COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT
SOUTHERN DISTRICT

FRANK CONDEZ

V.

TOWN OF DARTMOUTH and another[1]

NO. 17-ADCV-163SO

In the NEW BEDFORD DIVISION:

Justice: McGovern, J.
Docket No. 1533CV0828
Date of Decision Appealed: August 8, 2017
Date of Entry in the Appellate Division: October 26, 2017

In the APPELLATE DIVISION:

Justices: Hand, P.J., Kirkman & Finigan, JJ.
Sitting in: Plymouth, Massachusetts
Date of Hearing: December 8, 2017
Date Opinion Certified: May 30, 2018

APPEARANCE FOR PLAINTIFF

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OPINION

[1] David G. Cressman.

KIRKMAN, J. Frank Condez ("plaintiff"), a tenured civil service employee working as a police officer, sued the town of Dartmouth and its administrator, David G. Cressman, pursuant to G.L. c. 149,

§ 148 for improperly withholding wages. Cross motions for summary judgment were filed. A New Bedford District Court judge essentially found for the town.[2] **This is an appeal of the trial court's denial of the plaintiff's claim that he was denied "earned" wages, sick leave compensation, and prejudgment interest on the unpaid wages.**[3]

Background. **The facts are undisputed. The plaintiff began his employment with the Dartmouth police department on September 14, 1998. He rose to the rank of sergeant until he was placed on paid administrative leave on October 1, 2013, pending an investigation of misconduct. Important for purposes of this appeal, he performed no work for the department while on leave. On July 28, 2014, the town's select board issued a notice to the plaintiff charging misconduct and a right to a disciplinary hearing pursuant G.L. c. 31, § 41.**[4] **The parties agreed to a disciplinary hearing before a disinterested hearing officer designated by the chairman of the Civil Service Commission ("commission"), in lieu of a hearing before the appointing authority, under G.L. c. 31, § 41A. Evidentiary hearings were held from late 2014 into early 2015. On October 15, 2015, the commission adopted the decision of the hearing officer and unanimously**

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[2] Upon reconsideration, the court entered a partial judgment for the plaintiff solely on the issue of his entitlement to mandatory treble damages pursuant to G.L. c. 149, § 150, which were due because the town improperly delayed payment of wages that the plaintiff was entitled to receive. That judgment is not disputed or part of this appeal.

[3] The town moved to supplement the record appendix. We allow the motion.

[4] Pursuant to G.L. c. 31, § 41, the Dartmouth select board is the appointing authority with respect to police officers employed by the town.

voted to order the plaintiff's termination from employment. Therefore, the town administrator immediately removed the plaintiff from the payroll.

On November 16, 2015, the plaintiff filed an appeal of the termination decision, pursuant to G.L.

c. 31, § 44, in the Bristol Superior Court.[5] On November 30, 2015, the plaintiff filed this wage action in

the District Court. In the present case, both parties filed motions for summary judgment, and, as a result, judgment entered against the plaintiff on August 8, 2017.

The plaintiff claims the trial court erred and he is entitled to certain wages because the town administrator had no authority to remove the plaintiff from the town's payroll. If this Division were to find in his favor, then it must go on to determine two more issues: (1) whether the plaintiff's wage claim should include accrued, but unused, sick time, and (2) whether the plaintiff is entitled to prejudgment interest on the actual amount of unpaid wages from the day of the violation of G.L. c. 149, § 150. There was no error by the trial court, and the plaintiff is not entitled to any further sums under the Wage Act.

Standard of review. **It is well settled that a court will grant summary judgment where there are no genuine issues of material fact and where the record, including the pleadings and affidavits, entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and entitlement to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). We review a decision to grant summary judgment de novo. See *Boazova v. Safety Ins. Co.*, 462 Mass. 346, 350 (2012).**

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5 The Superior Court affirmed the commission's decision on September 25, 2017, in *Condez v. Civil Serv. Comm'n et al.*, No. 1673CV0796.

"[W]here both parties have moved for summary judgment, the evidence is viewed in the light most favorable to the party against whom judgment [has entered]." *Id*., quoting *Albahari v. Zoning Bd. of Appeals of Brewster*, 76 Mass. App. Ct. 245, 248 n.4 (2010). "A party seeking summary judgment may satisfy its burden of demonstrating the absence of triable issues, see *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989), by showing that the party opposing the motion has no reasonable expectation of proving an essential element of its case." *Id*., citing *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

***Discussion*. "Before the enactment of civil service laws in the Nineteenth Century, public employees served largely at the will of their employers. See Civil Service Act, St. 1884, c. 320. The civil service laws were enacted in order to protect employees from unjustified removal or suspensions.**

See *Branche v. Fitchburg*, 306 Mass. 613, 614 (1940). The civil service system sought to 'assur[e] that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.'" *City of Worcester v. Civil Service Comm'n*, 87 Mass. App. Ct. 120, 124 (2015), quoting G.L. c. 31, § 1. The Civil Service Act states that a tenured employee shall not be discharged or laid off except for "just cause" and except in accordance with specific procedural requirements set out in G.L. c. 31, § 41. Sections 43 and 44 of the Act provide a hearing process and subsequent judicial review in the Superior Court.

The Wage Act, G.L. c. 149, §§ 148-150, on the other hand, is designed "to protect employees and their rights to wages." *Mui v. Massachusetts Port Auth.*, 478 Mass. 710, 711-712 (2018), quoting *Electronic Data Sys. Corp. v. Attorney Gen.*, 454 Mass. 63, 70 (2009). An aggrieved employee may pursue a wage claim in the District or Superior Court on separate grounds from a disciplinary grievance that is pursued under the Civil Service Act. *Fernandes v. Attleboro Hous. Auth.*, 470 Mass. 117 (2014). Simply put, an aggrieved employee may seek relief from employment

termination based on just cause under the Civil Service Act, but also pursue a wage claim for a wrongful computation of wages on a theory other than wrongful termination. *Id.* See, e.g., *Awuah v. Coverall N. Am., Inc.*, 460 Mass. 484, 493 n.20 (2011) ("[T]he Wage Act is intended to protect employees from the harms of misclassification . . . ."). In the present case, however, the plaintiff conflates his statutory remedies by basing his wage claim on a procedural error in the termination of his employment after he lost his civil service hearing.

The plaintiff claims that because the selectmen for the town of Dartmouth never voted to terminate his employment, he should have remained on the payroll. But the undisputed facts are that the plaintiff chose to exercise his disciplinary hearing rights before the commission, rather than the town's selectmen (the appointing authority), pursuant to G.L. c. 31, § 41A. Thus, he was not unilaterally removed from the town's payroll by the town administrator as he claims in this appeal; rather, he was removed in

accordance with the order of the commission. The plaintiff should have challenged any procedural irregularity in his removal pursuant to G.L. c. 31, § 42. Cf. *Malden Police Patrolman's Ass'n v. City of Malden*, 92 Mass. App. Ct. 53, 57-59 (2017) (discussing doctrines of exhaustion of remedies and primary jurisdiction and their role promoting proper relationships between courts and administrative agencies). He chose not to, however, and seeks such relief under the Wage Act.

His reliance on the Wage Act is misplaced due to the specific procedure set out for civil service substantive and procedural grievances in contrast to claims for wages due under the Wage Act. See *Grady v. Commissioner of Correction*, 83 Mass. App. Ct. 126, 131-132 (2013) ("Statutes dealing with the same subject should be interpreted harmoniously to effectuate a consistent body of law, and the more specific statute should control over the more general one, so long as the

Legislature did not draft the more general statute to provide comprehensive coverage of the subject area."). See also *Peckham v. Mayor of Fall River*, 253 Mass. 590, 593 (1925) ("The appropriate procedure for trying out all questions involved in a removal or suspension of one entitled to the protection of the civil service law is that provided by the [Civil Service Act] . . . ."). In any event, for the reasons stated in the defendants' brief at pages 22-25, there was no procedural irregularity in the plaintiff's removal.

Nevertheless, the plaintiff is demanding wages for the period of time after which he was terminated from his job. That claim is based on his nonsensical belief that he was not terminated from the job, but rather was ordered not to report for work by the employer. And by complying with that order, he was entitled to compensation for not performing any actual work as a police officer. Yet he stipulated in the present proceeding that he has not performed any work for the Dartmouth police department since the decision terminating his employment. Clearly then, he did not earn a compensable wage after his employment was terminated on October 15, 2015. G.L. c. 149, § 148. See *Awuah*, *supra* at 492, quoting Black's Law Dictionary 584 (9th ed. 2009) (word "earn," while not statutorily defined, in its plain and ordinary meaning is "'[t]o acquire by labor, service, or performance,' or '[t]o do something that entitles

one to a reward or result, whether it is received or not'"). In sum, the plaintiff is not entitled to any "wages" for the time period after October 15, 2015.

His claim for sick time wages must similarly fail pursuant to the ruling in *Mui v. Massachusetts Port Auth.*, 478 Mass. 710 (2018). In this case, pursuant to his union's contract, the plaintiff's accrued sick time is not available for a buy back because he did not "retire" within the terms of the collective bargaining agreement. The denial of the buy back was based on his discharge for good cause that took the plaintiff outside of the retirement context. Yet he now

claims that he was denied compensation for his accrued sick leave in retaliation for filing the present law suit. In view of the procedural and substantive history of the plaintiff's discharge for good cause, the argument has no merit. In addition, the argument was never pleaded and will not be considered here. *Karaa v. Yim*, 86 Mass. App. Ct. 714, 718-719 (2014).

Finally, the plaintiff claims he is entitled to recovery of interest of $325.02 as prejudgment interest for wages earned after his employment was terminated. For the reasons stated above that he earned no wages after October 15, 2015, he is not entitled to the interest claimed.

For the foregoing reasons, the judgment of the District Court is affirmed.

HON. KATHRYN E. HAND, Presiding Justice
HON. J. THOMAS KIRKMAN, Justice
HON. THOMAS L. FINIGAN, Justice

This certifies that this is the Opinion of the Appellate Division in this case.
A True Copy, Attest:

Brien M. Cooper, Clerk