD benefits were terminated, and yet she failed to return to work as instructed on May 17. Further, as explained below, the deposition testimony of Cohran, Martinez, and Elsa Saavedra (Saavedra), another AstraZeneca supervisor, supports the notion that Delgado's territory and position were eliminated in reorganizations.

Therefore, we now consider whether Delgado can shoulder her ultimate burden of demonstrating that these articulated justifications were pretextual. "To establish pretext she must show that the explanation[s] [were] . . . lie[s], which would let a factfinder infer that [AstraZeneca] made the story up to cover [its] tracks." Collazo-Rosado, 765 F.3d at 92. Delgado makes several attempts to show pretext, but none persuades.

Delgado first claims that the reasons given by AstraZeneca for her termination — "elimination of position, failure to return to work, and resignation" — are inconsistent. We disagree. For starters, we see no inconsistency between the failure-to-return justification and the resignation justification on these facts. The May 14 letter from Cohran to Delgado warned: "[I]f you do not return to work by Thursday, May 17, 2012[,] you
will be presumed to have resigned your employment with AstraZeneca."20 (Emphasis added.) Similarly, Cohran's May 18 letter reminded Delgado: "[Y]ou were to have returned to work by Thursday, May 17, 2012 or you would be presumed to have resigned your employment with AstraZeneca." Thus, the letters, using language similar to that contained in the STD policy, equated Delgado's failure to return to work with her presumed resignation. Therefore, the fact that Martínez, who filled out AstraZeneca's Termination Details form for Delgado, entered that Delgado's resignation notice was turned in on May 18 is unremarkable; by not showing up to work on May 17 as instructed, she was presumed to have resigned under the terms of the May 14 letter.21

Nor do we agree that AstraZeneca's other stated justification for terminating Delgado — that her position was

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20 We note that this was not the first time that Delgado was informed of the consequence of her failure to return to work after the termination of her STD benefits. She received a similar notification two months earlier.

21 Delgado also notes that Martínez entered "S06," which evidently is short for "Separation 6 mo[nths]," on the form and that Martínez did not know what this entry on the form meant. But this minor inconsistency or mere inaccuracy does not show any broader inconsistency between the failure-to-return and resignation justifications. Cf. Carreras, 596 F.3d at 37 ("The minor inconsistencies cited by Carreras, however, do not undermine SGP's contention that his work performance was unsatisfactory. The slight differences in SGP's accounts of the timing of the decision or the reason for the short delay before its implementation do not permit a reasonable factfinder to infer that SGP did not fire Carreras because of his poor work performance.").
eliminated in a reorganization — is inconsistent with the failure-to-return-to-work justification. To be sure, "an employee can establish pretext 'by showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons such that a factfinder could infer that the employer did not act for the asserted nondiscriminatory reasons.'" Carreras, 596 F.3d at 37 (emphasis omitted) (quoting Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000)); see also Collazo-Rosado, 765 F.3d at 93. But Delgado has failed to do so here.

The May 18 termination letter first recounted the consequences of Delgado's failure to return to work. It then stated: "However, due to a recent reorganization in field sales, we are making a non-negotiable offer of severance to you." This reorganization was also referenced in the July 17 letter, which provided: "As outlined in my letter dated May 18, 2012, due to a recent reorganization in field sales your position was eliminated and you were made an offer for a non-negotiable severance." Although the elimination of her position was not referenced in the May 18 letter, these two letters were consistent in the reference to a reorganization in field sales and the resultant severance offer. See Collazo-Rosado, 765 F.3d at 94. And Delgado has not given us any basis to conclude that each termination letter "had to give every reason [AstraZeneca] had for" terminating her. Id.
at 93. There is simply nothing contradictory, incoherent, implausible, or inconsistent in these two different legitimate, nondiscriminatory reasons for her termination; "[a]t the very least[,] the rationales are not so inconsistent as to be 'unworthy of credence,' which is the test." Id. at 94 (quoting Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 168 (1st Cir. 1998)).

For similar reasons, we reject Delgado's argument that AstraZeneca has, at various points in this litigation, offered inconsistent justifications for her termination. In support of this contention, Delgado notes that AstraZeneca (1) relied on its elimination-of-position justification in its answer to Delgado's complaint, its representations in the joint case-management memorandum, and its answers to interrogatories, (2) relied on its failure-to-return justification in its motion for summary judgment, and (3) relied on both justifications in its appellate brief. But because, for reasons already explained, we perceive no inconsistency between these two justifications, we fail to see how AstraZeneca's reliance on one or the other in various documents through the course of this litigation renders these "rationales . . . so inconsistent as to be 'unworthy of credence.'" Id. (quoting Hodgens, 144 F.3d at 168).

Delgado's second pretext argument is grounded in AstraZeneca policy. Starting from the rock-solid premise that an employer's inadequately explained material deviation from standard
procedure can establish a genuine dispute of material fact as to whether the employer's stated justifications are pretextual, see Acevedo-Parilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 142-43 (1st Cir. 2012), Delgado identifies two instances of AstraZeneca's failure to follow its applicable STD policy: (1) that Delgado was not placed in an unpaid extended disability leave, an option under AstraZeneca's STD policy when an employee exhausts his or her STD benefits and is still unable to return to work; (2) Cohran's unauthorized selection of a return-to-work date, a task reserved for the CHS case manager, in consultation with an employee's treating physician after the physician approves the employee's return to work. We are unpersuaded.

The provision relating to LTD benefits and unpaid extended disability leave is contained in a section entitled "Employment Status After Exhausting STD Benefits." Consistent with this title, this section applies only to "[a]n employee who is unable to return to work due to continuing disability after exhausting" the full 26 weeks of available STD benefits. (Emphasis added.) Delgado did not exhaust her benefits, however. Instead, CHS terminated them after invoking its right under a separate section of the policy to terminate benefits when it determines that the employee is no longer totally disabled or the employee failed to submit adequate supporting documentation, and Delgado did not challenge the termination of her benefits through the
appeals procedure set forth in the policy and communicated to her in the benefits-termination letter.

Delgado's attempt to show pretext through Cohran's selection of her return-to-work date fares no better because AstraZeneca's STD policy is not as clear-cut as Delgado believes. Although the policy contains a section (section 8) outlining the return-to-work procedure and specifying that "[p]rior to returning to work, the employee must submit to the CHS case manager a completed [health-care physician s]tatement," the policy also provides in a separate section (section 5.4) that, "[i]f STD benefits are suspended or denied and the employee does not return to work, the employee may be considered to have abandoned the employee's job and be subject to immediate termination from employment." The policy is not clear on the need for a completed health-care physician statement and the applicability of section 8 where, as here, AstraZeneca suspends an employee's benefits under section 5.4 even when the employee's health-care physician requests that the employee remain out of work.22

Delgado's position — that, even in this scenario, a return-to-work date cannot be established absent "a statement from [the employee's] doctor that [the employee] is safely able to

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22 In his deposition, Cohran acknowledged the policy's silence on this issue, but testified that, in this scenario, a return-to-work statement from the physician is not required.
return to work"—would allow a recalcitrant health-care physician to remain steadfast in his or her opposition to AstraZeneca's benefits denial or termination, refuse to authorize the employee's return to work, and thereby singlehandedly render section 5.4 a nullity. We need not decide whether Delgado's interpretation of the policy language is erroneous; it suffices that, because it is not clear that Cohran's selection of the return-to-work date actually violated the policy in these circumstances, it does not create a genuine dispute of material fact as to whether AstraZeneca's stated justifications for firing Delgado were pretextual.

Delgado's third pretext argument asserts that AstraZeneca's stated justification that her position had been eliminated as part of the reorganization "is completely false." Relying on deposition testimony of Martínez and Saavedra, Delgado insists that the reorganization eliminated her territory but not her position. This false justification, Delgado argues, shows that AstraZeneca's justifications are pretextual. This argument rests on a flawed starting premise.

Although Martínez and Saavedra did indeed discuss a reorganization involving the elimination of Delgado's territory, Cohran discussed a second, separate reorganization in his deposition. According to Cohran, in this second reorganization, the floating position to which Delgado had been assigned as a
result of the elimination of her territory in the first reorganization was itself eliminated. Although AstraZeneca noted this aspect of Cohran's testimony in its brief to this court, Delgado failed to effectively address this testimony in either her opening or reply brief, and — we say it again — it is not our responsibility to dig through the record in the hopes of unearthing some nugget that creates a genuine dispute of material fact. See Belsito Commc'ns, 845 F.3d at 22. Therefore, given Delgado's failure to address Cohran's deposition testimony that her position was eliminated in a second reorganization, it effectively stands unrebutted on appeal and compels us to reject Delgado's assertion that AstraZeneca's reorganization justification "is completely false."23

23 Delgado also scatters complaints in her brief to the effect that the district court failed to consider the evidence of her "stellar performance history" with AstraZeneca from 2001 until late 2011. True, Delgado provided a detailed chronicle of her positive work history in the statement of facts that she submitted to the district court. And, to be sure, our cases indicate that positive performance evaluations can be relevant to the pretext inquiry, at least where poor performance is one of the justifications that the employer puts forward for the adverse-employment action. See Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 52-53 (1st Cir. 2010) (considering evidence of employee's positive work evaluations and concluding that genuine issue of material fact existed as to whether performance-problems justification was pretextual); cf. Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 62 (1st Cir. 2005) (affirming district court's admission of employee's positive performance evaluations to show that employee possessed necessary qualifications and adequately performed job and to rebut employer's assertion that employee lacked relevant knowledge to perform job). But, unlike in Collazo, AstraZeneca has not sought
That leaves Delgado's argument about the temporal proximity between the May 17 request for twelve more months of leave and the May 18 termination letter. Although such close temporal proximity "may suffice for a prima facie case of retaliation," it "does not[, standing alone,] satisfy [Delgado's] ultimate burden to establish that the true explanation for [her] firing was retaliation for engaging in protected conduct rather than" the reasons articulated by AstraZeneca. Carreras, 596 F.3d at 38. And we reiterate that, although the pretext inquiry entails consideration of "elusive concepts," Ameen, 777 F.3d at 68, summary judgment may still be appropriate on that issue, see, e.g., Collazo-Rosado, 765 F.3d at 94-95.

And it is in this case: Delgado cannot shoulder her ultimate burden of showing pretext, and the district court therefore properly granted summary judgment to AstraZeneca on Delgado's ADA retaliation claim.

B. Remaining Claims

Now that we've addressed Delgado's ADA claims, we finally turn briefly to her claims sounding in Puerto Rico law.

to justify its termination of Delgado on the ground that her performance was deficient. Instead, it has asserted that Delgado violated AstraZeneca policy by failing to report to work once her STD benefits were terminated and that her position had been eventually eliminated in a reorganization. And Delgado has not shown us why her positive work history in any way impacts those justifications.
She asserts claims under three Puerto Rico statutes: Law 44, Article 1802, and Law 80. We address each claim in turn.

1. Law 44

We can make quick work of the first of these claims: As Delgado appropriately concedes, "Law 44 and the ADA are coterminous." Ruiz Rivera v. Pfizer Pharms., LLC, 521 F.3d 76, 87 (1st Cir. 2008). Therefore, because we affirm the district court's entry of summary judgment on Delgado's ADA disability-discrimination claim, we affirm the entry of summary judgment on her Law 44 claim for the same reasons. See id.

2. Article 1802

We next examine Delgado's Article 1802 claims. As we read her complaint, she asserts two Article 1802 claims, one for negligence and the other for tortious infliction of emotional distress. We easily affirm the district court's entry of summary judgment on Delgado's claim that AstraZeneca (in Delgado's words) "was negligent by not adhering to the requirements of Law 44 and the ADA in accommodating the plaintiff in accordance with her doctor's certifications." Even assuming that such a claim is cognizable under Article 1802 — and we express no opinion on this issue — Delgado's failure to prevail on her ADA and Law 44 claims dooms her negligence claim premised on AstraZeneca's violation of those statutes.
With respect to Delgado's Article 1802 infliction-of-emotional-distress claim, the district court entered summary judgment in favor of AstraZeneca because the conduct underlying that claim was the same conduct that was "arguably covered by the ADA, Law 44, and the FMLA" and, "to the extent a specific labor or employment statute covers the conduct for which a plaintiff seeks damages, she is barred from using the same conduct to also bring a claim for damages under Article 1802."

In challenging the district court's entry of summary judgment on appeal, Delgado's argument is not a model of clarity. Indeed, it is tough for us to discern precisely what she is arguing, but we'll do the best we can. The main thrust of her argument seems to be that she alleged "specific conduct that supports her tort action independent from her other claims."

But Delgado has not told us what that specific other conduct is or explained how it is independent from the conduct giving rise to her other claims. According to the complaint, the conduct giving rise to her Article 1802 claim consisted of "various negative actions" on the part of AstraZeneca "[a]fter plaintiff disclosed her diagnosis to her supervisor," including "constant pressures to return to work while on a valid leave," "threats of termination," "ignor[ing] [her] doctor's recommendations," and continued harassment. No real specifics were provided. Similarly, in her briefing both below and on appeal, Delgado makes vague
references to "Cohran's undue and unreasonable interference with [Delgado's] treatment" and "Cohran's negligent and reckless intervention" without explaining how this conduct is independent from that giving rise to her other claims. She simply has not pointed to any record support for her assertion that her Article 1802 claim is premised on independent conduct, and we reject it for that reason.

All that remains of Delgado's Article 1802 arguments on appeal is the following cryptic assertion: "It is well settled that to the extent that the facts that comprise the actions executed against the plaintiff are not covered by the employment statutes, Article 1802 must provide." The meaning of this sentence is not readily apparent. In support of this assertion, Delgado cited Rios v. Municipality of Guaynabo, 938 F. Supp. 2d 235, 260 (D.P.R. 2013). We suspect that Delgado might have intended her cryptically phrased sentence and citation to Rios to constitute an argument that, if AstraZeneca's conduct is not covered by the various employment and discrimination statutes undergirding her other claims (by virtue of the district court's entry of summary judgment on those claims), then her Article 1802 claims necessarily survive. See id. (declining to enter summary judgment on Article 1802 and 1803 claims premised on the same conduct that gave rise to the retaliation claims for which summary judgment entered for
defendants because "such potentially tortious claims are no longer covered by any specific labor law".

The problem for Delgado, however, is that "[j]udges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." Zannino, 895 F.2d at 17 (internal quotation marks omitted) (quoting Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988)); see also Town of Norwood v. Fed. Energy Regulatory Comm'n, 202 F.3d 392, 405 (1st Cir. 2000) ("[D]eveloping a sustained argument out of . . . legal precedents is the job of the appellant, not the reviewing court, as we have previously warned."). Delgado has failed to do her part with respect to this Article 1802 argument. The combination of a single, confusing sentence and an unexplained citation to a case that offers an unsupported and unauthoritative view of the scope of Article 1802 is no substitute for developed argumentation. See Zannino, 895 F.2d at 17 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); see also United States v. Bulger, 816 F.3d 137, 148 (1st Cir. 2016) (explaining that "'we consider waived arguments confusingly constructed and lacking in coherence'" and declining to consider argument where litigant "fail[ed] to provide us with intelligible analysis, or case law, to support his claim" (internal quotation marks omitted) (quoting Rodriguez v.
Municipality of San Juan, 659 F.3d 168, 175 (1st Cir. 2011)).

Therefore, we decline to consider this undeveloped argument.

Because Delgado has not presented us with a developed, coherent, and convincing argument for overturning the district court's entry of summary judgment in AstraZeneca's favor on her Article 1802 claims, we affirm on this issue.

3. Law 80

That leaves Delgado's Law 80 claim for wrongful discharge. Law 80 provides a remedy to employees who are discharged "without just cause." P.R. Laws Ann. tit. 29, § 185a; see also Pérez v. Horizon Lines, Inc., 804 F.3d 1, 9 (1st Cir. 2015). It employs the following burden-shifting framework (one different from that applied in the ADA context): (1) the employee must show that he or she has been discharged and allege that the dismissal was not justified; (2) the burden then shifts to the employer to show, by a preponderance of the evidence, that the dismissal was justified; and (3) if the employer shoulders that burden, the employee must rebut the showing of good cause. Pérez, 804 F.3d at 9. In this case, Delgado has met her initial burden; she has shown that she has been terminated and alleged in her complaint that her termination was not justified.

24 Delgado also fails to address her Article 1802 claims in her reply brief or to respond to AstraZeneca's argument that those claims must fail because they are premised on the same conduct that forms the basis of her other claims.
Moving on to AstraZeneca's burden, Law 80 "specifies several grounds that are considered good cause for termination," id., including "[t]he employee's repeated violations of the reasonable rules and regulations established for the operation of the establishment, provided a written copy thereof has been opportunely furnished to the employee," P.R. Laws Ann. tit. 29, § 185b(c), as well as three other grounds "that relate to company restructuring or downsizing." Carrasquillo-Ortiz v. Am. Airlines, Inc., 812 F.3d 195, 196 (1st Cir. 2016); see also P.R. Laws Ann. tit. 29, § 185b(d)-(f). The statute also provides that "[a] discharge made by the mere whim of the employer or without cause relative to the proper and normal operation of the establishment shall not be considered as a discharge for good cause." P.R. Laws Ann. tit. 29, § 185b.

In order to shoulder its burden of establishing just cause, AstraZeneca "need only demonstrate that it had a reasonable basis to believe that [Delgado] has engaged in one of those actions that the law identifies as establishing such cause." Pérez, 804 F.3d at 9. "A 'just' discharge," we have said, "is one where an employer provides a considered, non-arbitrary reason for an employee's termination that bears some relationship to the business' operation." Id. This inquiry focuses not on "the objective veracity of the employer's action" but instead "on the employer's reasonable belief"; even "a 'perceived violation
suffices to establish that [the employer] did not terminate [the employee] on a whim, but rather for a sensible business-related reason." Id. at 10 (quoting Hoyos v. Telecorp Commc'ns, Inc., 488 F.3d 1, 10 (1st Cir. 2007)).

For reasons we explained in our discussion of Delgado's retaliation claim, AstraZeneca has shouldered its burden here by offering two potential bases for a finding of a just-cause termination: her failure to return to work after termination of her STD benefits and the elimination of her position. Both of these reasons are considered, non-arbitrary, and bear some relationship to AstraZeneca's business operation. See id. at 9. Therefore, "a reasonable jury could only conclude that [AstraZeneca] has met its burden of showing just cause." Id. at 10.

Because AstraZeneca satisfied its burden, Delgado can defeat summary judgment only if she can rebut AstraZeneca's just-cause showing. Id. To shoulder her burden, Delgado "must do more than show that [AstraZeneca] may have gotten some of the particulars wrong. Instead, [Delgado] had the burden to adduce probative evidence that [AstraZeneca] did not genuinely believe in or did not in fact terminate [Delgado] for the reason[s] given." Id. at 11. To this end, Delgado offers several reasons why, she contends, AstraZeneca's reasons are pretextual. See Collazo, 617 F.3d at 53 n.10 (vacating summary judgment on employee's Law 80
claims because genuine issue of material fact existed as to whether employee's "termination was the result of retaliatory animus, rather than company reorganization and inadequate performance".\textsuperscript{25} But we've already considered (and rejected) each of these contentions in the course of affirming the entry of summary judgment on Delgado's retaliation claim. Thus, for the same reasons, we conclude that Delgado has failed to shoulder her burden to proceed to trial on her Law 80 claim.

CONCLUSION

For these reasons, we affirm the district court's entry of summary judgment in AstraZeneca's favor. Each party shall bear its own costs.

\textsuperscript{25} We note that, even where an employer terminates an employee for one of the three specified grounds relating to restructuring and downsizing, Law 80 imposes additional obligations on the employer. In particular, "the employer must give preference to those employees with greater seniority over those with less seniority within the same occupational classification." Carrasquillo-Ortiz, 812 F.3d at 196; see also P.R. Laws Ann. tit. 29, § 185c. "If the employer terminates a more senior employee and retains a less senior employee within the same occupational classification, the employer must pay the terminated employee a mesada." Carrasquillo-Ortiz, 812 F.3d at 196; see also P.R. Laws Ann. tit. 29, §§ 185a, 185c. We need not concern ourselves with the application of these provisions in this appeal, however, because Delgado's sole focus on appeal is demonstrating that neither of AstraZeneca's stated justifications are the true reason why it terminated her. Therefore, because she makes no argument that AstraZeneca still owes her a mesada even if it terminated her on the basis of company restructuring or downsizing, we need not consider this issue.