

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-95

RICHARD ARMATO

vs.

TOWN OF STONEHAM & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Richard Armato, appeals from a summary judgment dismissing his claim against the town of Stoneham (town) under G. L. c. 149, § 185, the Massachusetts whistleblower act (act), and his claims of civil conspiracy and intentional interference with advantageous employment relationship against various town officials.² Concluding that Armato has not raised a genuine issue of material fact that he was constructively discharged, we affirm.

¹ Lawrence Means, Thomas Boussy, Ann Marie O'Neill, Caroline Colarusso, and David Ragucci. The plaintiff elected not to appeal from the judgment in favor of defendants Frank Vallarelli and John DePinto.

² Armato originally raised claims of defamation against the town officials. These claims were dismissed on the pleadings. Armato's notice of appeal did not reference this order, and he raises no issue concerning the defamation claims on appeal.

1. Background.³ Upon the retirement of Armato's boss in March 2014, the town promoted Armato to the position of grounds maintenance supervisor of the town's two golf courses, the Unicorn and Stoneham Oaks. Around that time, defendant David Ragucci, the town administrator, reorganized the golf courses, placing them under the jurisdiction of the department of public works. As a department of public works (DPW) employee, Armato reported to Robert Grover, the town engineer and DPW director.

Armato was responsible for the day-to-day operations of the courses, while Grover and Larry Brophy, the assistant DPW director, oversaw the courses. Carl Marchio, a golf professional, operated and managed the pro shop pursuant to a contract with the town. At the time and for the remainder of Armato's employment, defendant Lawrence "Larry" Means, an avid golfer, served as the elected town moderator,⁴ defendant Thomas Boussy chaired the town's Board of Selectmen (board),⁵ and defendant Ann Marie O'Neill served as a board member.⁶

³ We draw the facts from the parties' statements of the undisputed facts, as supplemented by undisputed facts of record. See Rule 9A(b)(5) of the Rules of the Superior Court (2018).

⁴ As the town moderator, an unpaid elected position, Means's primary function was to run the town meeting; he did not report to anyone, including Ragucci or the board.

⁵ The Board of Selectmen was renamed the Select Board in 2019, after the events at issue here. See St. 2002, c. 3.

⁶ Defendant Caroline Colarusso was elected to the board in April 2015.

Following a conversation with Means on a golf course on July 25, 2014, Armato gave written and oral notice to his immediate supervisors of allegations by Means that four individuals were "cooking the books" of the golf courses: Ragucci, Grover, and Robert Sweeney and John DePinto, two members of the board at the time (cooking the books report).

On August 6, 2014, Means confronted Armato at a golf course, interrupting Armato's attempt to fix a water main break. When Means started screaming at Armato and "getting into" his face, Armato responded, "Get your F-ing hands out of my face." Means responded, "My wife's right here." Armato replied, "I apologize. Get your F-ing hands out of my face." Means "got so heated that [Armato] asked him to leave or [Armato] would call the police." On his way out, Means threatened to sue Armato and "get" him if he ever wrote another letter to the board.

On or about August 9, 2014, certain members of the Unicorn golf course subcommittee, a subset of the eleven-member open space and recreation committee (recreation committee), demanded receipts from the pro shop for two months during which the course was closed (February and March 2014).⁷

⁷ At a board meeting in May 2014, Means and Ragucci had suggested that the recreation committee, an advisory committee to the board and Ragucci, look into ways of increasing revenue at the golf courses, which were losing money. At the June 10, 2014, board meeting, Armato admitted to the board that revenues were

In January and February 2015, the board and Ragucci rejected Armato's multiple requests to repair or replace the antiquated irrigation system.

The day after the April 2015 town elections, Dennis Visconti, a member of the recreation committee, went to a golf course and gave the golf pro, Marchio, notes instructing Marchio to "[h]ave Mr. Armato do this; have Mr. Armato do that."⁸ Visconti was not Armato's "boss." When the notes from Visconti kept coming, Armato conveyed his annoyance to Ragucci, informing him that the new tasks were causing Armato to neglect the courses. Ragucci told Armato to "[c]ontinue to do what you're doing on the golf course and he'll take care of" Visconti.

In late August or early September 2015, Means and Armato had another heated confrontation, after work hours at the Stoneham Stop & Shop near Armato's home. Means admitted stating to Armato, "Oh, you got what you deserved, didn't you? That's because you're with [Bob] Sweeney." Armato responded, "I don't know what you're talking about, Larry. I'm not with anybody. . . . You know, you like F-ing around with people's lives?" Means shot back, "I can do anything I want. . . . You continue

"down significantly" during Marchio's tenure and that running the courses was expensive.

⁸ For example, Visconti asked Armato to "hose down" and spray paint the bathrooms. Armato believed that he had more important regular work to do, and the purpose of these "ridiculous" tasks was to make him "neglect the golf course even more."

with Sweeney . . . you're going to get what you deserve or you got what you deserved." Armato responded, "I'm off the clock now. I can say whatever I want to say." Means added, "We'll see." After the two exchanged a few "F words," Armato walked away to go about his business. Means had uttered similar words to Armato on one or two earlier occasions. Ragucci, the only defendant with disciplinary authority, refused Means's subsequent demand that he suspend Armato, on the ground that the off-hours argument was not town business.

In early September 2015, Boussy, Means, and Ragucci toured the golf courses together to investigate complaints Boussy had received about its condition. After the tour, Ragucci announced to Armato that Boussy had decided to stop allowing all town employees to accrue additional compensation time. Within a week, Ragucci announced that the policy was reversed -- except as to Armato.⁹

At a board meeting on September 8, 2015, Boussy falsely stated, among other things, that Armato used his accrued compensation, accumulated by working nights and weekends during

⁹ By working weekends and nights during the golf season, Armato earned enough compensation time, paid at one and one-half time and double time on holidays, to allow him to take winters off with full pay. Up to this time, over a year after Armato made the cooking the books report, Ragucci had allowed this practice to continue. Armato earned around twenty-five dollars per hour, and the seasonal employees he supervised earned minimum wage.

the golf season, to travel to Florida in the winter and run a golf course there. Boussy admitted that he did not confirm the truth of these allegations before republishing them at the meeting.

Armato invited defendant board member Caroline Colarusso to visit him at one of the golf courses "to see if she was on their side or [whether] she was independent." Colarusso stated she was busy taking care of her mother, but she would "try to get down there in the next couple of weeks." After Colarusso failed to show up, Armato questioned her whereabouts while the two were standing in line at the Dunkin' Donuts inside the Stoneham Stop & Shop. Colarusso blamed her absence on having to deal with her mother's Alzheimer's disease and on personal difficulties, promising to get there when she could. Armato responded, "I have trouble believing that, because I hear you're running around door to door passing out pamphlets about this upcoming selectmen thing [that is, a proposal to restructure how selectmen were elected, which was defeated in the October 2015 town meeting]. . . . I have a hard time believing that you can't come down for 20 minutes and see me." Colarusso explained that she was fighting for her job, to which Armato stated, "I'm fighting for my career." Colarusso stated, "Well, Rick, sometimes you have to be prepared to lose your job."

On September 21, 2015, Armato submitted an internal complaint to the town's human resources department, charging Means and Boussy with harassment and discrimination.¹⁰

On October 22, 2015, town meeting voted in favor of privatizing the golf courses. Sterling Golf Management, Inc. won the public bid and took over the management and maintenance of the golf courses for the 2016 golf season. When the golf courses were privatized, Armato's town position was eliminated, along with all other town golf course positions.¹¹ Armato declined two job transfer offers from the town and retired effective April 1, 2016.¹² After Ragucci declined to fire Grover at Boussy's demand in 2016, the board did not renew Ragucci's contract.

2. Standard of review. "We review a grant of summary judgment de novo to determine 'whether, viewing the evidence in the light most favorable to the nonmoving party, all material

¹⁰ Referred by the town to outside counsel, Regina Ryan, for investigation, Armato's allegations were not substantiated. In her report, Ryan indicated that, although Armato asked to withdraw his complaint against Means, she completed the investigation of Means because the town had been "put on notice." Ryan reported that Armato attributed the harassment by Means and Boussy to their dislike of Grover.

¹¹ Armato no longer contends that the privatization was an adverse employment action by the town.

¹² Armato told Ragucci, "It doesn't matter what position I take, Dave, they're going to get rid of me." Armato testified that he would not have accepted any position from the town because he believed Means was going to get him fired and he would lose his pension.

facts have been established and the moving part[ies] [are] entitled to judgment as a matter of law.'" Chambers v. RDI Logistics, Inc., 476 Mass. 95, 99 (2016), quoting DeWolfe v. Hingham Centre, Ltd., 464 Mass. 795, 799 (2013). "In order to defeat summary judgment, the [opposing party is] required to 'set forth specific facts showing that there is a genuine issue for trial.'" Athanasiou v. Selectmen of Westhampton, 92 Mass. App. Ct. 94, 98 (2017), quoting Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974).

3. Whistleblower claim. To prevail on this statutory claim, the plaintiff must establish that (1) he "engaged in an activity protected by the act; (2) the protected activity was the cause of an adverse employment action, such that the employment action was retaliatory; and (3) the retaliatory action caused the plaintiff damages." Edwards v. Commonwealth, 488 Mass. 555, 568-569 (2021). We assume without deciding that disclosures to two of the alleged wrongdoers (Grover and Ragucci), intended for a personnel file, may constitute protected activity for purposes of the act.¹³ See G. L. c. 149, § 185 (b) (1), (3). Nevertheless, we conclude that Armato's proof was inadequate to raise a genuine issue of material fact

¹³ In October 2014, a local newspaper published two articles about the ongoing feud between Armato and Means and Boussy, reporting that, when Armato discovered that his cooking the books report had been made public, he became "furious."

with respect to the second element of his claim, an adverse employment action, pressed under the doctrine of constructive discharge.

On Armato's theory of his case, a group of individuals headed by "puppet masters" Means and Boussy were out to get him and harassed him to the point where he had no choice but to decline any transfer offer from the town and to take early retirement. The harassment took several forms, including public verbal abuse, interference with Armato's work at the golf course, and material changes in the terms of his employment.

"A '[c]onstructive discharge occurs when the employer's conduct effectively forces an employee to resign.'" GTE Prods. Corp. v. Stewart, 421 Mass. 22, 33-34 (1995), quoting Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1244-1245 (1994). The standard requires a finding, "based on an objective assessment of the conditions under which the employee has asserted he was expected to work," that the conditions "were so difficult as to be intolerable." GTE Prods Corp., supra at 34.

Here, the facts of record were inadequate to raise a genuine issue of material fact that the plaintiff was constructively discharged. As for the verbal abuse described above, the encounters were brief, and most occurred nowhere near Armato's workplace but during chance meetings around town. The alleged persecutors -- Means, O'Neill, and Colarusso -- were not

town employees, but rather elected officials who had no authority over Armato. Armato's feud with Means and "those people" predated his cooking the books report and continued after his retirement.¹⁴ Armato's screaming matches with Means tended to confirm the well-known and undisputed fact that Means disliked Armato. See Alba v. Sampson, 44 Mass. App. Ct. 311, 315 (1998) (laundry list of facts, including derogatory comments by supervisor about plaintiff and uncivil behavior toward plaintiff, did not support inference of actual malice).

These unpleasant encounters must be balanced against Armato's daily workplace interactions with the supervisors in his direct chain of command that had actual authority over him. First, Armato "thought pretty well" of his immediate supervisor Grover. Although Armato claimed that Ragucci "changed," he admits that, after his cooking the books report, Ragucci, with whom he spoke daily, continued to treat him in a friendly manner.¹⁵ Ragucci liked Armato, a fact corroborated by Sweeney.

¹⁴ Sweeney, a favorable witness for Armato, testified that Boussy and O'Neill, who hated Grover and Ragucci, demanded that Armato be "taken out of the golf course" and placed under the ambit of the DPW. In fact, Armato and the golf courses were placed under the jurisdiction of the DPW around March 2014 -- before Armato made the cooking the books report.

¹⁵ There is substantial undisputed evidence in the record that Ragucci, who was also disliked by Means, Boussy, and O'Neill, protected Armato from their common enemies and argued in favor of Armato's interests. For example, the day after the October 7, 2014, board meeting, Ragucci warned Armato, "Watch your back. They're out to get you. You're in a war zone." Even after the

Nor can Armato show that, because of his protected activity, the defendants interfered with his job and set him up to fail. Cf. 15 LaGrange St. Corp. v. Massachusetts Comm'n Against Discrimination, 99 Mass. App. Ct. 563, 572 (2021), quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (fact finder assessing hostile work environment claim "must consider the totality of the circumstances, which 'may include . . . whether [discriminatory conduct] is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance'").

The recreation committee's demand for nonexistent receipts from the pro shop was made in connection with that committee's investigation of the underperforming golf courses. It was directed at a third party responsible for maintaining them; bookkeeping was not part of Armato's job. By Armato's own admission, the town had "issues with finances"; the profitability of the golf courses was an "ongoing concern" for a number of years; concerns about repairing or replacing the irrigation system dated back to at least 2006; and the petitions

town policy regarding compensation time changed, Ragucci routinely approved significant amounts of it for Armato, putting Armato "well over" the cap. When Visconti questioned the amount of Armato's accumulated compensation time at an April 2015 recreation committee meeting, Ragucci explained the necessity of Armato's working long hours and weekends over the summer. At Armato's request, Ragucci blocked attempts to end the practice of allowing Armato's employees to play free rounds of golf.

submitted annually by Armato's predecessor for a new irrigation system were repeatedly rejected. Moreover, a new irrigation system was a capital improvement that required the approval of the ten-member capital improvement advisory committee and the town meeting.¹⁶ As Ragucci correctly notes in his brief, the record does not support Armato's claim that Ragucci failed to hire much needed replacement workers at Armato's request in September of 2015.¹⁷ In fact, the testimony cited by Armato in support of the claim undercuts his assertion. In any event, even if Ragucci did not hire two replacements, given the hiring trends during this time period, the understaffing and underfunding in every department, and the requests to Ragucci for additional employees from every department, no inference of retaliation or hostile work environment can reasonably be drawn from Ragucci's nonhiring of two replacement workers for the remaining months of the golf season.¹⁸

To the extent that Armato relies on the change in the longstanding practice of allowing him to accrue a significant amount of compensation time, the record shows that the town,

¹⁶ In May 2017, the town meeting voted to appropriate \$585,000 for a new irrigation system.

¹⁷ The board had no authority to hire golf course employees, though it had a right to reject candidates hired by Ragucci.

¹⁸ There was undisputed evidence that the board and Ragucci were attempting during this time to decrease the number of town employees; and that, between 2004 and 2016, the number of municipal employees declined "fairly appreciably."

Ragucci, and several board members had been considering the issue long before Armato engaged in his protected activity.¹⁹ The practice of paying a supervisor to water the course made little economic sense in a town facing budget problems; and where much less costly minimum wage workers could perform the watering duties at the course, no jury could reasonably find that the decision to end the practice with respect to Armato was driven by retaliatory animus as part of a plan to get rid of him.

To the extent Armato relies on the testimony of Sweeney that Boussy and O'Neill created a tense work environment for Armato that caused him to leave, Sweeney clarified that "it was [Armato's] personal decision to leave, but . . . not everybody

¹⁹ For example, from the beginning of his employment in 2006, Ragucci expressed concern to the board about the accumulation and use of compensation time by town employees; immediately eliminated or drastically reduced compensation time for nonunion employees, including the town human resources director; and began negotiating with all the unions that represented town employees to limit and cap the compensation time of their members. In October 2012, the town meeting voted to appropriate money to help pay down the existing liability to town employees resulting from the large amount of accumulated vacation, sick, and compensatory time on the books. Before Colarusso was elected to the board, she served on the town finance board, raising concerns in April 2014 about the amount of the DPW's overtime budget and inquiring whether college students could be hired to do some of the work over the summer; she also made it a campaign issue. Prior to her election, O'Neill attended a town meeting where a vote was taken to end the practice of providing compensation time to town employees. Once she was elected to the board and learned about the continuation of the practice for Armato, she was concerned "it would look bad."

in the complaint, any of the defendants, were really involved in [Armato's] personal decision to leave . . . [and] his decision to leave was actually his; but the others, Boussy and Ann Marie [O'Neill] . . . they kind of like got what they wanted."²⁰

Armato did offer testimony that a person named "Steve," a member of the finance board who walked his dog on the golf course, hid behind trees and took pictures of him. Armato's inference that Means, Boussy, and the board "controlled the whole thing" and sent Steve to the golf course to take pictures is based on nothing more than speculation. The same may be said about Armato's allegation that Visconti went to a golf course at the behest of Means and Boussy to harass Armato. See Godbout v. Cousens, 396 Mass. 254, 261 (1985), quoting Mass. R. Civ. P. 56 (e) ("When a motion for summary judgment is made and supported . . . , an adverse party may not rest upon the mere allegations . . . of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial"). Accord Edwards, 488 Mass. at 568; Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group, 469 Mass. 800, 804 (2014). See also O'Rourke v. Hunter, 446 Mass. 814, 821 (2006), quoting Cullen Enters., Inc. v.

²⁰ Sweeney also clarified that he thought O'Neill was "just going along with Boussy." Sweeney left the board in April 2015, a year before Armato retired.

Massachusetts Prop. Ins. Underwriting Ass'n, 399 Mass. 886, 890 (1987) ("[c]onclusory statements, general denials, and factual allegations not based on personal knowledge [are] insufficient to avoid summary judgment").

To sum up, Armato has shown that, over a twenty-one month period, he got into a number of verbal arguments with some town officials around town while he was not working, and was subjected to one or two acts of harassment at the golf course and a cryptic comment by Colarusso. The board, the recreation committee members, and the defendants had legitimate business reasons for taking the actions that Armato claims unduly interfered with his employment. Viewed from the requisite objective standard, as a matter of law, the acts of harassment did not create such an intolerable and hostile work environment that a reasonable employee would have felt compelled to resign. See GTE Prods. Corp, 421 Mass. at 34. It follows that Armato will be unable to prove the second element of his whistleblower claim. See Edwards, 488 Mass. at 571-573 (clarifying that "determinative cause" standard applies to retaliation claims brought under act). Summary judgment was properly granted on the claim.

4. Intentional interference with advantageous employment relationship. Concluding as we do that Armato's whistleblower claim failed as a matter of law, we determine that his tort

claims against the individual defendants, which were brought on the same constructive discharge theory, failed as well. See Blackstone v. Cashman, 448 Mass. 255, 259-260 (2007) (stating elements of intentional interference with advantageous relations claim in employment context).

5. Civil conspiracy. We conclude, as did the motion judge, that, given the failure of the whistleblower and the tortious interference claims, the defendants were entitled to summary judgment on these claims as well. See Bartle v. Berry, 80 Mass. App. Ct. 372, 383-384 (2011).

Judgment affirmed.

By the Court (Blake,
Massing & Ditzkoff, JJ.²¹),



Clerk

Entered: April 20, 2022.

²¹ The panelists are listed in order of seniority.