COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. No. SJ-2021-0129

CHRIS GRAHAM, JORGE LOPEZ, MEREDITH RYAN, KELLY AUER, COMMITTEE FOR PUBLIC COUNSEL SERVICES, and HAMPDEN COUNTY LAWYERS FOR JUSTICE,
Petitioners,

v.

DISTRICT ATTORNEY FOR HAMPDEN COUNTY,
Respondent.

PETITIONERS' SUPPLEMENTAL STATUS REPORT

Petitioners respectfully supplement to their Status Report dated September 16, 2021, with the attached Exhibit A, a decision of the Superior Court denying summary judgment to Chief Deputy Steven Kent, among others, in the matter *Vigneault v. Springfield, et al.* (Hampden Superior Court Docket No. 1779-00060) dated September 13, 2021. That case, in summary, involves allegations that the Springfield Police Department (the "SPD") unlawfully retaliated against and intimidated Steven Vigneault, a narcotics unit officer who cooperated with the Department of Justice. Petitioners did not learn of this decision until after they filed their status report.

Among other things, the decision states:

- SPD official Steven Kent—the same person upon whom the HCDAO is exclusively relying to locate and produce records of misconduct by the SPD's narcotics unit—himself refused to answer deposition questions concerning the narcotics unit based on his own Fifth Amendment right against self-incrimination. *See* Ex. A at 10, 16, 22. The court noted that he asserted the right "extremely broadly" and apparently refused to answer "virtually all questions" about the narcotics unit because the answers might tend to show he committed crimes. *See id.* at 10, 22.

- Kent was one of six SPD officers who apparently asserted their Fifth Amendment right to avoid answering virtually all questions about the narcotics unit in depositions in that case. *See id.* at 10, 22. The court ruled that, as a result of their invocation of the privilege, a finder of fact may draw adverse inferences against these officers

(including Kent), specifically that "those invoking the privilege participated in a scheme" to coerce and intimidate Vigneault into resigning as means of covering up misconduct within the narcotics unit. *See id.* at 12-13.

- Kent has apparently had a significant amount of contact with the HCDAO about misconduct in the SPD's narcotics unit. In 2016, Kent wrote an email stating that he had personally communicated with Hampden County District Attorney Anthony Gulluni about the investigation of SPD officer Gregg Bigda and was told "on the 'QT' that the investigation of [Bigda] was 'most likely going nowhere.'"[1] *Id.* at 5.

- Vigneault has evidently made sworn statements, both in a verified complaint and in deposition, that there was "heavy on-duty drinking" in the narcotics unit and that specific narcotics unit officers—including Kent—drank alcohol on duty. *See id.* at 2, 30. Vigneault has also apparently made statements to the effect that narcotics unit officers filed false reports, unlawfully beat suspects, used seized drug money to purchase liquor, and engaged in witness intimidation. *See id.* at 9-10, 12, 25, 26.

The HCDAO's status report fails to explain how the documents reflecting allegations of misconduct against Deputy Chief Kent will be disclosed to criminal defendants. Nor does it discuss how the allegations and evidence of misconduct against Deputy Chief Kent further disqualify him, as well as any other SPD officer, from determining which documents about SPD misconduct will be disclosed to criminal defendants, or withheld.

[1] Bigda was ultimately not charged by the HCDAO, and he was later indicted for the same incident by the U.S. Department of Justice. *See United States v. Bigda*, No. 18-30051-MGM (D. Mass.).

Dated: September 20, 2021

Respectfully submitted,

/s/ Matthew P. Segal

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Exhibit A

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1779-00060

STEVEN VIGNEAULT
Plaintiff,
vs.

CITY OF SPRINGFIELD, JOHN BARBIERI, GREGG BIGDA, STEVEN KENT, LUKE COURNOYER, ALBERTO AYALA, EDWARD KALISH, JOSE ROBLES and GAIL GETHINS,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON CROSS- MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, Steven Vigneault ("Plaintiff" or "Vigneault) filed this case alleging whistleblower, civil rights, misrepresentation intentional interference and conspiracy claims against the City Of Springfield, John Barbieri ("Barbieri"), Gregg Bigda ("Bigda"), Steven Kent ("Kent"), Luke Cournoyer ("Cournoyer"), Alberto Ayala ("Ayala"), Edward Kalish ("Kalish"), Jose Robles ("Robles") and Gail Gethins ("Gethins").[1] On March 12, 2021, each of the Defendants filed a Motion for Summary Judgment ("Motions"), which Vigneault has opposed. On the same day, Vigneault filed "Plaintiff's Cross-Motion for Summary Judgment" ("Cross-Motion"). The court heard the matter in zoom hearings on July 7 and 28, 2021. Upon review of the written materials, the court DENIES THE MOTIONS, except ALLOWS THE MOTIONS OF DEFENDANTS KALISH, ROBLES AND GETHINS. The court DENIES the CROSS-MOTION IN ITS ENTIRETY.

[1] On June 13, 2017, the court (Callan, J.) dismissed the claims against Joseph Gentile, Kevin Coyle and the International Brotherhood of Police Officers, Local 364 for failure to state a claim upon which relief can be granted relying, among other things, upon immunity grounds.

BACKGROUND

The parties' Rule 9A(b)(5) statement of facts and response establishes the following material facts, drawing all inferences favorable to Vigneault as opposing party and accepting the allegations of the complaint (which Vigneault verified on January 21, 2017) where the moving parties have failed to meet their burden to show that Vigneault cannot prove those allegations at trial (see below, Discussion, Part I). While the court recognizes that these statements are not proven, and may well turn out not to be true, it must assume their truth for purposes of summary judgment.

Steven Vigneault ("Plaintiff"/ "Vigneault") was duly appointed a Springfield Police Officer on January 20, 2013. Upon transferring into the narcotics unit, Vigneault began to earn significant overtime pay.[2]

On-duty drinking: Upon entering the narcotics unit, Vigneault observed heavy on-duty drinking, in particular, by Greg Bigda, who could not perform the essential functions of his job. Bigda was frequently drunk and carrying his firearm. Defendant Kent was drinking on the Job. Defendant Bigda would show up to work drunk and hung over. Defendant Ayala drank while on duty. The entire narcotics unit was drinking at night while on duty and under the supervision of

[2] It is true that Vigneault offers no citation for this proposition, but the Defendants offer no Rule 9A(b)(5) statement or supporting evidence to show that overtime opportunities were no greater in the narcotics unit than in the patrol unit to which Vigneault was transferred. See City's Rule 9A(b)(5) Statement, par. 22 ("There is no difference in pay between narcotics and patrol). which does not address overtime and is supported by a cut-off citation to Vigneault's deposition (pp. 201, 202), which excises the response, if any, to a more general question about "monetary effect" which appears on the following page and constitutes a negative answer to a negative question, leaving the entire issue unclear. Follow-up questioning established facts that the defendants have not disproven through undisputed evidence. See below, Discussion, Part II.a.2

Defendants Kent & Ayala. Plaintiff was repeatedly told "you didn't see anything, that didn't happen, keep your fucking mouth shut."

Vigneault complained to Defendants Ayala, and Kent and to Hitus, his supervisors, about the excessive on duty drinking. A jury could infer that supervisors took steps to protect Bigda.

February 26 Palmer/Wilbraham Incidents: On February 26, 2016, Vigneault left an unmarked cruiser unattended in Palmer. Juveniles stole the car. The next day, Vigneault learned that a Wilbraham police officer was pursuing the vehicle, which was headed for Palmer. A Wilbraham officer, Christopher Rogers and State Police Trooper Baird (with a canine) chased the suspects and retrieved the unmarked cruiser. Vigneault and Bigda stayed at the Palmer Police station until completion of the juveniles' interrogation in Palmer. During that interrogation, Bigda and Cournoyer threatened the juveniles, including making racial slurs and threats to crush their skulls once they crossed the Springfield Line. The interrogation was captured on video tape. During the interrogation Cournoyer failed to intervene and stop Bigda. Bigda and Defendant Cournoyer drove the juveniles to the juvenile detention facility in Springfield, where they were booked and processed. Vigneault wrote multiple reports and left. He reported Bidga's conduct to his Lieutenant, Defendant Ayala.

The Wilbraham Police Chief reported these events directly to Hampden County District Attorney, Anthony Gulluni. At the time the matter was reported to DA Gulluni, Defendant Barbieri, Kent, IBPO President Joseph Gentile and other managers at the Springfield Police Department made a concerted effort to protect Defendant Bigda. During these periods of time, supervisors told Vigneault, "you didn't see anything, keep your fucking mouth shut." The

Defendants began giving Mr. Vigneault the silent treatment in the workplace and it became hostile. Vigneault felt threatened and uncomfortable at work.

March 12 Assault by Bigda: On March 12, 2016, Bidga, while intoxicated, broke into the home of Defendant Gethins then assaulted her and Vigneault. Gethins testified at a March 14, 2016 hearing under G.L. c. 209A, that Bidga showed up to her home repeatedly threatened her and Vigneault and felt a gun strapped to his body. Restraining orders under G.L. c. 209A issued against Bidga. He later violated the orders. Vigneault reported this conduct, which resulted in issuance of a criminal complaint against Defendant Bigda on March 12, 2016.

On the night he broke into Defendant's Gethins home, Bidga told Vigneault verbatim, "I'm going to get you to transfer. I have the power to have you transferred. I'm going to ruin your career." Defendant Bigda made repeated threats towards Vigneault and Defendant Gethins. Defendant Bigda left a voicemail for Defendant Gethins on March 14, 2016, stating "Hey whore, nice to meet ya', I'll take care of all of you people in the future, I'm glad I did what I did."

Alleged Retaliation: The Saturday after he reported Bigda's conduct, Plaintiff received a telephone call from Defendant Ayala indicating he should request a transfer out of the unit or would be kicked out of the unit. Defendant Barbieri had Deputy Chief Marc Anthony meet with Plaintiff. D.C. Anthony informed the Plaintiff that he was like a cousin to the narcotics unit and Greg was like a brother and that Barbieri was having him transferred out of the unit. Within two days after Vigneault complained to his supervisor, Defendant Kent, about Bigda's practice of drinking alcohol while on duty. The City began to transfer him out of the Narcotics Unit. Vigneault alleges that the transfer out of the narcotic unit prevented him from earning routine overtime pay through the narcotics unit. As explained in f.n. 1 above and the "Discussion"

below, the Defendants have not shown that Vigneault will be unable to prove this allegation at trial.

The last time Vigneault worked a shift in the Springfield Police Department was in March, 2016. From March to October, he worked for the Air National Guard. From October to December 3, 2016, he worked at the VA Hospital.

By April 1, 2016, Defendant Kent already had a replacement for Vigneault and wrote an email stating that he spoke to the District Attorney Anthony Gulluni and that he got it on the "QT" that the investigation of Defendant Bigda was "most likely going nowhere." Defendant Kent further exchange emails with Springfield Police Department Management stating that "The PC and Deputy D.C. are in the loop. P.C. seems to be on Gregg's side." Defendant Kent admitted he spoke with Bigda and was told that Bigda spoke to Defendant Barbieri and Defendant Barbieri was on Bigda's side. A jury could find that, during this period of time, Defendant Barbieri and Bigda were social friends. Officer Joshua Dufresne provided a statement that the friendship between Defendant Barbieri and Bigda played a role in Bigda not being criminally charged for the armed home invasion. A jury could so find.

Defendant Barbieri commissioned an IIU investigation against Defendant Bigda for the home invasions at the Defendant Gethin's home. He assigned Officer Richard T. Pelchar to conduct the IIU investigation.

On May 30, 2016, the IIU report completed its report regarding Bigda's invasion into Gethins' home. A log of cell phone calls supports an inference that, on the night Defendant Bigda broke into Gethins' home, he exchanged calls and texts with Defendant Barbieri.[3]

[3] Arguably, the phone logs were authenticated because the defendants produced them, thereby acknowledging their authenticity. Even if that is not so, the defendants have failed to meet their burden of proving that Vigneault cannot authenticate them at trial.

Defendant Barbieri withheld the information as to his contact and calls with Defendant Bigda from the IIU Officer investigating events.

Bidga called Defendant Barbieri from a cell phone right after he broke into Defendant's Gethins home. Bigda never produced that cell phone to the FBI and he claimed that it fell into a pool.

On June 2, 2016 (three days after the May 30 IIU report), Defendant Barbieri issued disciplinary charges against Vigneault and Defendant Gethins alleging a host of charges including allowing Defendant Bigda to leave Gethin's home while intoxicated, making False Statements, Neglect of Duty and Willful Maltreatment of Prisoner, allegedly by Defendant Bigda. Given the timing and Barbieri's non-disclosures, a jury could find that Barbieri initiated these charges against Vingneault and failed to disclose his own role in the aftermath of the home invasion only to assist Defendant Bigda.

While this was occurring, Defendant Barbieri initiated another IIU investigation against Bigda and other for the alleged Palmer incident. A jury could infer that Barbieri never disclosed to Sargent Andrews that Defendant Bigda had been calling and texting him right after he entered Gethin's home or his relationship with Bigda. A jury could also infer that Barbieri made material misrepresentations to the media, his investigating officers, and the public as to when he learned of the video and when he could have initiated charges against Bigda for the video.

Defendant Barbieri claimed that July 23, 2016 was the first time he learned of a video tape which depicted Defendants Bigda and Cournoyer abusing suspects. The defendants have not met their burden to show that Vigneault will be unable to disprove this.[4] Referring to the video

[4] In particular, they have not shown that IIU Officer William Andrews' contrary position will be unavailable at trial. Andrews sent an email to Defendant Barbieri outlining how he scapegoated him in Defendant Bigda's IIU investigation noting that not only were the interrogation videos in

of the Palmer incident, D.C. Cheetham authored an email to D.C. Larry Brown affirming that Barbieri had "it in his hand since June 30, 2016." D.C. Cheetham provided a statement that D.C. Brown knew about the video all along. A photograph of the IIU file shows that the Bigda videos were attached to the IIU report sent to Barbieri. Barbieri's statements, if false, may support an inference that he was conscious of liability if he told the truth.

Disciplinary Proceedings: Upon the conclusion of Sargent Andrews IIU report, Defendant Barbieri issued charge letters to many of the Defendants in this matter and scheduled a hearing for mid-August of 2016. He then had conversations with IPBO President Joseph Gentile, which all focused on Defendant Bigda.

Defendant Barbieri initiated at least one conversation with Gentile focusing upon Vigneault. Barbieri told Gentile that if Officer Rogers identified Vigneault as the kicker, that Vigneault would be fired and could be prosecuted and would lose his pension benefits and that he could resign or be fired.[5] Barbieri initiated a direct meeting on this topic with Gentile, even though the SPD's usual contact with the Union was D.C. Cheetham.

On August 10, 2016, Vigneault received a text from Coyle saying, "call me right away." Coyle told Vigneault that Rogers was going to ID him and that he could resign or be terminated at the hearing that was to occur on August 11, 2016. Coyle told him he must have "pissed somebody off."

Coyle and Gentile gave Vigneault the option to resign or be fired. They told him that he had until 11:00 A.M. the next day to decide; that he could lose his pension; that he was being

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the IIU file but that four superior officers had the IIU report as well. Andrews provided a statement that all Defendant Barbieri intended to do was "yell at Bigda" for his actions in Palmer.

[5] See Vigneault Tr. 197. The jury could infer that the source of the union's information was Barbieri.

investigated by CPACT Unit and could be prosecuted. Vigneault claims that neither Coyle nor Gentile prepared Vigneault for the hearing, by discussing witnesses with him or reviewed the video with him or any possible defenses. Coyle had an August 10, 2016 call with Vigneault; Coyle never explained his Collective Bargaining Agreement Rights to him; Coyle never had contact with Vigneault again. Gentile insisted on obtaining the resignation and Vigneault's work credentials within the 12-hour time period provided by Coyle and Gentile.

At this point in the narrative, there are numerous disputes of fact and matters for jury resolution, including what Barbieri said to Gentile, what was conveyed to Vigneault and whether there were any actual or implied threats or any implications that Barbieri had information that Officer Rogers' testimony would incriminate Vigneault. A jury may find that Barbieri's statements, initiated by him outside the usual chain of command, were threatening and were specifically directed at Vigneault. It could also find that Barbieri's unprecedent direct contact with Gentile and specific threat implied that he expected Officer Rogers to identify Vigneault as the kicker – despite Officer Rogers' prior statement that he could not identify the SPD officer who assaulted the juvenile and despite the lack of video evidence against Vigneault. Indeed, Gethin's statement to Vigneault that the City was "bluffing" suggests that a reasonable person would interpret Barbieri's statement, in context, as implicitly saying that Rogers was expected to identify Vigneault. Barbieri's threat and implied statement had particular force because of statements Vigneault had previously given, which would permit an inference that Vigneault was the only SPD officer in a position to be the assailant. Barbieri gave Vigneault fewer than twelve hours to resign on August 10, 2016. There is evidence to support an inference that he did so to protect Bidga (or others) or for some other inappropriate motive, particularly where no

legitimate reason appears why he would break the chain of command or actively seek to disrupt the usual hearing process in this matter.

In fact, Officer Rogers actually stated he did not even see the actual kick done by the plain-clothed officers. He never identified the officer, never told his police chief that he could identify any officers and never had any contact with Defendant Barbieri. Given Barbieri's position and his access to the video and to information from the Wilbraham Police Department, a jury could find that Barbieri knew or believed that Rogers's testimony would not implicate Vigneault. If it draws that conclusion, then Vigneault resigned under threat of loss of pension and reputation and because of the false information provided to him by Barbieri.

DLR Proceeding. Vigneault filed an Appeal at the Department of Labor asserting his employment law rights under his Collective Bargaining Agreement. After an evidentiary proceeding, the hearing officer ruled against him and in favor of the Union, Gentile and Coyle.

FBI Interviews: Vigneault's first debriefing with the FBI was on March 1, 2017. Vigneault's initial debriefing included information about, among other things:

- the intoxicating liquors that were consumed by officers while on duty;
- Illegal beating of suspects on drug raids and the using of drug raid money to purchase intoxicating liquors that were brought into the Springfield Police Department;
- Bigda's racial remarks and illegal beating of suspects including in a State Street-Hancock Street raid, a Central High School incident, an interaction with an American International College student and an Oswego Street Drug Raid where Bigda and co-defendants beat a suspect;

- Complaints about the excessive beatings and Defendant Ayala stating "you didn't see anything, keep your mouth shut about the narcotics unit outside of the narcotics unit."
- Fabrication of police reports, confidential information and search warrant affidavits by Bigda, Kent & Ayala.

The United States Justice Department launched an investigation into the practices of the Springfield Narcotics Unit resulting from data provided by Vigneault. The case highlighted in the report were ones about which Vigneault spoke and provided data to the Justice Department.

Assertion of Fifth Amendment Privilege: Defendants Bidga, Cournoyer, Kent, Ayala, Robles, and Gethins asserted their Fifth Amendment right to protect against self-incrimination in depositions in this case extremely broadly, including as to material matters in this case. Bigda specifically asserted his 5th Amendment right to protect against self-incrimination regarding meetings with Attorney Coyle in August 2, 2016, in response to inquiries concerning an alleged plan to blame Vigneault for the pending charges contained within the charge letter.

While Defendant Kalish asserted his Fifth Amendment privilege before the Federal Grand Jury, he was immunized and did not invoke his Fifth Amendment privilege in response to questions in this case. The only other defendant who did not invoke his Fifth Amendment privilege in depositions in this case was Barbieri.

DISCUSSION

On summary judgment, the moving party has the burden to demonstrate that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. Foley v. Boston Hous. Auth., 407 Mass. 640, 643 (1990). "[T]he court does not pass upon the credibility of witnesses or the weight of the evidence [or] make [its] own decision of facts."

Shawmut Worcester County Bank, N.A. v. Miller, 398 Mass. 273, 281 (1986). Rather, "[a]ll reasonable inferences drawn from the material accompanying a motion for summary judgment 'must be viewed in the light most favorable to the party opposing the motion.'" Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 632 (1996) (citations omitted). See Parent v. Stone & Webster Engr. Corp., 408 Mass. 108, 112-113 (1990). The movant may also meet its burden by showing that the Paintiffs has no reasonable expectation of producing evidence on a necessary element of his case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Once the moving party meets the burden, the opposing party must advance specific facts that establish a genuine dispute of material fact. Id.

I.

A moving party must affirmatively show the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). The court must deny a summary judgment motion if a moving party fails to meet the burden to show that the Plaintiff cannot prove his case, regardless of weaknesses in the opposition. See, e.g. Khalsa v. Sovereign Bank, 88 Mass. App. Ct. 824, 828-829 (2015).

As shown in the "Background" above, there are a number of allegations on which the Defendants have failed to meet their burden as moving party. The "Discussion" below highlights those allegations and demonstrates why the Defendants have failed to meet their burden as moving parties. The defendants also rely on a number of alleged facts that do not appear in their Rule 9A(b)(5) statement, including the assertion that there was no difference in overtime opportunity between the narcotics unit and the unit to which Vigneault was transferred. They also fault Vigneault's response without addressing the threshold question – whether they

met their burden, as moving parties, to show that Vigneault cannot prove his assertions at trial. These are serious deficiencies in the Motions.

Compounding the problem for numerous defendants is their invocation of the Fifth Amendment privilege, including in response to questions about resolution of the charges against themselves in August, 2016. Under "the long-standing rule in Massachusetts that an adverse inference may be drawn against a party who invokes a testimonial privilege in a civil case." Mass. Guide to Evid., § 525(a), COMMENT, citing Phillips v. Chase, 201 Mass. 444, 450 (1909) (attorney-client privilege). See Frizado v. Frizado, 420 Mass. 592, 596 (1995) (privilege against self-incrimination).

> "In a civil action, a reasonable inference adverse to a party may be drawn from the refusal of that party to testify on the grounds of self-incrimination." Quintal v. Commissioner of the Dept. of Employment & Training, 418 Mass. 855, 861 (1994), quoting from Labor Relations Commn. v. Fall River Educators' Assn., 382 Mass. 465, 471 (1981). However, "the adverse inference drawn from the silence of a party is insufficient, 'by itself, to meet an opponent's burden of proof.' " Ibid., quoting from Custody of Two Minors, 396 Mass. 610, 616 (1986). "Instead, 'a case adverse to the interests of the party affected [must be] presented' before an adverse inference may be drawn." Ibid., quoting from Custody of Two Minors, supra.

Scully v. Beverly Retirement Board, 80 Mass. App. Ct. 538, 544-545 (2014). This does not mean that the plaintiff must prove his entire case without reference to the claim of privilege, but only that "a case adverse to the interests of the party affected [must be] presented so that failure of a party to testify would be a fair subject of comment." Custody of Two Minors, 396 Mass. at 616, quoting Mitchell v. Silverstein, 323 Mass. 239, 240 (1948).

Given the proximity of these invocations to the proceedings during which Vigneault alleges that he was transferred, and, later, coerced and intimidated into resigning, the fact-finder may infer that those invoking the privilege participated in a scheme, in concert with the other

defendants, to accomplish in that result by means of covering up drinking while on duty, making false reports, and intimidating Vigneault as a witness.[6]

II.

Vigneault alleges that the City violated the state Whistleblower Protection Act, G.L. c. 149, §185 (Count I) and interfered with his collective bargaining rights (Count VI).

A.

"To prevail on a whistleblower claim, '[t]he plaintiff-employee must prove that (1) the employee engaged in a protected activity; (2) participation in that activity played a substantial or motivating part in the retaliatory action; and (3) damages resulted.'" Cristo v. Worcester County Sheriff's Office, 98 Mass. App. Ct. 372, 376 (2020), quoting Trychon v. Massachusetts Bay Transp. Auth., 90 Mass. App. Ct. 250, 255 (2016). The City's Motion contests all three elements. There is no dispute that Vigneault was an "employee" within the meaning of G.L c. 149, §185 (a)(1) at least until resignation on August 10, 2016.[7]

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[6] Moreover, the court declines to reward the defendants who have asserted privilege indiscriminately, in response to questions to which the privilege almost certainly does not apply. Moving parties who fail to provide discovery may also fail to meet their burden under Kouravacilis to show that the plaintiff cannot prove his case. Moreover, the court has discretion to deny summary judgment (see below), and does so here as to the defendants who have claimed 5th Amendment privilege, where the case will go to trial against other defendants in any event, most or all of the defendants may be witnesses even if dismissed as parties, and little or no trial time would be saved by granting summary judgment to parties who have not been forthcoming in discovery.

[7] There is no need to decide whether Vigneault remained an employee until adjudication of his complaint against Gentile, Coyle and the Union before the Massachusetts Department of Labor Relations on February 13, 2020. In the Matter of IBPO, Local 364 and Steven Vigneault, Case No. MUPL-17-5778. If so, then statements to the FBI occurred while Vigneault was an employee protected by the Whistleblower Act. In that regard, G.L. c. 149, § 185 (a)(1) defines "employee" as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." For a very recent decision interpreting almost exactly the same language (in G.L. c. 149, § 52E) broadly to accomplish the remedial purposes of the applicable statute, see Osborne-Trussell v. Children's Hospital, 488 Mass. 248, 254-259

1.

The City first argues that Vigneault cannot recover under the Whistleblower Protection Act because he has not "brought the activity, policy or practice in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment, to the attention of a supervisor of the employee by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice." G.L c. 149, §185 (c)(1) (emphasis added). There is ample evidence that Vigneault did bring his concerns to the attention of Defendants Kent and Ayala, who were supervisors within the meaning of G.L. c. §185 (a). He did not, however, do so in writing.

In Cristo v. Worcester County Sheriff's Office, 98 Mass. App. Ct. 372, 377 (2020), the Appeals Court held that the notice requirement applies only to disclosure-based claims, that is, claims under G.L. c. 149, § 185(b)(1). The court also stated that notice is required "only before an employee brings misconduct to the attention of a public body, not before an employee brings misconduct to the attention of a supervisor." Id. at 379. Vigneault therefore may maintain his claim for retaliation on account of complaints he made to his supervisors, which appears to be the thrust of his allegations regarding pre-termination events.

Moreover, even as to reports to outside agencies (such as the FBI), the statute excuses compliance with the written notice requirement in the following circumstances:

> (2) An employee is not required to comply with paragraph (1) if he: (A) is reasonably certain that the activity, policy or practice is known to one or more supervisors of the employer and the situation is emergency in nature; (B) reasonably fears physical harm as a result of the disclosure provided; or (C) makes the disclosure to a public body as defined in clause (B) or (D) of the definition for "public body" in subsection (a) for the purpose of providing evidence of what the employee reasonably believes to be a crime.

(2021) (plaintiff was an "employee" where she had been hired into an employment relationship, but had yet to perform services).

G.L c. 149, §185 (c)(2). If post-termination activity is properly considered, a jury could find that part (C) of this exception applies to Vigneault's statements to the FBI (a "public body") concerning crimes arising out of the excessive use of force and narcotics officers' ongoing drinking on the job, which runs at least a risk of being under the influence during police activity and while driving.

2.

The City next argues that Vigneault cannot show that retaliation was the motive for any adverse employment action. It assumes that the only relevant employment action was Vigneault's termination, but Vigneault also alleges that his forced transfer from the Narcotics Division was an adverse employment action.

On the transfer issue, the City argues that Vigneault suffered no adverse employment action, because "[t]here is no difference in pay between narcotics and patrol." See City's Rule 9A(b)(5) Statement, par. 22. This assertion does not address overtime. For factual support, the City's Rule 9A(b)(5) statement cites incompletely to Vigneault's deposition (pp. 201, 202). On the following deposition page (203), Vigneault responded to a more general question about "monetary effect" by answering "no" to a negative question, leaving the entire issue unclear. Upon further questioning, Vigneault testified that he would do fewer "road jobs" when in narcotics than as a patrolman, but that narcotics offered the opportunity for "a lot of coming in early and doing overtime with the day shift for midday raids, for assistance." Tr. 203. Also, members of the narcotics unit "get a lot of court time" and "[t]he guys who were in the unit for years, they had court time every day." When asked squarely whether "there was actually a

detrimental effect to go in the Narcotics Unit,"[8] Vigneault testified that "it depends." He elaborated: "[u]ntil I could get cases and work a lot of CIs and get a lot of arrests, I just had to put my time in to get to do what they were doing, to get court time." Given the numerous considerations and judgmental inputs, Vigneault might be able to show that, despite identical base salaries, he would have earned more had he stayed in the narcotics unit long enough. Most importantly for purposes of the Motions, given the state of the summary judgment record, the City has failed to establish the plaintiff's inability to make that showing.

Even as to the termination, the City's argument (not presented as a supported, statement of undisputed fact) that Vigneault "voluntarily resigned" (City Mem. at 5) is highly contested and raises numerous genuine disputes of fact. There is evidence of personal friendships and decisions favoring Bidga over Vigneault – not the least of which is the City's offer and acceptance of a 60-day suspension for Bidga for the Palmer incident while Vigneault received no such offer. And, as it turns out, not only did Bigda make threats (as the City knew), but the evidence ultimately identified him as the culprit, not Vigneault. The City tried to explain all these circumstances, but the jury does not have to agree with the City's explanations, particularly where numerous defendants, including supervisors, have taken the Fifth Amendment on key questions.

Moreover, based on Vigneault's testimony, a jury could find that Barbieri coerced Vigneault to resign by threatening to fire him and implying that Officer Rogers was going to implicate Vigneault in the Palmer excessive force incident. The same testimony would support a finding that the decision-maker – Barbieri – gave a false reason for the threatened termination,

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[8] This question was perhaps not what the questioner intended to ask, because the real question was whether there was a detrimental effect to leave (not "to go to") the Narcotics Unit and go into Patrol.

namely expected inculpatory testimony from Officer Rogers. Giving a false reason for an employment action supports an inference of unlawful (here, retaliatory) motive. See Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 689 (2016) (citations omitted).

To be sure, Barbieri states that he never implied that Rogers' testimony would be inculpatory and never tried to force Vigneault to resign. Gentile and Coyle's testimony probably will support Barbieri's version. The jury does not have to believe Barbieri, Gentile and Coyle, however. It may believe Vigneault's testimony, which finds some support in the circumstantial evidence, discussed above, pp. 8-9. From that testimony, the jury may infer that what Coyle and Gentile told the plaintiff accurately repeated Barbieri's statements. For summary judgment purposes, then Vigneault's version of what Coyle and Gentile told him would support an inference that Barbieri falsely stated or implied that Barbieri expected Rogers to identify Vigneault as the assailant.

This case thus falls within the general rule: "An employer seeking summary judgment in a discrimination case faces a high burden because 'the question of the employer's state of mind (discriminatory motive) is elusive and rarely is established by other than circumstantial evidence.'" Scarlett v. City of Boston, 93 Mass. App. Ct. 593, 597 (2018), quoting Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 38 (2005) (quotation omitted). See also Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 689 (2016) (". .. the ultimate issue of discriminatory intent is a factual question" . . . . A defendant's motive "is elusive and rarely is established by other than circumstantial evidence," therefore "requir[ing] [a] jury to weigh the credibility of conflicting explanations of the adverse hiring decision.") (citations omitted).

In short, the City has not foreclosed the possibility that Vigneault will be able to prove, at trial, that the City retaliated against him by transferring him out of Narcotics and by forcing him

to resign, because he reported unlawful acts (drinking on the job and Bidga's intrusion into Gethins' home) to his supervisors.

3.

The City next argues that Vigneault cannot show any harm or damages from the alleged retaliation. Key to this argument is the assertion that Vigneault waived emotional distress damages. Unless waived, emotional distress damages are recoverable in a Whistleblower action. See G.L c. 149, §185 (d) ("All remedies available in common law tort actions shall be available to prevailing plaintiffs."). Cf. DaPrato v. Mass. Water Res. Auth., 482 Mass. 375, 393-394 (2019) (upholding emotional distress award in an FMLA action involving termination from employment; citing authorities under other statutes).

The City's argument that Vigneault cannot show emotional injury focuses upon the statement of plaintiff's counsel that "[t]here's no claim for emotional distress." Vigneault Tr. 170. The City takes this statement out of context. For one thing, the statement is ambiguous and probably meant what plaintiff's counsel stated at oral argument: the amended complaint makes no claim for intentional infliction of emotional distress. Moreover, in context, plaintiff's counsel was trying to limit inquiry into plaintiff's infidelity with his then-wife, on the ground that the topic was irrelevant and harassing. Whatever the statement meant, the City was not misled, because its counsel immediately proceeded (at id. Tr. 170-171) to point out that Vigneault was claiming a "loss of sleep and PTSD and sense of shame . . .." The record amply showed that Vigneault was indeed making such a claim. Vigneault's counsel did not disagree and, on the contrary, said "[y]ou can ask him about his treatment . . .". Tr. 171. The City has not shown that Vigneault waived any claim that the retaliation caused emotional harm, in the form of loss of sleep, PTSD and sense of shame. There is no question that the jury could find that Vigneault's

allegedly retaliatory transfer to patrol and his allegedly forced resignation caused him emotional harm.

B.

The only other claim against the City is Count VI, which alleges interference with Vigneault's collective bargaining agreement rights in violation of G.L. c. 150E, § 10. While the City prevailed on closely related issues before the Department of Labor Relations, its Motion does not address Count VI. Accordingly, the court does not consider the possible deficiencies in that count.

III.

Vigneault alleges that the individual defendants violated his civil rights (Count II against Barbieri; Count III against the other individual defendants), intentionally misrepresented the facts (Count IV against Barbieri), intentionally interfered with contractual relations (Count V against Barbieri, Kent and Ayala), and participated in a civil conspiracy to violate his collective bargaining rights and his civil rights (Count VII against all individual defendants).

A.

To prove his claims under the Massachusetts Civil Rights Act, G.L c. 12, §11I (the "MCRA"), Vigneault must prove that (1) he was exercising or enjoying rights secured by the Constitution or laws of either the United States or of the Commonwealth; (2) the defendant has interfered with, or attempted to interfere with her exercise or enjoyment of those rights; and (3) the interference or attempted interference occurred by means of threats, intimidation or coercion. Kennie v. Natural Resources Department of Dennis, 451 Mass. 754 (2008). There is no question that Vigneault has presented enough evidence to satisfy the first element, as he had a right under

the Whistleblower Act (as discussed in part IIA, above), property rights in his employment, a right to free speech and a right to petition the government (including the FBI).

Vigneault has satisfied the second element with respect to those who, drawing all inferences favorable to Vigneault, forced him to transfer or resign. As noted above, that includes Barbieri, if the jury believes Vigneault's testimony. With respect to the transfer to patrol, Vigneault has also proven the second element as against the defendants who had supervisory authority, namely Ayala and Kent. For these purposes, the court treats Bigda in the same manner as a supervisor because, though not formally empowered to be a supervisor, he was the senior member of the narcotics unit, asserted the power to get Vigneault transferred and had sufficient influence in administration of the unit to allow him to act coercively. Additional facts supporting the conclusion that interference occurred appear below, during the discussion of the third element.

The third question is whether Vigneault was deprived of his rights to employment by "threats, intimidation or coercion" within the meaning of the MCRA. See Glovsky v. Roche Bros. Supermarkets, Inc., 469 Mass. 752, 762 (2014); Planned Parenthood League v. Blake, 417 Mass. 467 (1994) ("'Intimidation' involves putting in fear for the purpose of compelling or deterring conduct . . .."). The phrase "threats, intimidation or coercion" within the meaning of the MCRA must be applied according to their natural connotation, that of forcing submission by conduct calculated to frighten, harass, or humiliate. Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington, 399 Mass. 771, 781 (1987). The concept of "threats, intimidation or coercion" establishes an objective test, not a subjective one. The court does not question Vigneault's

subjective distress or feelings of intimidation, but the fact that Vigneault "subjectively may have felt 'threatened' or 'intimidated' does not suffice." Glovsky, 421 Mass. at 764 and cases cited.[9]

The courts have defined the controlling terms. A "threat" is "the intentional exertion of pressure to make another fearful or apprehensive of injury or harm." Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 474 (1994), cert. denied, 513 U.S. 368 (1994), quoted in Glovsky, 469 Mass. at 763. "Intimidation" means putting someone "in fear for the purpose of compelling or deterring conduct." Id. "Both threats and intimidation often rely on an element of actual or threatened physical force." Kennie, 451 Mass. at 763. The term "coercion" is broader. Id. It means "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done." It is the active domination of another's will, or the use of physical or moral force to compel another to act or assent, or to refrain from acting or assenting. It is not necessary that "coercion" involve force or the threat of physical force. Id.

For the supervisors, "potentially coercive behavior includes both verbal statements [the threats] . . . and actions taken to effectuate those statements," including termination of employment. See Kennie v. Natural Resources Department of Dennis, 451 Mass. 754, 763 (2008). The fact pattern warrants an inference of "physical, moral or economic coercion." See id., 451 Mass. at 763-765. As discussed more fully below, a jury could find that Barbieri,

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[9] A direct deprivation, accomplished without threats, intimidation or coercion, does not violate the MCRA. Swanset Dev. Corp. v. Taunton, 423 Mass. 390, 396 (1996). Compare Freeman v. Planning Board of W. Boylston, 419 Mass. 548, 563, cert denied, 516 S. Ct. 931 (1995) ("no evidence that the [defendants] attempted to exercise coercion against the plaintiff to force him to forgo development of his property."). To hold otherwise would not only undermine defendants' free speech rights, but would also create precisely the "vast constitutional tort" that the SJC has repeatedly said the MCRA was not intended to enact. See, e.g. Glovsky, Mass. at 762. The element of coercion, at least, is met because the jury may find that the defendants acted collectively to coerce Vigneault not to report the drinking, to leave the Narcotics unit, and to resign.

supported by other defendants, threatened, coerced and intimidated Vigneault into resigning by departing from established lines of communication to deliver an implied and false threat, lacking any basis in fact, that Officer Rogers would or might implicate Vigneault in the Palmer incident. Moreover, given the failure to show that Vigneault cannot show an overtime salary disadvantage between Narcotics and Patrol, the court must assume that coercing Vigneault by transferring his assignment caused him to lose significant employment rights, as well as his right to speech regarding his colleagues' misconduct.

Bigda and the supervisors who took the Fifth on virtually all questions cannot foreclose the possibility that Vigneault can prove his case. As just one example, Bigda has provided no rebuttal to Vigneault's statement that Bigda said "I will get you transferred out of the narcotics unit and ruin your career" and that he had the power and ability to do so. Ayala has not rebutted Vigneault's statement that Ayala called plaintiff on his cell phone and stated: "now you better transfer out of this unit to plain clothes or you will be kicked out" and "it will look better for you to voluntarily fill the form and get out rather than us kicking you out." The jury could infer that Kent and Ayala joined in the coercive behavior by supporting Bigda and deprived Vigneault of his position in the Narcotics unit. They could also infer that Bidga, though not himself authorized to reassign personnel on his own, was a cause of that transfer.

Non-Supervisors Generally: The MCRA was not intended to remedy minor slights, especially in the context of the workplace, "where some amount of friction, unpleasantness, and even occasional shouting, is not unusual." Meuser v. Federal Express Corp., 524 F.Supp.2d 142, 148 (D. Mass. 2007). Here, the evidence regarding most of the non-supervisors falls short of potentially coercive verbal statements and actions taken to effectuate those statements. See Kennie, 451 Mass. at 763.

The non-supervisors themselves had no authority to deprive Vigneault of any employment rights or to exercise any real coercion, apart from peer pressure. While there is evidence that they participated in drinking in the Narcotics unit – much as Vigneault himself did – there is no evidence tying any of them to Vigneault's transfer to patrol, or any conspiracy to coerce or intimidate Vigneault with respect to on-the-job drinking. As to the non-supervisor defendants, Vigneault alleges the following: "Defendants began giving Mr. Vigneault the silent treatment in the workplace and it became hostile. Vigneault felt threatened and uncomfortable at work." He does not name any non-supervisor defendants who told him to "shut the fuck up," and, even if he did, a non-supervisor's comment along those lines does not rise above ordinary job-related conflict among peers. These allegations fall with the rule stated by Meuser, supra.

With one exception, the specific allegations against the non-supervisor defendants do not change that conclusion.

Kalish: Kalish actually answered substantive questions and testified without contradiction that he did not talk to Vigneault after the East Longmeadow incident. Having subjected himself to inquiry at deposition, Kalish has shown, by uncontested evidence, that he never went to Palmer on the evening of the alleged excessive force. He therefore played no role in Vigneault's termination hearing, or eventual forced resignation. Indeed, he was not even a subject of Barbieri's charge notices of July 20, 2016 regarding drinking on the job.

The plaintiff's citations (Mem. at 6) to portions of Kalish's deposition (App. 981-984) prove only what Kalish later heard about Vigneault's transfer. To the extent that plaintiff offers these citations as proof of Kalish's involvement, they are misleading. Vigneault has not raised an issue for trial regarding Kalish.

Gethins: Although Gethins took the Fifth, the record is clear that she advised Vigneault not to resign, told him she believed that Barbieri was "bluffing" and said that Vigneault could fight a termination but not a resignation. Gethins thus did not contribute to the forced resignation and engaged in no coercive or threatening conduct on that issue.

Vigneault asserts that Gethins played a role in arranging Vigneault's arrest under G.L. c. 209A and assisted Kent in arranging for issuance of a warrant, as well as service inside the United States District Court House. Even if that were true, Gethins had a right to seek judicial redress under G.L. c. 209A. Cf. Erlich v. Stern, 74 Mass. App. Ct. 531, 538 (2009) (filing a lawsuit "is the paradigm of petitioning activity" within the definition of G.L. c. 231, § 59H), citing Wenger v. Aceto, 451 Mass. 1, 5-6 (2008) ("criminal claim brought in the Dedham District Court"). See also McLarnon v. Jokisch, 431 Mass. 343, 345 (2000) (application for an abuse prevention order under G. L. c. 209A). Gethins sought judicial relief directly, not by means of threats, intimidation or coercion. In this circumstance, even a threat to use lawful means to achieve the defendants' intended result cannot constitute threats, intimidation or coercion. See Sena v. Commonwealth, 417 Mass. 250, 263 (1994), citing Pheasant Ridge Assocs. Ltd. Partnership v. Town of Burlington, 399 Mass. 771, 782 (1987).

Finally, Vigneault asserts that Gethins took a number of actions out of revenge for him cheating on her during or after their romantic relationship. These actions include asserting that he admitted that he "kicked a kid." However, there is no evidence that she took any of these actions to threaten, coerce or intimidate Vigneault in the exercise of constitutional or statutory rights. There is no MCRA cause of action for harassment between present or former romantic partners. Nor is there a cause of action for threats, coercion or intimidation taken out of revenge

for cheating. Her involvement with the facts of this case after Vigneault's resignation does not include any "threats, intimidation or coercion."

Robles: Robles had no authority to transfer, discipline or discharge Vigneault. He was a member of the Narcotics unit and allegedly drank on the job, filed false reports and covered up those actions. Even if these allegations are true, they do not constitute interference by Robles with any of Vigneault's rights. Nor do they constitute threats, intimidation or coercion to accomplish an such interference. While Robles went to Palmer in connection with the stolen police vehicle, there is no evidence that he observed or was involved in the abuse of a juvenile prisoner, or that he fabricated evidence against Vigneault on that point. There is no evidence that Robles participated in any way in the management decisions regarding disciplinary proceedings that led to Vigneault's alleged forced resignation. While he did take the 5th Amendment, that, without more, is not enough to show a MCRA violation.

Cournoyer: The situation is different with respect to defendant Cournoyer, who authored a February 27, 2016 report attributed to Vigneault about the events in Palmer, although Vigneault never reviewed or approved the final version. Cournoyer was present when Bigda interrogated one of the juveniles and received a charge letter regarding the Palmer incident, which he resolved through settlement. Vigneault himself made a written statement on June 4, 2016, which on its face disclosed that Vigneault was the only officer helping Officer Rogers handcuff the juvenile – and thus the only officer in a position to have kicked the juvenile.

Cournoyer: The question regarding Cournoyer is different. He did go to Palmer and participated in interrogating the juveniles with Bidga. There is no evidence that he kicked any juvenile in Palmer. On the other hand, he did not intervene and ultimately obtained a favorable resolution of charges against himself. Vigneault alleges that, two years after the fact, Cournoyer

fabricated a story that Vigneault "told him he kicked a kid." Cournoyer claims he told Kalish about this, but Kalish did not remember that, and no statement to that effect appears in the police report. This raises a genuine issue of material fact, because Vigneault denies that he kicked a juvenile, and there is evidence to support the denial, including testimony of the juvenile himself. It is a jury question whether Cournoyer lied to the FBI in an effort to implicate Vigneault and exonerate other defendants. Vigneault also may be able to prove that Cournoyer has not been subjected to any form of discipline, despite admitting lying and falsifying police reports. Cournoyer also reportedly told the FBI that the defendants met, conferred and had agreed to tell a false story to Vigneault's detriment. See Kennie, 451 Mass. at 764 n. 17 and related text (defendant's statement that he would fabricate evidence). Moreover, because that Cournoyer is likely to be a witness to the Palmer events whether or not he is a party, the court exercises its discretion not to enter judgment in his favor at this time.[10] This approach avoids the risk of error on a close question, particularly where it appears that judgment in Cournoyer's favor would save little, if any, trial time.

B.

The defendants argue that, even if the plaintiff makes out the three elements of an MCRA claim, he has failed to show damages, because Vigneault in fact did exercise his rights to speak out and to petition the government. Of course, this argument does not address the loss of employment rights, including the loss of overtime opportunity in the narcotics unit, and his loss of employment altogether.

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[10] Despite the apparently mandatory language of Mass. R. Civ. 56, "even if on the established facts entry of summary judgment would have been warranted, a motion judge nevertheless has discretion to deny summary judgment because a particular issue or an entire action should not be foreclosed at that early stage." Phelps v. MacIntyre, 397 Mass. 459, 461 (1986). See Ruggiero v. Costa, 28 Mass. App. Ct. 967, 968 (1990). If no practical benefit would result from a decision at this stage, the court may deny the motions as a matter of discretion.

Just as importantly, the plaintiff points out that the MCRA prohibits "attempts" to interfere with civil rights. It is true that the record focuses primarily upon his emotional and economic damages flowing from completed acts (transfer, forced resignation), not from any attempt to deprive him of his rights. However, unlike the Whistleblower Act, the MCRA does not require an employer-employee relationship. Attempts to interfere with Vigneault's reports to, and cooperation with the FBI, logically may have caused, at least, emotional distress. And it requires a highly selective reading of the record to miss the obvious point that Vigneault complains of the great emotional distress that he experienced because of the defendants' actions in response to his post-employment speech and petitioning activity, including his disclosures to the FBI. The defendants have not met their burden to prove undisputed facts that show otherwise. There is a jury issue whether attempted interference with Vigneault's post-employment speech and petitioning, by means of threats and intimidation, caused damages in the form of, at least, emotional distress.

The defendants effectively argue that, because the alleged coercion was merely an unsuccessful attempt to interfere Vigneault's free speech and petitioning rights, Vigneault suffered no damage because he was able to speak and petition. Such a reading would not only limit the MCRA's broad wording, but would defeat the statute's remedial purpose in ways bordering on the absurd.[11] The court does not read the word "attempt" in the MCRA in the cramped way that the defendants propose. A victim may well suffer emotional distress from threats, intimation or coercion inflicted attempt to deprive him of his civil rights to speak and to

[11] By the defendants' logic, the MCRA would provide no relief to Ruby Bridges for her emotional distress resulting from the threats, intimidation and coercion that other people employed in an unsuccessful attempt to prevent her from attending an integrated school, because of her race. While this case obviously involves very different rights and different motivations, this hypothetical simply applies the same reading of "attempts" that the defendants urge the court to adopt.

petition his government. That is true even if the attempt is unsuccessful. Indeed, if that were not so, there would be no need for the MCRA to include "attempts" along with the prohibition on actual interference. Nor do the defendants cite any case adopting a principle that damages cannot flow from attempted interference with civil rights by threats, intimidation or coercion.

Because the defendants may be liable for attempted interference with civil rights, there is no ground for summary judgment on this record as to events occurring after Vigneault's allegedly forced resignation. If there is any basis for limiting a trial to the period when Vigneault was an employee, the defendants may raise the matter by motion in limine.

IV.

The final claim against the non-supervisory defendants is for civil conspiracy.[12] One form of civil conspiracy, reflected in the Restatement (Second) of Torts s. 876 (1977), derives from "concerted action," whereby liability is imposed on one individual for the tort of another. Aetna Casualty Surety Co. v. P.B. Autobody, 43 F.3d 1546, 1564 (1st Cir. 1994) (elements of "concerted action" in tort form of civil conspiracy). See Gurney v. Tenney, 197 Mass. 457, 466 (1908); Kyte v. Philip Morris, Inc., 408 Mass. 162, 166 (1990). Under this theory, a "claim for civil conspiracy . . . requires a showing that the defendants (1) knew that the conduct of [the alleged tortfeasor] constituted a [tort] and (2) substantially assisted in or encouraged that conduct." Baker v. Wilmer Cutler Pickering Hale and Dorr LLP, 91 Mass. App. Ct. 835, 847-848 (2017), citing Kurker v. Hill, 44 Mass. App. Ct. 184, 189 (1998). The defendant acted "in concert with or pursuant to a common design with" the tortfeasor. Kyte, 408 Mass. at 166.

[12] Because the case against Barbieri will go to trial in any event, the court exercises its discretion not to dismiss the other charges against him, including intentional misrepresentation, because doing so would save no trial time and achieve no other efficiencies, while creating a risk of reversible error. In any event, the above discussion demonstrates that there is very likely a trial issue on the intentional misrepresentation count.

The second kind of conspiracy turns upon a showing of intentional coercion through concerted action. In Kurker, 44 Mass. App. Ct. at 188, the Court said: "The element of coercion has been required only if there was no independent basis for imposing tort liability - where the wrong was in the particular combination of the defendants rather than in the tortious nature of the underlying conduct. See, e.g., Neustadt v. Employers' Liab. Assur. Corp., 303 Mass. 321, 325 (1939).

Here, the plaintiff has not shown either type of conspiracy with respect to defendants Kalish, Robles and Gethins. As noted in part III, above, Vigneault cites no action by Kalish regarding the alleged transfer, but only refers to matters that Kalish later learned. Kalish did not go to Palmer and was therefore not part of the alleged effort to force Vigneault to resign. Vigneault cites no evidence that Robles participated in either the transfer or forced resignation. His evidence regarding Robles involves unlawful drinking and false police reports, all of which existed independent of any attempt to transfer or terminate Vigneault. There is no evidence that Gethins attempted to get Vigneault transferred, and she expressly urged him not to resign because the other defendants were "bluffing." There is no direct or circumstantial evidence that any of them knew of any combined effort to transfer or terminate Vigneault. There is also no evidence that any of them knew that others were treating Vigneault in an unlawful manner, particularly where, as non-supervisors, Vigneault's employment status was outside their scope of authority.

For the same reasons discussed in part III, above, the other defendants played a role in the challenged actions, did so together, and a genuine issue of fact exists on whether they engaged in concerted action to force Vigneault to resign, or to force him out of the narcotics unit. Vigneault has, at least, made out a joint coercion claim of civil conspiracy. It is not necessary to decide

whether he has also made out a concerted action claim. Moreover, dismissing any of the civil conspiracy claims against the supervisory defendants (and Bigda) potentially creates an appellate issue, without any appreciable benefit in managing the trial. Thus, whether or not there is sufficient evidence to show that these defendants engaged in a civil conspiracy, the question is close enough so the court would exercise its discretion to deny summary judgment, where the civil rights claims - based on the same facts, testimony and witnesses - will go forward.

V.

The Court denies the Cross-Motion. Vigneault has the burden of proof at trial, in addition to the burden he bears as moving party. It is "rare[]" that a plaintiff has "established his case by evidence that the jury would not be at liberty to disbelieve." Hanover Ins. Co. v. Sutton, 46 Mass. App. Ct. 153, 166-67 (1999). Since much of his case depends upon his own testimony (which the jury need not believe) and drawing inferences against the Defendants (which the court cannot do where the Defendants are opposing the Cross-Motion), the court must deny Vigneault's Cross-Motion in its entirety.

VI.

Finally, the Court allows the Defendants' motion to strike the materials submitted by Vigneault, except for the deposition testimony and other testimony given under oath. The stricken materials are not authenticated and do not comply with the requirement of Mass. R. Civ. P. 56(e) that they "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The court therefore does not consider those materials in support of the Cross-Motion (where Vigneault has the burden to present admissible evidence) or in opposition to any properly-supported statement in the Defendant's 9A(b)(5) Statement in support of the

defendants' Motions. That said, the fact that certain matters appear in the stricken materials – and that the defendants have not disproven those facts by undisputed evidence – does highlight the short-comings in the Defendants' affirmative case for summary judgment, because there is no showing that, at trial Vigneault will be unable to prove those matters. That is particularly true where other people have asserted those matters in reports, findings or writings that the Defendants have not shown to be inauthentic or baseless.

CONCLUSION

For the above reasons:

1. The Motions for Summary Judgment by defendants City of Springfield, John Bartieri, Gregg Bigda, Steven Kent, Luke Cournoyer and Alberto Ayala are DENIED;
2. The Motions for Summary Judgment of defendants Edward Kalish, Jose Robles and Gail Gethins are ALLOWED. All claims against those defendants are dismissed on summary judgment.
3. Plaintiff's Cross-Motion for Summary Judgment is DENIED.
4. The defendants' motion to strike the Plaintiff's Summary Judgment Appendix is ALLOWED, except as to depositions and other testimony by the defendants under oath.

/s/Douglas H. Wilkins
Douglas H. Wilkins
Justice of the Superior Court

Dated: September 13, 2021

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. No. SJ-2021-0129

CHRIS GRAHAM, JORGE LOPEZ, MEREDITH RYAN, KELLY AUER, COMMITTEE FOR PUBLIC COUNSEL SERVICES, and HAMPDEN COUNTY LAWYERS FOR JUSTICE,
Petitioners,

v.

DISTRICT ATTORNEY FOR HAMPDEN COUNTY,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that, on September 20, 2021, I served a copy of the foregoing Petitioners' Supplemental Status Report, with exhibit, through email on the following counsel of record for the Respondent:

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