

Employment Law – Whistleblower/Retaliation Summary Judgment

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Gail M. McKenna v. Office of the District Attorney for the Plymouth District, Timothy Cruz, Individually and Michael Horan, Individually

Massachusetts Superior Court, Plymouth Division, Civil Action No. 22-00191

Boyle Shaughnessy Shareholder Aaron R. White recently received Summary Judgment from the Plymouth County Superior Court in a lawsuit filed by the former Chief of Appeals at the Plymouth County District Attorney’s Office asserting employment discrimination, retaliation, whistleblower, intentional and negligent infliction of emotional distress against the firm’s client, District Attorney Timothy Cruz, his Office, and former Chief of Staff Michael Horan.

The Plaintiff, Gail McKenna, served as an Assistant District Attorney (“ADA”) in the Plymouth County District Attorney’s Office (“PCDAO”) from 1997 until her termination on April 1, 2019. While handling post-conviction proceedings in *Commonwealth v. Frances Choy*, McKenna discovered that certain prosecutors in the office had exchanged racist and unprofessional emails, including those who had prosecuted Choy, an Asian American defendant. Believing this information should be disclosed, McKenna forwarded the emails to defense counsel. The Office was thereafter ordered to produce additional information relating to its internal and third-party investigation of allegations stemming from the conduct of several former Assistant District Attorneys, including allegedly offensive emails.

In March 2019, eleven months after the Court’s order, the Office requested that a second ADA assist ADA McKenna to comply with the Court’s order. ADA McKenna refused to continue assisting with the transition or to file a court-ordered status report. The PCDAO terminated her employment on April 1, 2024.

Attorney McKenna filed a complaint in Superior Court asserting multiple state and federal claims, including retaliation under G.L. c. 151B, whistleblower retaliation under G.L. c. 149 §185, and negligent and intentional infliction of emotional distress. Earlier in the case, a Superior Court Judge dismissed several claims but allowed certain of Attorney McKenna’s retaliation and tort counts to proceed. The Defendants’ discovery included several days of the deposition of Attorney McKenna. The remaining defendants—the PCDAO, Cruz, and Horan—moved for summary judgment. Justice Glenny granted their motions on all remaining claims.

In considering summary judgment the court considered the following issues:

1. Whether McKenna could maintain individual retaliation claims against Cruz and Horan under G.L. c. 151B.
2. Whether she could recover for negligent or intentional infliction of emotional distress.
3. Whether she established a causal connection between her protected activity and termination sufficient to sustain a Title VII retaliation claim.

The court granted summary judgment for all defendants on all remaining counts. It held that McKenna failed to show any Defendants District Attorney Cruz and Michael Horan, acted outside the scope of their employment, specifically where Massachusetts law does not impose individual liability for employment decisions carried out in the scope of public employment. The Court determined that her whistleblower claim was filed too late, where two-year statute of limitation for the claim expired many months prior to filing the Complaint. In addition, the Court found that her emotional distress claims were procedurally defective and unsupported by extreme conduct. The Court further found that Attorney McKenna's firing was not causally connected to any protected opposition to discrimination.

Finally, under Title VII (42 U.S.C. §§2000e & 2000e-3), the Court found that although McKenna engaged in protected activity by raising concerns about racist emails, she could not show that retaliation was a substantial or determinative factor in her termination.

Please contact Attorney White awhite@boyleshaughnessy.com should you have questions concerning his handling of this case or the firm's Employment Law practice.