COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-12485

WARREN YEE,
Plaintiff-Appellant

v.

MASSACHUSETTS STATE POLICE,
Defendant-Appellee

ON APPEAL FROM A FINAL JUDGMENT OF THE SUFFOLK SUPERIOR COURT

AMICI CURIAE **BRIEF OF FAIR EMPLOYMENT PROJECT, INC., GLBTQ LEGAL ADVOCATES & DEFENDERS, GREATER BOSTON LEGAL SERVICES, JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION, LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND ECONOMIC JUSTICE, MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION, AND THE UNION OF MINORITY NEIGHBORHOODS IN SUPPORT OF THE APPELLANT**

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ISSUES PRESENTED

1. Whether an employer's refusal to transfer an employee to a position with greater opportunities for overtime and detail work, and commensurately overtime and detail pay, can be an adverse action that supports a finding of discrimination under G. L. c. 151B.
2. Whether summary judgment for the employer should be reversed where the lower court prematurely dismissed at the prima facie stage by improperly resolving disputed issues of fact against the plaintiff and failed to consider substantial circumstantial evidence of discrimination, including comparator evidence, uncontrolled subjectivity in the transfer decision, and the employer's general practices concerning the hiring and promotions of minority candidates.

INTEREST OF AMICI CURIAE

Fair Employment Project, Inc. ("FEP")

FEP is a non-profit organization incorporated in 2007. FEP was founded by public-interest attorneys concerned about the lack of legal resources for lower-income workers whose employment rights have been

violated. FEP's mission is to protect those rights by providing legal assistance and resources to workers.

Over the past ten years, FEP has assisted more than 7,000 Massachusetts workers. About half of those workers report unlawful discrimination in the terms and conditions of employment.

FEP joins this brief, as the outcome of this case will have a significant impact on the ability of employees to redress unlawful discrimination. For this reason, FEP respectfully requests that its views be considered by this Court.

GLBTQ Legal Advocates & Defenders ("GLAD")

Through strategic litigation, public policy advocacy, and education, GLAD works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. Since 1978, GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS.

GLAD's history includes litigating and providing amicus support in a wide range of anti-discrimination

and employment matters. See, e.g., Muzzy v. Cahillane Motors, 434 Mass. 409 (Mass. 2001) (amicus brief addressing appropriate level of specificity of jury instruction on "reasonable person" standard in same-sex sexual harassment case); Melnychenko v. 84 Lumber Co., 424 Mass. 285 (1997) (amicus brief arguing that same-sex sexual harassment is prohibited by Chapter 151B regardless of the sexual orientation of the parties); Bragdon v. Abbott, 524 U.S. 624 (1998) (establishing that people with HIV are protected under the Americans with Disabilities Act); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (holding that transgender person denied opportunity to apply for loan may state sex discrimination claim under Equal Credit Opportunity Act). GLAD has an enduring interest in ensuring that employees receive full and complete redress for the violation of their civil rights in the workplace.

Greater Boston Legal Services ("GBLS")

Greater Boston Legal Services ("GBLS") is one of the largest providers of civil legal aid in New England. GBLS's mission is to provide free legal assistance to as many low-income families as possible to help them secure some of the most basic necessities of

life. In the employment arena, GBLS strives to help low-wage workers maximize their income and overcome obstacles that limit their employment opportunities and income levels, such as discrimination on the job. Therefore, GBLS has a strong interest in the broad interpretation of adverse employment action pursuant to G.L. c. 151B discrimination claims.

Jewish Alliance for Law and Social Action (“JALSA")

JALSA is a membership civil rights organization which draws upon an institutional history reaching back to 1918. JALSA members have worked for many years in the struggle for civil rights for all Americans drafting and encouraging passage of anti-discrimination laws for all members of the community and participating as amici in federal and state cases where essential civil rights protections are at risk. Our members, working earlier as New England Region of American Jewish Congress, were significantly involved in the establishment of the Massachusetts Commission Against Discrimination (“MCAD”) and have worked to support the full breadth of the duties and responsibilities assigned to that agency. JALSA views it to be of critical importance that the courts interpret and apply G. L. c. 151B broadly in order to effectuate its core purpose of eradicating

discrimination in the Commonwealth. This can only be accomplished, in JALSA's view, by taking a broad view of what constitutes "terms, conditions, and privileges of employment," so that the statute may be used as intended to eliminate discriminatory barriers to full participation in the workplace.

Lawyers' Committee for Civil Rights and Economic Justice ("LCCR")

LCCR fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCCR engages in creative and courageous legal action, education, and advocacy, in collaboration with law firms and community partners. As part of this work, LCCR has long sought to root out discrimination in the workplace. This has included challenges to policies and practices that are facially neutral but that have an unjustified disparate impact on communities of color. LCCR thus has a strong interest in ensuring that courts broadly interpret an adverse employment action for the purposes of discrimination claims under 151B.

Massachusetts Employment Lawyers Association ("MELA")[1]

MELA is a voluntary membership organization of more than 175 lawyers who regularly represent employees in labor, employment, and civil rights cases in Massachusetts. MELA is an affiliate of the National Employment Lawyers Association (NELA), the country's largest organization of lawyers who represent employees and applicants with workplace-related claims (approximately 3,000 attorneys).

MELA's members actively advocate for the rights of employees before the executive, legislative and judicial branches. MELA has filed numerous amicus curiae briefs in cases before the appellate courts of Massachusetts, including: Oxford Global Resources, LLC v. Jeremy Hernandez, SJC-12439 (2018); Barbuto v. Advantage Sales and Marketing, et al., 477 Mass. 456 (2017); Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290 (2016); Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., 474 Mass. 382 (2016); Bulwer v. Mount Auburn Hosp., 473 Mass. 672 (2016); Psy-Ed. v. Klein, 459 Mass.

[1] Plaintiff's counsel Jonathan J. Margolis and Beth R. Myers are current members, and Ms. Myers is the current president, of MELA. Plaintiff's counsel were not included in any of MELA's discussions concerning whether MELA would seek to file a brief as amicus curiae nor have they had input on the brief.

697 (2011); Gasior v. Mass. Gen. Hosp., 446 Mass. 645 (2006); and Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367 (2005).

MELA's members represent employees who experience discrimination in myriad ways in the modern workplace, including but not limited to discriminatory compensation, hiring and promotion practices, working conditions, education and training, and flexibility and remote work options. MELA is deeply committed to ensuring that G. L. c. 151B continues to broadly protect employees from all discriminatory barriers to career progression and advancement in the workplace, including those that do not necessarily impact traditional factors related to title, grade, or compensation. The interest of MELA in this case is also to protect the rights of its members' clients by ensuring that Massachusetts courts properly apply the summary judgment standard in employment cases and that juries, not judges, retain their fact-finding role where, as here, there are material disputed issues of fact to be resolved at trial.

Union of Minority Neighborhoods ("UMN")

UMN is a Boston-based community organization founded in 2002 to increase activism, empowerment, and opportunity in communities of color. UMN provides

skills training to community activists and technical assistance to community-based organizations in a number of areas, including housing, employment, CORI reform, economic development and voting rights. UMN has organized and led successful coalitions that include labor organizations, non-profits, government agencies, and businesses to address issues that directly affect communities of color, including, in particular, the problems of discrimination in employment and housing.

UMN's efforts are designed to strengthen democracy and re-build communities of color, in which the pernicious effects of discrimination continue to exist as barriers to equal opportunity. In these efforts, it is of critical importance to UMN that the laws enacted to secure equal rights, including G. L. c 151B, remain meaningful tools in the eradication of employment discrimination in this Commonwealth. To that end, and recognizing the core remedial purpose of G. L. c. 151B, UMN has a strong interest in ensuring that the statute is interpreted broadly, to prohibit any and all employment actions that work to impose barriers on the basis of an individual's membership in a protected class to his or her full participation in the workforce.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth in the Appellant's opening brief.

STATEMENT OF FACTS

Amici adopt the Statement of the Facts as set forth in the Appellant's opening brief.

SUMMARY OF ARGUMENT

The goal of G. L. c. 151B, to "eliminate discrimination at root level" in the workplace, is achieved by liberally construing the law to protect employees. Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 536 (2001). Liberal construction is a statutory mandate, which the courts must follow. G. L. c. 151B § 9. (Infra pp. 12-13.) This Court and the Appeals Court have repeatedly held that employers' actions can constitute impermissible discrimination even where those actions do not affect an employee's existing compensation or job title. Rather, as the plain language of chapter 151B sets forth, actions that affect "the terms, conditions, and privileges of employment" can constitute discrimination. Massachusetts courts and the Massachusetts Commission Against Discrimination ("MCAD") have broadly interpreted this language to make clear that any action that creates barriers to an

individual's full and equal participation in the workplace may constitute actionable discrimination. Such a deprivation may occur under various circumstances: prior to employment in the job posting, screening, and hiring process; during employment with respect to job titles and duties, compensation and other benefits, and career opportunities; or in differential treatment following the termination of the employment relationship (e.g., termination and lay-off procedures, severance terms, references).

An employee's equal access to a job transfer opportunity falls well within the broad ambit of "the terms, conditions, and privileges of employment" contemplated by chapter 151B. An employee may seek out such an opportunity for any range of reasons, including but not limited to the opportunity for higher pay and benefits, different job duties and skills, better working conditions, opportunities for career advancement, more flexibility, and shorter commute time. In the instant case, there is specific record evidence, supported by the plaintiff's and a witness's personal knowledge, of greater opportunities for overtime and paid detail work in the position at issue. Denial of a transfer to a position with the opportunity for higher

compensation indisputably satisfies a plaintiff's minimal burden at the prima facie stage of establishing an "adverse action." However, the terms, conditions, and privileges of employment may broadly encompass both monetary and non-monetary considerations. Therefore, Amici urge the Court to hold that denial of a job transfer can be an adverse employment action for a discrimination claim under G. L. c. 151B where it may deprive an employee of beneficial terms, conditions, or privileges of employment, thereby creating a barrier to full and equal access to such terms, conditions, or privileges. Authority from this Court and lower Massachusetts courts, as well as other jurisdictions construing analogous federal law, supports this conclusion. (Infra pp. 14-28.)

The Court should further recognize that determination of an adverse action is a fact-specific inquiry that should be determined on a case-by-case basis with any material disputed facts resolved by a jury at trial, not a judge on summary judgment. In the instant case, the plaintiff met his burden at the summary judgment stage to produce evidence supporting his claim of discrimination. The lower court erroneously disregarded plaintiff's evidence of the benefits of the

lateral position, thereby rejecting evidence of the adverse action and prematurely dismissing the case at the prima facie stage, which is not meant to be onerous. In doing so, the court improperly resolved material disputed facts against the plaintiff and failed to consider substantial evidence of pretext in violation of the summary judgment standard clarified by Bulwer v. Mount Auburn Hosp., 473 Mass. 672 (2016) and Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382 (2016). (Infra pp. 28-41.) The Court should reverse the improper finding of summary judgment for the defendant.

ARGUMENT

I. BECAUSE CHAPTER 151B IS A BROAD REMEDIAL STATUTE THAT AIMS TO ELIMINATE ALL DISCRIMINATORY BARRIERS TO FULL PARTICIPATION IN THE WORKPLACE, ANY ACTION THAT DISADVANTAGES AN EMPLOYEE WITH RESPECT TO TERMS, CONDITIONS, OR PRIVILEGES OF THEIR EMPLOYMENT IS AN "ADVERSE EMPLOYMENT ACTION"

Chapter 151B embodies the Commonwealth's commitment to eradicating discrimination and retaliation in the workplace. As this Court has stated:

> Chapter 151B was enacted in 1946 to provide remedies for employment discrimination, a practice viewed as harmful to "our democratic institutions" and a "hideous evil" that needs to be "extirpated." The Legislature recognized that employment discrimination is often subtle and indirect, and that it may manifest itself "by so many devious and various means that no single corrective rule can be applied to prevent the injustices committed." And the Legislature determined that workplace discrimination harmed not only the targeted individuals but the entire social fabric.

Flagg v. AliMed, Inc., 466 Mass. 23, 28–29 (2013) (citations omitted). Responding to the harms the Legislature identified as resulting from employment discrimination, chapter 151B "seeks the removal of artificial, arbitrary, and unnecessary barriers to full participation in the workplace." Coll.-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987). As these cases highlight, our Legislature and this Court have

long recognized that employment discrimination can be "subtle and indirect" and that only the removal of all "artificial, arbitrary" barriers to participation in the workplace will fulfill the statute's promise of eradicating employment discrimination.

The language of the statute itself requires that it be construed liberally to achieve these purposes. G. L. c. 151B, § 9. See also Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 620 (2013) ("Employment statutes in particular are to be liberally construed, 'with some imagination of the purposes which lie behind them.'") (citations omitted). In engaging in the liberal construction of 151B this Court has noted that in many respects it provides broader protection than its federal cognates. See Cuddyer, 434 Mass. at 536. Consistent with the plain language of the statute, the concept of "adverse actions" must be liberally construed to capture the myriad ways employers can discriminate against employees and erect arbitrary, artificial barriers to their full participation in the workplace.

II. "ADVERSE ACTIONS" IN EMPLOYMENT DISCRIMINATION CASES EXTEND WELL BEYOND COMPENSATION, HIRING, FIRING, AND PROMOTION DECISIONS

Chapter 151B, by its language, makes it unlawful for an employer to, inter alia, "discriminate against

such individual in compensation or in terms, conditions or privileges of employment." G. L. c. 151B, § 4(1). The phrase "terms, conditions or privileges of employment" is broad, consistent with broad remedial purpose of the statute to eliminate all forms of employment discrimination. As the Appeals Court has noted, the term "adverse employment actions" has come to refer to those decisions that materially affect an employee's working terms, conditions, or privileges and thus violate the law. King v. City of Boston, 71 Mass. App. Ct. 460, 468 (2008). "Material disadvantage for this purpose arises when objective aspects of the work environment are affected." Id. The phrase "working terms, conditions, or privileges of employment" is broad and inclusive: an adverse change in the terms, conditions, or privileges of employment may include "slights or indignities that seem evanescent." Id. at 469 (quoting Trustees of Health & Hosps. of City of Boston, Inc. v. Massachusetts Comm'n Against Discrimination, 65 Mass. App. Ct. 329, 334 n.5 (2005), aff'd 449 Mass. 675 (2007)). A narrower view of these statutory terms would defeat the statute's broad remedial purposes.

A. Massachusetts and Federal Cases Illustrate the Breadth of Actions that Can Impact Terms, Conditions, and Privileges of Employment

Terms, conditions, and privileges of the work environment consist of more than simply the title one is given or the salary one earns. An employee's experience of his or her job depends on numerous factors that may make a job materially more or less desirable. These factors might include the location of the workplace, the duties and responsibilities of the position, the flexibility of the job, opportunities for advancement, opportunities for on-the-job education and training, or the ability to work from home. Even considerations of basic dignity, respect, and reputational integrity constitute terms and conditions of employment that are subject to scrutiny under G. L. c. 151B. Trustees of Health & Hosps. of City of Boston, Inc. v. Massachusetts Comm'n Against Discrimination, 449 Mass. 675, 687 (2007) (holding that humiliating manner of lay off of black female employees compared to white male employee was adverse action for discrimination claim under c. 151B). All these factors, in addition to the job title and salary accorded the employee, constitute terms, conditions, or privileges of employment that must be

provided in a manner free from discrimination based on an employee's membership in a protected class.

So, for example, in Trustees of Health & Hosps. of City of Boston, Inc., 449 Mass. at 687, this Court determined that black, female employees suffered a discriminatory adverse action when they were monitored and escorted out of the building while being laid off while a white, male employee was not during his layoff. The manner of the layoff alone – unfairly casting suspicion on minority female employees while treating their white male counterpart with professionalism and respect – was a sufficiently material condition of employment to support a discrimination claim.

In King, the Appeals Court held that a jury could find that the Boston Police's failure to provide female officers with rank-specific locker rooms (so that female superior officers had a separate locker room from female patrol officers), while providing such benefits to male officers, constituted an adverse employment action that "deprive[d] them of a material feature of their employment." 71 Mass. App. Ct. at 470. See also Bray v. Cmty. Newspaper Co., 67 Mass. App. Ct. 42, 44-45 (2006) (holding that frequent changing of sales territory, baseless criticism, and delayed issuance of

credits to advertisers whom plaintiff solicited could constitute adverse actions).

The MCAD has similarly interpreted the terms, conditions, and privileges of employment as broadly reaching both pecuniary and non-pecuniary matters. Massachusetts Comm'n Against Discrimination & Annette Whitehead-Pleaux, v. Shriners Hosp. for Children, Nos. 04-BEM-01593, 06-BEM-01307, 2014 WL 4165630, at *3 (MCAD Aug. 7, 2014)(finding that temporary denial of insurance coverage to complainant's spouse, even where complainant and spouse incurred no medical costs during the denial, constituted adverse action); Massachusetts Comm'n Against Discrimination & Ismael Ramirez-Soto v. Univ. of Massachusetts Boston, No. 04-BEM-01916, 2009 WL 2208512, at *13 (MCAD July 17, 2009) (holding university's failure to come to agreement on terms of professor's contract, including length of contract and whether he would be considered tenured, could be adverse action); Massachusetts Comm'n Against Discrimination & Maureen Kearney v. Massachusetts Dep't of State Police, No. 03-BEM-01040, 2008 WL 5385816, at *7 (MCAD Dec. 17, 2008)(finding plaintiff suffered adverse action where respondent State Police transferred male officers to positions that female complainant indicated she would be

agreeable to, but did not transfer complainant, despite settlement agreement requiring the parties to agree on complainant's placement).

Applying the analogous Title VII law, the First Circuit has held that a plaintiff in a gender discrimination suit against the Department of Homeland Security put forth sufficient evidence that she experienced an adverse action when her duties as an international flight scheduler were reduced although the DHS claimed she would be assigned new duties in a few months. Burns v. Johnson, 829 F.3d 1, 10-11 (1st Cir. 2016). The Tenth Circuit has held that a plaintiff made out a case of discrimination that should go to the jury where she asserted that female corrections officers were not permitted to work at a prison where the work "would be less arduous and stressful [] due to the indirect nature of supervision" and where they would have increased "chances of obtaining additional job and leave flexibility." Piercy v. Maketa, 480 F.3d 1192, 1205 (10th Cir. 2007). The Second Circuit determined that a jury could find that one position in a police department was "objectively and materially better" than another where it was more prestigious and provided the officers "opportunities for advanced training in forensic

science, as well as access to new technology and techniques." Beyer v. Cty. of Nassau, 524 F.3d 160, 162 (2d Cir. 2008).

In all of these cases, courts recognized that there are broad criteria, including those that are not quantifiable by nature, that a jury can consider that may make the terms, conditions, or privileges of one job superior to that of another. Cf. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006) ("[A] legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an 'act that would be immaterial in some situations is material in others.'") (citation omitted).

B. MacCormack, As Relied Upon by the Lower Court, Does Not Represent the Adverse Action Standard Governing Unlawful Discrimination Under G. L. c. 151B.

In assessing whether plaintiff had stated an adverse action, the lower court relied on this Court's decision in MacCormack v. Boston Edison Co., 423 Mass. 652 (1996) and wrongly suggested that for an adverse action to "materially change[] objective aspects of the plaintiff's employment" for the purposes of a discrimination claim, it must be limited to examples "such as a demotion or a firing or a pay cut." (R. 306-

308.) MacCormack was a case alleging retaliation, not discrimination, thus its direct applicability to plaintiff's claims is questionable. Moreover, MacCormack does not establish a standalone standard for adverse actions under G. L. c. 151B, even for claims of retaliation. In MacCormack, the plaintiff asserted an adverse action when he felt professionally stigmatized by way of a "public demotion," when the employer imposed an additional layer of hierarchy over him, and redistributed his duties in the context of a corporate-wide reorganization. MacCormack, 423 Mass. at 661-663. This Court found no adverse action, because the specific context of the reorganization, which reassigned duties across the department generally, showed no overt stigmatization of the plaintiff beyond his subjective disenchantment.

As support for its finding, the MacCormack court explained that the plaintiff "offered no objective evidence that he had been disadvantaged with respect to salary, grade, or other objective terms and conditions of employment." Id. at 663. This context shows that the court did not intend for its critique of the plaintiff's evidence to reflect the ultimate standard, even for adverse actions in retaliation cases. It was

simply a list of types of evidence that had not been introduced in that case, addressed to the theory the plaintiff had actually advanced: constructive demotion causing a diminishment of status. Id. The language in MacCormack does not mean, as the lower court here wrongly suggested, that unlawful employment actions under G. L. c. 151B are limited only to monetary or otherwise quantifiable measures. Lower courts, like the one in the instant case, that have incorrectly read MacCormack's language as creating an invariable and too-narrow standard for adverse actions in the discrimination context are mistaken.[2] Amici urge this

[2] To the extent lower courts apply MacCormack in the retaliation context, these courts are also mistaken. In the context of retaliation claims, this Court explained in Psy-Ed Corp. v. Klein, 459 Mass. 697, 707 & n.25 (2011), that the term "adverse employment actions," is simply "shorthand" to refer to the panoply of actions that may violate G. L. c. 151B. Thus, while MacCormack purports to require changes in "objective terms and conditions of employment," this Court's case law has recognized as illegal retaliation actions that are much broader than that narrow definition. See id. at 708-709 (holding that retaliation claims can be based on harmful actions taken against the employee, even when they are taken after the employment relationship has ended, favorably citing to the Supreme Court's decision in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006)). Under Burlington Northern, an adverse action is one that would dissuade an employee from the exercise of his or her rights. 548 U.S. at 73. To the extent lower courts continue to apply MacCormack as the adverse action standard in retaliation cases, that

Court to reaffirm a broad standard for adverse employment actions that reflect the reality that discrimination in the terms, conditions, and privileges of employment in the workplace takes place in various forms and need to be assessed on a case-by-case basis.

III. THE DEPRIVATION OF OPPORTUNITIES TO EARN A HIGHER SALARY THROUGH OVERTIME WORK IS INDISPUTABLY THE TYPE OF DISCRIMINATION CHAPTER 151B IS MEANT TO ERADICATE

The purpose of chapter 151B is to "eliminate discrimination at root level." Cuddyer, 434 Mass. at 536. As in other areas where this Court has recognized the broad applicability of chapter 151B, an employer's discriminatory decision to bar a minority employee from positions that would provide that employee the opportunity to earn substantially more by way of overtime income or paid detail work than the position the employee holds "causes a direct and specific injury to the employee and represents 'a formidable barrier to the full participation of an individual in the workplace.'" Flagg, 466 Mass. at 27 (citation omitted). The lower court erred in failing to recognize that as a legal matter the denial of a transfer to a job with the

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standard does not survive Psy-Ed, Burlington Northern, or their progeny.

opportunity for better terms, conditions, or privileges can constitute a discriminatory adverse action.

A. Lost Opportunities for Additional Pay Constitute Adverse Actions

It is widely recognized that supposedly "lateral" transfers can be adverse actions where there are indicia that the sought-after job "is materially more advantageous than the employee's current position, whether because of prestige, modernity, training opportunity, job security, or some other objective indicator of desirability." Beyer, 524 F.3d at 165.

A lost opportunity for overtime pay is one such indicium that the sought-after job is "materially more advantageous than the employee's current position." Id. Courts interpreting the language of Title VII, which is analogous to 151B, have found that employers engage in adverse actions by failing to transfer employees to jobs that offer a greater opportunity to earn overtime where a plaintiff can demonstrate that the sought-after job provided more opportunity for overtime work and that the plaintiff desired such work. See, e.g., Sims v. D.C., 33 F. Supp. 3d 1, 7 (D.D.C. 2014) (recognizing that the lost opportunity to obtain overtime is "'an adverse employment action where the trier of fact could

reasonably conclude that plaintiff in the past sought opportunities for overtime pay or it was otherwise known to defendant that plaintiff desired such opportunities.'") (quoting Bell v. Gonzales, 398 F.Supp.2d 78, 97 (D.D.C. 2005)). See also Lewis v. City of Chicago Police Dep't, 590 F.3d 427, 436 (7th Cir. 2009) (holding that it was a question for the jury whether the denial of a female police officer's request to be assigned a detail she claimed would provide her a greater opportunity for overtime work constituted an adverse employment action). Cf. Rios-Colon v. Toledo-Davila, 641 F.3d 1, 4 (1st Cir. 2011) (recognizing that police officer stated a claim for racial discrimination under Title VII and the Equal Protection Clause where he was transferred to a position that provided less opportunity for overtime pay); Reynaga v. Sun Studs, Inc., 27 F. App'x 740, 742–43 (9th Cir. 2001) (unpublished) (holding that plaintiff had raised a question of fact as to whether his transfer from a veneer plant to a lumber mill was discriminatory where "the opportunity to earn overtime and incentive pay at the lumber mill was substantially less than at the veneer plant and by evidence that this fact was widely known.").

In a case analogous to the one at hand, the Seventh Circuit held that the reassignment of white waitresses to areas of a casino that were known to generate higher tips constituted an adverse action to the plaintiffs, black waitresses, who were routinely assigned to lower-tipping areas of the casino. Alexander v. Casino Queen, Inc., 739 F.3d 972, 980 (7th Cir. 2014). The court held that because the loss of the potential tips constituted a "significant financial impact" to the plaintiff waitresses, the reassignments were an adverse action under Title VII. Id. The Court explicitly rejected the district court's holding that because the tips were speculative, there was no adverse action. Id. The Seventh Circuit held that because the plaintiffs' claims were based on their personal knowledge and experience, and because they could quantify their lost tips, they had pled sufficient facts to survive a motion for summary judgment. Id. at 980-81.

Historically, when determining the scope of G. L. c. 151B, the instances in which the Supreme Judicial Court has departed from federal Title VII precedent have been those where this Court has determined that similar language in G. L. c. 151B supports a broader, more expansive interpretation than that offered by the

federal courts, resulting in greater protections against workplace discrimination for the residents of this Commonwealth. See, e.g., Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 Mass. 160, 167 (1978) (departing from federal precedent when concluding that G. L. c. 151B's protection against sex discrimination included discrimination on the basis of pregnancy); College-Town v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987)(departing from federal precedent when concluding that, under G.L. c. 151B, employers are vicariously liable for the sexual harassment of their supervisory personnel). The Court should not interpret G. L. c. 151B in a manner that is more restrictive than Title VII where to do so would be in direct contradiction to this Court's mandate to construe chapter 151B liberally to protect the rights of employees.

Lt. Yee testified that he sought the position in Troop F because of its overtime and detail opportunities. (R. 173.) He further established that the opportunity for overtime and detail work in Troop F is based on his own knowledge and experience, (id.), and on the personal experience of his comparator, Lt. Lyndon. (R. 225.) Lt. Lee further quantified that lost

overtime by identifying a similarly-situated comparator who was awarded the transfer to Troop F instead of plaintiff (Lt. Lyndon) and who made a significant amount in overtime pay while in Troop F, a fact defendant does do not dispute. (R. 300.) The undisputed facts before the lower court established that Lt. Lyndon's income increased because of increased overtime pay while he was in Troop F and decreased once he left Troop F. (Id.) Simply put, there is no question that denying Lt. Yee the transfer opportunity denied him the opportunity to earn more money--a fundamental term, condition, or privilege of his employment.

IV. THE LOWER COURT MISAPPLIED THE SUMMARY JUDGMENT STANDARD TO THE FACTS BEFORE IT

The lower court erroneously granted the defendant's motion for summary judgment based on its assessment that there was no evidence that would allow a jury to conclude that plaintiff suffered an adverse employment action. In so deciding, the court failed to follow this Court's instructions for how to address evidence of discrimination at the summary judgment stage.

In Bulwer v. Mount Auburn Hosp., 473 Mass. 672 (2016), and Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382 (2016), this Court

clarified the summary judgment standard that applies to discrimination claims under Chapter 151B. In Bulwer, this Court made clear that there is a difference between what a plaintiff must prove to succeed in an employment discrimination claim at trial, and what a plaintiff must show to survive a motion for summary judgment: "In order to prevail at trial, . . . [the plaintiff] must demonstrate four things: that he or she is a member of a protected class; that he or she was subject to an adverse employment action, that the employer bore 'discriminatory animus' in taking that action; and that that animus was the reason for the action (causation)." Bulwer, 473 Mass. at 680 (emphasis added). "In the pretrial context, . . . [a plaintiff] may survive a motion for summary judgment by providing '[d]irect evidence of [the] elements' of discriminatory animus and causation." Id. at 680 (citation omitted)(emphasis added). However, because direct evidence of discriminatory animus and causation "'rarely exists,' . . . an employee plaintiff may also survive such a motion by providing 'indirect or circumstantial evidence [of discriminatory animus and causation] using the familiar three-stage, burden shifting paradigm first set out in McDonnell Douglas Corp. v. Green . . .'" Id. at 680-81

(quoting Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 40-41 (2005).

At the first stage, the plaintiff has the burden to show a prima facie case of discrimination by showing that (1) he is a member of a protected class; (2) he performed his job at an acceptable level; and (3) he was subject to an adverse employment action. Bulwer, 473 Mass. at 681; see also Verdrager, 474 Mass. at 396. At the prima facie stage, the plaintiff's burden "is not intended to be onerous," but rather is, "a small showing . . . easily made." Trustees of Health & Hosps. of City of Boston, Inc., 449 Mass. at 683 (citations omitted). At the second stage, the defendant can rebut the presumption created by plaintiff's prima face case "by articulating a legitimate, nondiscriminatory reason for the employment decision." Bulwer, 473 Mass. at 681. At the third stage, "the burden of production shifts back to the plaintiff employee, requiring the employee to provide evidence that 'the employer's articulated justification is not true but a pretext.'" Id. (citation omitted).

This Court also reminded lower courts that basic summary judgment principles apply to the burden-shifting analysis: (1) Evidence must be viewed "in the light most

favorable to the party opposing summary judgment" while "drawing all reasonable inferences in" that party's favor; (2) the plaintiff has the burden of production, *not* the burden of persuasion, and the burden always remains on the defendant to show the absence of a disputed fact; (3) the motion judge does not weigh evidence; and (4) evidence must be "taken as a whole rather than viewed in isolation." Bulwer, 473 Mass. at 680, 681 & n.7, 684, 689.

A. Defendant Took an Employment Action Every Time it Denied Plaintiff's Request for Transfer in Favor of a White Candidate

In the instant case, the fact that plaintiff is a member of two protected classes and the fact that he was qualified for the position in Troop F have not been disputed. The parties dispute whether the State Police took an adverse action against Lt. Yee.

The lower court rested its decision, in part, on a view that the State Police did not take any "action" with respect to Appellant Yee in this case when it chose to transfer younger, white lieutenants into Troop F instead of Yee. (R. 308-09.) Calling the defendant's actions a failure to act rather than taking an action is a semantic distinction with no practical difference. Our law does not require such a narrow understanding of

the term “adverse employment action.” Each time the State Police had a lieutenant position to fill in Troop F it took an employment action. Each time the action it took was to reject Appellant’s outstanding request for transfer and place a younger, white lieutenant in the position.

The lower court’s interpretation of what constitutes an adverse action would undermine the protections of chapter 151B and allow employers to make decisions that clearly discriminate against members of protected classes, so long as those decisions were not cast as formal employment “actions” taken with respect to a particular employee or group of employees. For example, following the reasoning of the lower court, employers would be allowed to systematically discriminate against groups of employees so long as they did so by hiring all employees into the less desirable positions with the fewest opportunities for advancement or additional compensation, and then transferring the favored class out into the more desirable positions.

Under the lower court’s interpretation of the law, had Lt. Yee been originally hired into Troop F, then transferred to Troop H, losing overtime pay he had been earning, he might have been subject to an adverse action.

However, because the State Police never even gave Lt. Yee the chance to work in Troop F and avail himself of the additional opportunities for overtime there, the lower court found he has no claim. Such a plainly inequitable system, which would permit blatant discrimination so long as employers only transferred members of the favored class into the more desirable positions, does not comport with either the language or purpose of chapter 151B.

B. The Lower Court Resolved Disputed Facts Regarding the Materiality of the Adverse Impact on Plaintiff's Employment Against the Plaintiff, in Violation of the Summary Judgment Standard

As explained above, the opportunity to earn overtime is a term, condition, or privilege of employment. The Appeals Court has noted that often "a finding regarding the materiality of the benefit at issue cannot be made as a matter of law," and that "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry." King v. City of Boston, 71 Mass. App. Ct. at 470 (citation omitted). For this reason, deciding questions of the materiality of the adverse action is not well-suited to summary judgment, but instead should be made by the jury at trial.

There can be no dispute that Lt. Yee is a member of a protected class and performed his job at an acceptable level. With respect to the adverse action, the plaintiff proffered undisputed evidence that he sought the transfer to Troop F in part because of the opportunity for more details and more overtime work. (R. 173, 288-289.) He further proffered undisputed evidence that his comparator, Lt. Lyndon, earned at least $30,000 more each year in overtime compensation during the time he worked in Troop F. (R. 225-226, 300.) By setting forth facts that showed that a transfer to Troop F was likely to result in increased overtime compensation and that he sought that increased overtime compensation, the plaintiff more than amply made out his "non-onerous" burden at the prima facie stage.

C. The Lower Court Erroneously Disregarded Comparator Evidence And, Even Then, Failed to Recognize Such Evidence Is Not Required

The lower court took issue with the fact that plaintiff identified a single comparator to support his claim of disparate treatment, insinuating that plaintiff should have analyzed the earnings of other lieutenants in Troop F. (R.A. 310-311.) This suggestion misunderstands the requirements to prove discrimination by circumstantial evidence. Comparator evidence is not

necessary to make out a case of discrimination. Trustees of Health & Hosps. of City of Boston, Inc., 449 Mass. at 683. This Court has held, for example, that in reduction of force cases a plaintiff must simply produce "some evidence that her layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination." Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 45 (2005). In age discrimination cases with relatively small age disparities, plaintiffs can still make out a prima facie case where they produce "evidence that the termination occurred in circumstances that would raise a reasonable inference of unlawful age discrimination." Knight v. Avon Prod., Inc., 438 Mass. 413, 425 (2003).

When a comparator is used, a single comparator will suffice to demonstrate disparate treatment. Trustees of Health & Hosps. of City of Boston, Inc., 449 Mass. at 682 ("Under that evidentiary paradigm, a complainant must show in the first stage that, inter alia, she was treated differently from another person . . . .) (emphasis added).

Nor is Lt. Lyndon's pay increase in Troop F "completely unconnected to Plaintiff's own circumstances," as the lower court suggested. (R. 311.)

Lt. Lyndon is an appropriate comparator for plaintiff because he held the same title in the same troop as plaintiff, was transferred to Troop F instead of plaintiff, and he (as plaintiff would have) took advantage of the increased opportunity for overtime to earn substantially more money than he had before the transfer. The two lieutenants are similarly situated in every way other than their membership in protected classes (and plaintiff's superior experience and credentials) and thus Lt. Lyndon is a natural comparator in this case.

If, as the lower court insinuates, comparison with the other lieutenants serving in Troop F might show less disparity in overtime compensation between Troop H and Troop F, that is evidence the defendant was free to put forth at summary judgment in support of its case. The defendant put forward no such evidence.

D. Plaintiff Presented Evidence Demonstrating Defendant's Justification for Refusing to Transfer Him was Pretextual

Because the lower court erroneously determined that the loss of potential income could not be an adverse action, and that the plaintiff had not produced sufficient evidence of the loss of that potential income, he did not engage in the McDonnell Douglas

burden-shifting analysis required in the second stage of the analysis for deciding motions for summary judgment in employment discrimination actions. Here too, defendant failed to meet its burden to show there were no disputed issues of material fact as to the legitimacy of its alleged reasons for rejecting plaintiff's transfer request in favor of white, primarily younger, officers.

Crediting, as the Court must, the evidence put forth that supports the plaintiff's position, he met his burden of production such that a reasonable juror could find that the defendant's proffered reason for refusing to transfer plaintiff is pretextual. Defendant's proffered reason was that it chose Lt. Lyndon, a younger, white man, to transfer to Troop F instead of plaintiff because Lt. Lyndon had previously served on a Community Action Team (CAT). (R. 200, 238). Lt. Yee has produced evidence from which a jury could infer that defendant's explanations are false and under Bulwer, this is all that is required at the third stage. 473 Mass. at 682.

1. The Evidence Put Forth at Summary Judgment Demonstrated that Plaintiff was More Qualified for the Position than the Younger White Man the State Police Chose

Defendant put forward no evidence that it had ever relied on service on a CAT to determine transfers to shift commander roles prior to transferring Lt. Lyndon, and the evidence demonstrates that there was little to no correlation between the experience Lt. Lyndon had on the CAT and the tasks he was required to do as a shift commander in Troop F. (R. 213-214.) Moreover, the undisputed evidence demonstrates that while Lt. Lyndon had no prior experience as a shift commander before he was promoted to lieutenant and assigned as shift commander in Troop F, plaintiff had prior experience serving as a shift commander. (R. 299.) Plaintiff set forth additional evidence, including his educational background and ability to speak multiple languages, that a jury could determine made him a more qualified candidate for the Troop F position than Lt. Lyndon. (Id.) The undisputed evidence also showed that the supervisors making the decision as to who to transfer to Troop F had never worked with either Lt. Lyndon or plaintiff, yet they did not seek to interview either candidate or read their performance reviews. (R. 241.)

A reasonable juror could determine that the evidence, taken together, casts significant doubt on the truthfulness of the defendant's witnesses who testified that the decision to transfer Lt. Lyndon was based on his experience in the CAT; where the people making the hiring decisions took no steps to assess either candidate and where, in fact, plaintiff's credentials showed him to be a more appropriate choice for the position. Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006) (recognizing that evidence of plaintiff's superior qualifications may be sufficient to prove discrimination).

2. The Complete Subjectivity of the Hiring Process Supports an Inference of Discrimination

A jury could find that the uncontrolled, subjective nature of the selection process supports that the criteria cited for choosing Lt. Lyndon over Lt. Yee were pretext for discrimination. See City of Salem v. Massachusetts Comm'n Against Discrimination, 44 Mass. App. Ct. 627, 643 (1998), overruled on other grounds, DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass. 1, 10 (2006) (holding that "employer's use of uncontrolled subjectivity in the hiring process" was factor to consider in determining if plaintiff met his

burden to show pretext); Riffelmacher v. Bd. of Police Comm'rs of Springfield, 27 Mass. App. Ct. 159, 164-165 (1989), quoting Rowe v. General Motors Corp., 457 F.2d 348, 358-359 (5th Cir.1972) (holding that police department's "unbounded procedure" for choosing candidates was "a 'ready mechanism for discrimination'"). Cf. Smith Coll. v. Massachusetts Comm'n Against Discrimination, 376 Mass. 221, 231 (1978) (noting that where employment decisions are made based on subjective factors "the opportunity for unlawful bias is particularly great").

3. The State Police's General Practices Concerning Employment of Minorities and Disproportionate Employment of White Men over Other Demographics, Gives Rise to an Inference of Discrimination

A jury could also review the State Police's history of differential treatment of minority employees generally and infer that defendant's reasons for denying Yee's job transfer were false.[4] See Appellant Br. at 3-

[4] The fact that the State Police is disproportionately white and male, and has widespread discrimination problems is well known. See Ramos, Nestor, Behind the Blue Wall: Claims of Bias in the State Police Force, Boston Globe (March 12, 2017), https://www.bostonglobe.com/metro/2017/03/12/behind-blue-wall-women-and-minority-troopers-clash-with-state-police-culture/Q2bs8R8142mSuftfnJL6eK/story.html. As the Globe study shows, as one climbs the ranks of the

4; Verdrager, 474 Mass. at 400 ("Finally, there is evidence that women at the firm, and in the ELB section in particular, were subject to discriminatory treatment."); McKenzie v. Brigham & Women's Hosp., 405 Mass. 432, 437 (1989) ("[E]vidence which may be relevant to the plaintiff's showing of pretext may include . . . the employer's general practice and policies concerning employment of racial minorities.") (citation omitted); Smith Coll., 376 Mass. at 228 n.9 ("In a proper case, gross statistical disparities alone may constitute prima facie proof of a practice of discrimination.").

Viewed as a whole, the foregoing evidence of pretext suffices to raise material issues of fact regarding defendant's motive and a reasonable jury could infer that at least one of defendant's explanations was pretext. Even if defendants have articulated nondiscriminatory reasons, "[t]he question of whose interpretation of the evidence is more believable 'raised by the [parties'] conflicting evidence as to the defendant[s'] motive, is not for a court to decide on

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State Police the number of women and minorities shrinks, such that as of 2016 only 8.6% of lieutenants (like the plaintiff) were minorities, and there was not a single minority officer in any of the top five ranks of the force.

the basis of [briefs and transcripts], but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of witnesses.'" Bulwer, 473 Mass. at 689 (citations omitted).

CONCLUSION

To achieve chapter 151B's goal of eradicating workplace discrimination, the phrase "terms, conditions, or privileges of employment" has been interpreted broadly, and must continue to be interpreted broadly in order to effectuate the remedial purpose of the statute. The loss of an opportunity for overtime or detail work falls squarely into that category of employment decisions that impact those terms, conditions, or privilege. Where, as here, Lt. Yee produced evidence that he sought a transfer to take advantage of those opportunities, and evidence that his comparator who was granted the transfer did enjoy a material improvement to the terms, conditions, and privileges of his employment, Lt. Yee has met his burden of production at the summary judgment stage. For the foregoing reasons, Amici urge this Honorable Court to reverse the judgment of the lower court, hold that a lateral transfer can constitute an adverse action that is actionable under G. L. c. 151B where the transfer may provide improved terms,

conditions, or privileges of employment, and remand for further proceedings.

Respectfully Submitted for
FAIR EMPLOYMENT PROJECT, INC., GLBTQ LEGAL ADVOCATES & DEFENDERS, GREATER BOSTON LEGAL SERVICES, JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION, LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND ECONOMIC JUSTICE, MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION, AND UNION OF MINORITY NEIGHBORHOODS

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CERTIFICATE OF COMPLIANCE

I, Naomi R. Shatz, hereby certify that I have complied with all relevant provisions of Massachusetts Rules of Appellate Procedure 16, 17, 19, and 20 with respect to the contents, format, filing, and service of the within brief.

/s/ Naomi R. Shatz

Naomi R. Shatz