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ARTICLES

IN DEFENSE OF CHARITIES: A CASE FOR MAINTAINING THE MASSACHUSETTS DAMAGES CAP FOR CERTAIN EMPLOYMENT DISCRIMINATION CLAIMS

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This article is directed at lawyers who work with or for charities in Massachusetts. Earlier this year the Massachusetts Supreme Judicial Court put to rest a mini-debate that had been brewing in the employment bar for some time: are discrimination claims brought against public charities pursuant to Mass. Gen. L. ch. 151B (hereinafter "chapter 151B") torts subject to the $20,000 damages cap of Mass. Gen. Laws ch. 231, § 85K? In Ayash v. Dana-Farber Cancer Institute, 822 N.E.2d 667 (Mass. 2005), the Supreme Judicial Court emphatically said "no." Accordingly, Massachusetts synagogues, food pantries, and homeless shelters sued by disgruntled employees for discrimination may no longer seek to minimize huge damage awards merely because they are charities, at least insofar as the discrimination claims against them arise under state law.

Does this make sense? Wasn't the $20,000 cap put in place to keep charities open and serving the poor, hungry, and sick? And haven't chapter 151B claims—since the beginning of time—always been viewed as torts? Moreover, must the same result be reached with respect to the main federal anti-discrimination in employment

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statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII")?

Well, fellow do-gooders, the Supreme Judicial Court has spoken and it is probably too late to put the chapter 151B genie back in the bottle. For better or for worse, charities sued for unlawful employment discrimination under chapter 151B should prepare to face the prospect of uncapped damages. A different result, however, can be reached with respect to Title VII claims. Public charities may argue that the language of Title VII fits snugly within the brim of the damages cap.

Part I of this Article sets forth a brief history of section 85K, the state charity cap statute. Part II analyzes chapter 151B, specifically its relationship to section 85K, and culminates in a discussion of *Ayash*. Part III describes Title VII and proposes a charity-friendly application of section 85K to this federal anti-discrimination statute.

I. SECTION 85K

In Massachusetts, as elsewhere, charities are under attack, often for good reason. Watchdog websites are scrutinizing how charities spend their donations,[1] consumer associations are rating charities on a variety of scales,[2] and the state Attorney General's Division of Public Charities is working to ensure the proper use and solicitation of charitable funds.[3] Unfortunately, church sex-abuse scandals, the auctioning of donor lists by dubious charities, and unscrupulous telemarketing strategies by others have not helped the overall goal of philanthropy. Perhaps, then, it's unsurprising that the historic legal protections for charities continue to be assaulted.

For well over a century, charities in Massachusetts, as well as elsewhere in the country, enjoyed complete immunity from tort liability.[4] The so-called "charitable immunity doctrine" originated in

1. *See* Bruce Mohl, *It is Better to Give when not Being Deceived: Watchdog Websites Track how Charities Spend Their Money*, BOSTON GLOBE, Nov. 21, 2004, at L1 (describing "Charity Navigator" and "Guide star" as "charity watchdogs created by businessmen frustrated with the lack of reliable information available to donors").

2. *See id.* (noting that ratings established by the Better Business Bureau can be found at http://www.give.org while those of the American Institute of Philanthropy are located at http://www.charitywatch.org).

3. The Office of Massachusetts Attorney General Tom Reilly, Division of Public Charities, The Attorney General's Commitment to Ensuring Proper Use of Charitable Funds, http://www.ago.state.ma.us/sp.cfm?pageid=972 (last visited on October 14, 2005).

4. *See* Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 687 (Mass. 2005).

two British decisions from the first half of the nineteenth century.[5] As applied in this country, the charitable immunity doctrine was based on three separate theories: (1) the protection of charitable trust funds; (2) an implied waiver by injured persons through acceptance of a charity's benefits; and (3) public policy.[6]

If you work with charities, you understand that these theories have resonance today as well. Charitable money is always scarce, particularly in Massachusetts's tight economy.[7] There are also controversial policies being pursued at the highest levels of government to encourage private, philanthropic solutions to social ills.[8]

In December of 1969, however, the Supreme Judicial Court issued a wake-up call.[9] In a tragic wrongful death case against a not-for-profit hospital, the court stated that while "[n]othing has been brought to our attention suggesting that the doctrine of charitable immunity is repugnant to any provision of the Constitutions of the United States and the Commonwealth . . . it appears that only three or four States still adhere to the doctrine."[10] "Accordingly," the court continued, "we take this occasion to give adequate warning that the next time we are squarely confronted by a legal question respecting the charitable immunity doctrine it is our intention to abolish it."[11]

The Massachusetts Legislature responded quickly to the Supreme Judicial Court's salvo, enacting section 85K as an "emergency law" on September 16, 1971.[12] In summary, the statute abolished the charitable immunity defense—thus placating the Supreme Judicial Court—but put a $20,000 damages cap on "any

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5. Feoffees of Heriot's Hosp. v. Ross, 12 Clark & Fin 507, 8 Eng Reprint 1508 (1846); Duncan v. Findlater, 6 Clark & Fin 894, 7 Eng Reprint 934 (1839).

6. *See* Bell v. Presbytery of Boise, 421 P.2d 745 (Idaho 1966); Roland v. Catholic Archdiocese of Louisville, 301 S.W.2d 574 (Ky. App. 1957); *see also* McDonald v. Mass. Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 529 (1876).

7. According to the Associated Grant Makers May 2005 report, Massachusetts ranks forty-first in the nation in giving as a percentage of personal income. ASSOCIATED GRANT MAKERS, GIVING IN MASSACHUSETTS 2 (May 2005), *available at* http://www.agmconnect.org/givingreport.pdf (last visited October 14, 2005).

8. For example, President George W. Bush continues to push a variety of faith-based and community initiatives. *See White House Office of Faith-Based and Community Initiatives,* available at http://www.whitehouse.gov/government/fbci (last visited October 14, 2005).

9. Colby v. Carney Hosp., 254 N.E.2d 407, 408 (Mass. 1969).

10. *Id.*

11. *Id.* Two decades later, the Supreme Judicial Court softened its language, noting that *Colby* actually "suggested that the doctrine of charitable immunity is constitutional." English v. New Eng. Med. Ctr., Inc., 541 N.E.2d 329, 331 (Mass. 1989).

12. 1971 Mass. Acts 674.

cause of action based on tort" where "the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of" a charitable organization.[13]

Is the cap too low? Perhaps. Should the definition of "charity" be modified, for example, to remove insured hospitals from its scope?[14] Maybe. Just as there are strong justifications for the cap, there are also persuasive policy reasons for its abolition.[15] Nonetheless, section 85K exists—unless and until it gets amended or repealed by the Legislature —and it remains the duty of the courts, as with any statute, to interpret its terms.

The Supreme Judicial Court has had a number of occasions to interpret section 85K, most recently in *Ayash*.[16] In 1989, the *English* court found the cap to be constitutional.[17] In so holding, the court noted that the "clearly legitimate" objective of section 85K "is to protect the funds of charitable institutions so they may be devoted to charitable purposes."[18] "If a charity's property were 'depleted by the payment of damages,'" the Supreme Judicial Court continued, "'its usefulness might be either impaired or wholly destroyed, the object of the founder or donors defeated, and charita-

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13. MASS. GEN. LAWS ch. 231, § 85K (2005). The first paragraph of the statute provides:

> It shall not constitute a defense to any cause of action based on tort brought against a corporation, trustees of a trust, or members of an association that said corporation, trust, or association is or at the time the cause of action arose was a charity; provided, that if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association, liability in any such cause of action shall not exceed the sum of twenty thousand dollars exclusive of interest and costs. Notwithstanding any other provision of this section, the liability of charitable corporations, the trustees of charitable trusts, and the members of charitable associations shall not be subject to the limitations set forth in this section if the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for charitable purposes.

Id. In 1987, a second paragraph was added exculpating directors, officers and trustees of charitable educational institutions from individual liability (except for motor vehicle incidents) so long as "such person was acting in good faith and within the scope of his official functions and duties, unless such damage or injury was caused by willful or wanton misconduct." *Id.* (as amended by 1987 Mass. Acts 508).

14. A Westlaw search conducted on October 14, 2005 revealed that hospitals or health centers were defendants in approximately one-half of the reported and unreported state decisions addressing section 85K over the past thirty-five years.

15. *See* Colby v. Carney Hosp., 254 N.E. 2d 407 (Mass. 1969).

16. Ayash v. Dana-Farber Cancer Inst., 822 N.E. 2d 667 (Mass. 2005).

17. English v. New Eng. Med. Ctr., Inc., 541 N.E.2d 329, 331 (Mass. 1989).

18. *Id.* at 333.

ble gifts discouraged.'"[19] Subsequent decisions have tackled the question of what constitutes a "charity,"[20] and have determined that the cap does not apply where a compensated officer of the charity is a defendant,[21] and held that the cap may not be stricken as a discovery sanction.[22] For more than three decades, however, the cap has survived intact.

Even so, the Supreme Judicial Court has recently demonstrated a desire to dissociate the cap from statutory causes of action. For example, in 1997, the court held that the cap did not apply to damages awarded under Mass. Gen. Laws. ch. 93A (hereinafter "chapter 93A"), the state's consumer protection act, "because that statute created 'broad new rights, forbidding conduct not previously unlawful under the common law of contract and tort or under any prior statute.'"[23] Similarly, in 1998, the court held that section 85K did not apply to a claim that a charity violated the state wiretapping statute.[24] In so doing, the court applied the same reasoning as in the chapter 93A case.[25]

Of course, section 85K never mentions an exception for statute-based causes of action; as described, the cap applies to "*any* cause of action *based on* tort."[26] Moreover, it is clear that many tort claims arise pursuant to statute, for example, claims under the Massachusetts Tort Claims Act ("MTCA")[27] or the Federal Employers' Liability Act (hereinafter "FELA").[28] Yet the Supreme Judicial Court felt compelled to put on the brakes—at least with regard to chapter 93A and wiretap act claims—and now with regard to chapter 151B discrimination claims.

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19. *Id.* (quoting St. Clair v. Trs. of Boston Univ., 521 N.E. 2d 1044 (Mass. App. Ct. 1988)).

20. Connors v. Northeast Hosp. Corp., 789 N.E.2d 129, 133-35 (Mass. 2003); Harlow v. Chin, 545 N.E.2d 602, 613 (Mass. 1989).

21. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 341-42 (Mass. 1983).

22. Keene v. Brigham & Women's Hosp., Inc., 786 N.E.2d 824, 836 (Mass. 2003).

23. Ayash v. Dana-Farber Cancer Inst., 822 N.E. 2d 667, 687 (Mass. 2005) (quoting Linkage Corp. v. Trs. of Boston Univ., 679 N.E.2d 191, 209 (Mass. 1997)).

24. *See id.* (citing Birbiglia v. Saint Vincent Hosp., Inc., 692 N.E.2d 9, 15 (Mass. 1998)).

25. *See id.*

26. MASS. GEN. LAWS ch. 231, § 85K (emphasis added).

27. MASS. GEN. LAWS ch. 258, § 2 (2005).

28. 45 U.S.C. §§ 51-60 (2005).

II. CHAPTER 151B

A. *Chapter 151B in a Nutshell*

In 1946, a full quarter-century prior to the passage of section 85K, the Massachusetts Legislature enacted chapter 151B.[29] As originally passed, section 1 of the statute provided that "[t]he right to work without discrimination because of race, color, religious creed, national origin or ancestry is hereby declared to be a right and privilege of the inhabitants of the commonwealth."[30] Over the past six decades, the Legislature has tinkered with various provisions,[31] but the "clear purpose" of the statute remains "to implement the right to equal treatment guaranteed to all citizens."[32]

When initially passed, chapter 151B was not as earth-shattering as one might imagine since a number of employee-friendly common law causes of actions already existed. "The statute broadens existing remedies," the Supreme Judicial Court stated in 1982.[33] Or, in the words of the Massachusetts Appeals Court, "[l]ong before the passage of" chapter 151B, disgruntled employees could sue their employers under a variety of tort-based theories, including for example "the common law tort of interference with an advantageous relationship."[34] In fact, as recently as April 2005, the Appeals Court continued to look to the common law in order to interpret provisions of chapter 151B.[35] The Supreme Judicial Court, too, recently reaffirmed chapter 151B's tort roots in *Stonehill College v. Massachusetts Commission Against Discrimination*.[36]

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29. 1946 Mass. Acts 372.

30. 1946 Mass. Acts 372, § 1.

31. The main operative provision of chapter 151B, section 4, has been amended, on average, about once per year since 1946. *See* MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2004) (historical and statutory notes).

32. Katz v. Mass. Comm'n Against Discrimination, 312 N.E.2d 182, 187 (Mass. 1974).

33. Comey v. Hill, 438 N.E.2d 811, 817 (Mass. 1982).

34. Melley v. Gillette Corp., 475 N.E.2d 1227, 1229 (Mass. App. Ct. 1985); *see* Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993, 1993 (1989) (noting that "the common law has long embraced a principle of antidiscrimination that requires that parties engaged in public callings—so-called 'public service companies'—serve the general public on a nondiscriminatory basis").

35. *See* Lowery v. Klemm, 825 N.E.2d 1065, 1068 (Mass. App. Ct. 2005) (holding that a volunteer is not an "employee" under traditional common law standards and thus cannot invoke chapter 151B); *see also* Marc D. Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMP. L. QUAR. 65 (1985) (suggesting recognition of employment discrimination claims as extensions of the common law).

36. 808 N.E.2d 205, 214 (Mass. 2004) ("Independent research indicates that, from

As presently configured, chapter 151B prohibits a variety of employment acts.[37] Primarily, section 4 of the statute provides that it shall be an "unlawful practice" for an employer "to refuse to hire or employ or to bar or to discharge from employment" any individual "because of the race, color, religious creed, national origin, sex, [or] sexual orientation" of that individual.[38] The statute also protects certain older workers[39] and handicapped employees[40] by making it unlawful "[f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by chapter 151B,"[41] and requires employers to maintain policies against sexual harassment.[42] It also guards against unlawful retaliation by employers,[43] the discrimination provision at issue in *Ayash*.

The Massachusetts Commission Against Discrimination (hereinafter "MCAD") is charged with "formulat[ing] policies to effectuate the purposes of [chapter 151B]."[44] In addition, the statute establishes a comprehensive scheme, bolstered by MCAD regulations, for administrative procedures and, as necessary, judicial review.[45] Finally, chapter 151B states that its provisions are to "be construed liberally for the accomplishment of its purposes."[46]

Most cases construing chapter 151B have concerned current employees (as well as former and prospective employees) alleging discrimination or retaliation by employers due to their status as members of a protected class. A typical scenario is this. An employee, say an African-American woman, is fired from her job—for our purposes, we will assume her job was at a food pantry—shortly after she complains of either sexual or racial harassment. Although the food pantry proffers a "legitimate business reason" for the termination, the employee senses pretext and thus brings an adminis-

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the late 1700's until midway through the 1800's, common law in both England and the American States provided for an employee's cause of action against an employer for wrongful discharge or breach of employment contract." (citing Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976))).

37. *See generally* Douglas A. Randall & Douglas E. Franklin, 18 Mass. Prac. § 281 (2005).

38. MASS. GEN. LAWS ch. 151B, § 4(1) (2005).

39. *Id.* § 4(1B).

40. *Id.* § 4(16).

41. *Id.* § 4(4A).

42. *Id.* § 3A.

43. *Id.* § 4(4).

44. *Id.* §§ 2, 3.

45. *See id.* §§ 5-9.

46. *Id.* § 9.

trative complaint to the MCAD. There she may receive a "right to sue" letter. Accordingly, she files a complaint in court in which she alleges that the food pantry's actions in firing her violated chapter 151B and/or Title VII. Discovery proceeds and either the parties settle, the employer moves for summary judgment, or the case is marked up for trial. Common law claims such as defamation or negligent infliction of emotional distress are likely asserted as well.

What relief might our hypothetical plaintiff seek? According to chapter 151B, she is entitled to "damages or injunctive relief."[47] Most plaintiffs seek damages. "Compensatory damages may include those that make [the plaintiff] whole, . . . 'including those which are the natural and probable consequences . . . of the illegal conduct.'"[48] Typically, these involve back pay, front pay, lost benefits, emotional distress damages, attorneys fees, and court costs.[49] Punitive damages may also be awarded "where [the employer's] conduct warrants condemnation and deterrence."[50] If section 85K applies, however, the plaintiff's damages would be capped at $20,000. If not, her damages could easily swell to hundreds of thousands, if not millions, of dollars.[51]

Of course, there are clear policy reasons to hold the food pantry liable for one hundred percent of the damages it caused our hypothetical plaintiff. However, it is equally clear that there are countervailing policy reasons favoring the food pantry, not the least of which is the protection of its limited resources. In addition, and perhaps more to the point, the court should not make policy decisions by torturing section 85K's text.

B. *Pre-*Ayash *Cases Construing Section 85K's Relationship to Chapter 151B*

As described above, section 85K applies to "*any* cause of action *based on* tort" where "the tort was committed in the course of

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47. *Id.*

48. Blockel v. J.C. Penney Co., 337 F.3d 17, 27 (1st Cir. 2003) (quoting Conway v. Electro Switch Corp., 523 N.E.2d 255, 257 (Mass. 1988)) (alterations in original).

49. *See Conway*, 523 N.E.2d at 256; Horney v. Westfield Gage Co., 211 F. Supp. 2d 291 (D. Mass. 2002), *rev'd,* 77 Fed. Appx. 24 (1st Cir. 2003); Gasior v. Mass. Gen. Hosp., No. 20012772H, 2005 WL 1367182, at *1 (Mass. Super. Ct. Apr. 5, 2005).

50. *Blockel*, 337 F.3d at 28.

51. In one particular employment discrimination case, a jury awarded over one million dollars in damages, a figure that was later reduced to the still hefty sum of $582,225. *Horney*, 77 Fed. Appx. at 24; *see* Verdict and Settlement Summary, Edwards v. Mass. Bay Transit Auth., JVR No. 802-380, 2001 WL 910047 (Mass. Super. Ct. June 2001) (reporting chapter 151B plaintiff's verdict of $7,602,999).

any activity carried on to accomplish directly the charitable purposes of" the charitable organization.[52] In our hypothetical, we will assume that the firing of the food pantry worker occurred while the employer was directly pursuing its "charitable purposes." The section 85K question for the hypothetical court, therefore, is whether the discriminatory retaliation committed by the employer was a "cause of action based on tort."[53]

Prior to *Ayash*, the charity would have had a fighting chance of coming within the cap. Granted, the Supreme Judicial Court had occasionally "distinguished [chapter 151B] discrimination actions from tort actions."[54] Still, the court had also conceded that it "referred frequently to tort-like aspects of claims of discrimination under . . . [chapter] 151B."[55] For example, in *Conway v. Electro Switch Corp.*, the court held that lost "front pay" was compensable in a chapter 151B action insofar as such a remedy had been "traditionally allowed, as an element of tort damages."[56] Similarly, in *Dalis v. Buyer Advertising, Inc.*, the court held that discrimination plaintiffs, like all other tort victims, have a constitutional right to a jury trial.[57] In so holding, the court found chapter 151B claims to be "analogous" to common law tort claims, particularly to "action[s] for defamation or intentional infliction of mental distress."[58]

Despite these pro-charity messages emanating from the Supreme Judicial Court, several trial court decisions opined, without any real discussion, that chapter 151B claims would not be recognized as "torts" for purposes of the charitable damages cap.[59] Such a result was also foreshadowed by the United States Court of Appeals for the First Circuit. In *McMillan v. Massachusetts Society for*

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52. MASS. GEN. LAWS ch. 231, § 85K (2005) (emphasis added).

53. *Id.*

54. Thomas v. EDI Specialists, Inc., 773 N.E.2d, 415, 418 (Mass. 2002) (refusing to recognize chapter 151B contribution action by employer); *see also* Stonehill Coll. v. Mass. Comm'n Against Discrimination, 808 N.E.2d 205, 215 (Mass. 2004) (noting that "we have, on many occasions, identified tort-like aspects of a . . . discrimination claim," but that "a violation of G. L. c. 151B is not a tort"); Jancey v. Sch. Comm. of Everett, 658 N.E.2d 162, 173 (Mass. 1995) ("[A]cts of discrimination—whether intentional or unintentional—do not thereby become torts.").

55. Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 688 (2005).

56. 523 N. E. 2d 255, 257 (Mass. 1988) (citing, *inter alia*, Mitchell v. Walton Lunch Co., 25 N.E.2d 151 (Mass. 1940)).

57. 636 N. E. 2d 212, 214 (Mass. 1994).

58. *Id.* (citations omitted).

59. *See, e.g.*, McMillan v. Mass. Soc'y for Prevention of Cruelty to Animals, 168 F.R.D. 94, 96-97 (D. Mass. 1995), *aff'd*, 140 F.3d 288 (1998); Walsh v. Carney Hosp. Corp., No. 94-2583, 1998 WL 1470698, at *8 (Mass. Super. Ct. June 10, 1998) (citing, *inter alia*, Forti v. Mass. Inst. of Tech., No. 92-3948 (Middlesex Sup. Ct. June 5, 1996)).

Prevention of Cruelty to Animals, the Court of Appeals for the First Circuit concluded that the MSPCA's liability on a chapter 151B claim was not limited by section 85K's damage cap.[60] The Court of Appeals for the First Circuit stated, "Like chapter 93A, chapter 151B creates rights that did not exist under the common law; the causes of action to which it gives rise thus cannot properly be called causes of action in tort."[61] "Accordingly," the court continued, "we hold that the damages award to [the plaintiff] pursuant to chapter 151B is not subject to the constraints of [section 85K]."[62]

Somewhat curiously, the Court of Appeals for the First Circuit reached this decision—and thus dramatically changed the state-law landscape—without certifying the question to the Supreme Judicial Court[63] or, as it had done with other controversial state-law matters, avoiding the issue altogether.[64] Moreover, it was obviously the Supreme Judicial Court's voice that mattered, not that of the Court of Appeals for the First Circuit. In addition, there remained the argument that chapter 151B need not be a "tort" to be constrained by section 85K, only that it be "*any* cause of action *based on* tort."[65] That nuance had not (and apparently has still not) been explored by any court. Even so, the Court of Appeals for the First Circuit's *McMillan* decision was a rifle shot across Massachusetts's charitable landscape.

C. Ayash *Holds that Chapter 151B Retaliation Claims Against Charities are not Subject to the Damages Cap.*

Interesting as the pre-*Ayash* debate might have been, the holding in *Ayash* is clear: "[Section] 85K does not apply to limit damages awarded pursuant to a successful claim of unlawful retaliation under [chapter] 151B."[66] However, this does not mean that *Ayash* was properly decided.

The facts in *Ayash* are gut-wrenching. In November 1994, a research fellow at the Dana-Farber Cancer Institute, a public charity for section 85K purposes, "accidentally ordered four-fold over-

60. McMillan v. Mass. Soc'y for Prevention of Cruelty to Animals, 140 F.3d 288, 307 (1st Cir. 1998).

61. *Id.* (citation omitted).

62. *Id.*

63. *See* MASS. R. SUP. J. CT. 1:03.

64. *See* Martel v. Stafford, 992 F.2d 1244, 1247 (1st Cir. 1993) (observing that federal courts should not "steer state law into unprecedented configurations").

65. MASS. GEN. LAWS ch. 231, § 85K (2005).

66. Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 687 (Mass. 2005).

doses of . . . a powerful chemotherapy drug with well known heart toxicity for two patients in an experimental [breast cancer] protocol."[67] Both patients suffered almost immediate adverse reactions. One patient died. The other patient lived, but experienced severe cardiac damage.[68] Perhaps because the deceased victim was a Boston Globe health columnist, there was intense media scrutiny and a number of investigations.[69] Ultimately, fingers were pointed at Dr. Lois Ayash, the protocol chair and principal investigator, resulting in the hospital taking disciplinary actions against her.[70] Most notably, Dr. Ayash was fired shortly after she sued the hospital in state court.[71] Accordingly, she thereafter amended her complaint to include a claim against the hospital for unlawful retaliation in violation of chapter 151B.[72]

After a five week trial, the jury found the hospital liable, among other common law claims, for discriminatory retaliation in violation of chapter 151B.[73] The jury awarded Dr. Ayash over $1.2 million dollars in compensatory and punitive damages and almost $400,000 in attorney's fees and costs.[74] The trial judge, however, agreed with the hospital that section 85K's cap applied and, accordingly, entered an amended judgment allowing the plaintiff to recover only $20,000 in damages.[75] Dr. Ayash appealed, and, on October 6, 2004, the Supreme Judicial Court heard oral argument. The court issued its decision on February 5, 2005. According to the Supreme Judicial Court, the cap did not apply.[76]

Curiously, the majority of the Supreme Judicial Court's forty-one page decision dealt with issues other than the charitable cap, for example, Dana-Farber's cross appeal and appeals by the hospital administrator (who was found liable for damages of $840,000), the Globe Newspaper Company (which was found liable for damages of $1,680,000), and a reporter (who was found liable for damages of $420,000).[77] A few paragraphs, however, were devoted to

67. *Id.* at 675.
68. *Id.* at 676.
69. *Id.* at 673.
70. *Id.* at 675-80.
71. *Id.* at 680-81.
72. *Id.* at 681.
73. *Id.* at 674.
74. *Id.* at 674 n.5.
75. *Id.* at 674-75.
76. *Id.* at 687-88.
77. *Id.* at 674.

the hospital's arguments with respect to section 85K's cap.[78] The court rejected those arguments.

First, the Supreme Judicial Court agreed with the Court of Appeals for the First Circuit in *McMillan*, that chapter 151B, like chapter 93A, created rights that did not exist under the common law and, *ergo*, chapter 151B claims should not be considered torts for purposes of section 85K.[79] There are several problems with this conclusion. For one, the Supreme Judicial Court apparently ignored its previous pronouncements that chapter 151B *broadened* the existing common law tort remedies.[80] The court also seemed to have conflated the term "torts"[81] with the actual language used in chapter 85K: "any cause of action based on tort."[82] Surely a cause of action can be "based on tort" without being a complete "tort" in and of itself. Indeed, that was the very distinction the court drew in *Stonehill College* (and again in *Ayash*) when it stated that chapter 151B claims of discrimination contain "tort-like aspects."[83]

Second, the court noted that section 85K is limited to circumstances where the cause of action is "committed in the course of any activity carried on to accomplish directly [a defendant's] charitable purposes."[84] But clearly, the hospital thought it was acting for the good of the charity when it discriminated against the plaintiff. It was insulating itself against patient lawsuits and bad publicity. Moreover, as the court itself recognized, just because the plaintiff's circumstances may be "compelling" does not mean that the "charitable purpose" limitation should not apply.[85] "The purpose behind the charitable cap," the court acknowledged, "was 'to protect the funds [and other assets] of charitable institutions so they may be devoted to charitable purposes.'"[86]

Third, the Supreme Judicial Court looked to chapter 151B's legislative history. As the Supreme Judicial Court pointed out,

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78. *Id.* at 687-88.

79. *Id.* at 687.

80. Comey v. Hill, 438 N.E.2d 811, 817 (Mass. 1982); *see supra* text accompanying note 33.

81. *Ayash*, 822 N.E.2d at 687; *see id.* at 687 n.20 (citing Jancey v. Sch. Comm. of Everett, 658 N.E.2d 162, 173 (Mass. 1995) for the proposition that "acts of discrimination . . . do not thereby become torts").

82. MASS. GEN. LAWS ch. 231, § 85K (2005).

83. *Ayash*, 822 N.E.2d at 688 (citing Stonehill Coll. v. Mass. Comm'n Against Discrimination, 808 N.E.2d 205, 215 (Mass. 2004)).

84. *Id.* (citing MASS. GEN. LAWS ch. 231, § 85K (2005)).

85. *Id.*

86. *Id.* at 687-88 (quoting English v. New Eng. Med. Ctr., Inc., 541 N.E.2d 329, 333 (Mass. 1989), *cert. denied*, 493 U.S. 1056 (1990)) (alteration in original).

charitable and religious organizations were initially exempted from the definition of "employers" subject to chapter 151B liability.[87] Noting that the exemption was lifted in 1969, the Supreme Judicial Court concluded that the Legislature desired to make charities "subject to the same provisions and remedies as other employers for claims brought under" chapter 151B.[88] In a general sense, that was probably true.[89] But it appears more likely that, in 1969, the legislature was focused on the insular problems surrounding the regulation of religious institutions, i.e., free exercise challenges. Indeed, the amendment was linked to another one that specified that such organizations could still discriminate on the basis of religion.[90] In short, there appears to have been absolutely no indication that the legislature, in 1969, was seeking to rewrite the definition of "torts" or causes of action "based on tort."

Regardless of whether *Ayash* properly interpreted the court's own precedent, its conclusion as to the relationship between chapter 151B and section 85K was pellucid. "A fair reading of both statutes," the court stated in no uncertain terms, "does not support the extension of the charitable cap to damages awarded for successful claims under [chapter] 151B."[91] Interestingly, however, neither *Ayash* nor any of the cases upon which it was based (most notably *McMillan*) said anything about chapter 151B's federal analogue, Title VII. Accordingly, there may still be room for charities confronted with employment discrimination claims to maintain the protection of the damages cap.

III. TITLE VII

The Civil Rights Act of 1964 was passed on July 2, 1964, less than one year after the assassination of President John F. Kennedy.[92] The bill had been originally submitted by the late President as a way to remedy the racial segregation of African Americans in many facets of daily life.[93] Regarding employment, however, the

87. *Id.* at 688.

88. *Id.*

89. *See generally* Note, *The Operation of State Fair Employment Practices Commissions*, 68 HARV. L. REV. 685, 687 (1955).

90. *See* 1969 Mass. Acts 115.

91. *Ayash*, 822 N.E.2d at 688.

92. Pub. L. No. 88-352, 78 Stat. 241 (1964).

93. For example, Title I concerned voting rights and Title II dealt with accommodation at public places. *See generally* DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW: TEXT AND CASES 387-466 (South-Western College/West 12th ed. 2004) (describing history of Title VII).

Act was quite broad, going beyond race-based discrimination. Title VII of the Act made it an "unlawful employment practice" to discriminate against any individual with regard to his or her "race, color, religion, sex, or national origin."[94] Like chapter 151B, Title VII also prohibited retaliation against any individual because he or she opposed a discriminatory employment practice or engaged in other protected conduct.[95] In addition, again similar to chapter 151B, Title VII contained comprehensive prelitigation administrative requirements.[96] All of these provisions still exist today.

A main purpose of Title VII is to make victims of unlawful employment discrimination whole.[97] As initially enacted, however, the only available remedies were injunctive relief and reinstatement, with or without back pay.[98] Noting this inequity, the Civil Rights Act of 1991 amended Title VII to allow the recovery of a broad range of compensatory and punitive damages,[99] and to give plaintiffs the right to a jury trial.[100] Even before those amendments, however, several circuit courts had already considered discrimination suits under federal law as analogous to tort actions seeking to redress personal injuries.[101] Indeed, as early as 1978, the Supreme Court itself had deemed "distress"—a main component of Title VII damages—to be a tort-based "personal injury."[102]

The particular issue of whether Title VII claims could be considered "torts" came to a head in the Court's 1992 decision in *United States v. Burke*.[103] In *Burke*, the Court was confronted with the question whether a Title VII settlement payment could be excluded from taxable income as "damages received . . . on account of personal injuries."[104] That question turned on another: whether Title VII injuries and claims were "personal and tort-like in na-

94. 42 U.S.C. § 2000e-2(a)(1) (2000).

95. *Id.* § 2000e-3(a).

96. *See* CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS §§ 1:69-1:97 (West 1997-2004).

97. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

98. 42 U.S.C. § 2000e-5(g)(1).

99. Pub. L. No. 102-166, § 402(a), 105 Stat. 1099 (1991).

100. 42 U.S.C. § 1981a(c).

101. *See, e.g.*, Rickel v. Comm'r., 900 F.2d 655, 663 (3d Cir. 1990) (deeming discrimination claim under Age Discrimination in Employment Act, a companion statute to Title VII, to be akin to a tort action); Pistillo v. Comm'r., 912 F.2d 145, 148 (6th Cir. 1990) (similar).

102. Carey v. Piphus, 435 U.S. 247, 263 (1978).

103. 504 U.S. 229 (1992).

104. *Id.* at 230.

ture."[105] The Court said "no"—Title VII claims were not necessarily tort-like—but, and this is important, only insofar as the statute existed prior to the 1991 amendments.[106] The amendments which made compensatory and punitive damages recoverable, the Court continued, "signal[ed] a marked change in [Congress'] conception of the injury redressable by Title VII."[107]

For example, the Court observed, "A 'tort' has been defined broadly as a 'civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.'"[108] Title VII claims, as amended, fit that definition nicely. In addition, the Court continued, torts make available "a broad range of damages to compensate [a] plaintiff 'fairly for injuries caused by the violation of his [or her] legal rights.'"[109] Again, the amended version of Title VII comports fully with that definition.

True, the *Burke* Court went on to opine that Title VII, as *originally* enacted, did not allow awards for compensatory or punitive damages and, thus, it would have been difficult, under the original language, to have deemed a Title VII cause of action a "tort."[110] However, the "marked change" signified by the 1991 amendments would appear to put to rest any doubt that Title VII discrimination claims are "torts."[111] Today, just like other tort litigants, Title VII plaintiffs can seek "compensatory damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,' as well as punitive damages."[112] They also have the right to a jury trial.[113]

Since *Burke*, the trend in Title VII jurisprudence has indeed been to view post-amendment Title VII actions as akin to common law tort claims.[114] As one court put it, where a Title VII award

105. *Id.* at 232 (quoting Burke v. United States, 929 F.2d 1119, 1121 (6th Cir. 1991)).

106. *See id.* at 233-42.

107. *Id.* at 241 n.12.

108. *Id.* at 234 (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 2 (5th ed. 1984)).

109. *Id.* at 235 (quoting Carey v. Piphus, 435 U.S. 247, 257 (1978)).

110. *See id.* at 237-42.

111. *Id.* at 241 n.12.

112. *Id.* (quoting 42 U.S.C. § 1981a(b)(3) (2000)).

113. 42 U.S.C. § 1981a(c) (2005).

114. *See, e.g.*, Stender v. Lucky Stores, Inc., No. C-88-1467 MHP, 1993 WL 557652, at *2-3 (N.D. Cal. Dec. 15, 1993); King v. Webb (*In re* Webb), 214 B.R. 553, 557-58 (Bankr. E.D. Va. 1997); *see also* Abrams v. Lightolier Inc., 50 F.3d 1204, 1220 n.18 (3d Cir. 1995) (observing that the 1991 amendments which allow recovery of compensatory and punitive damages "throw doubt on the continued validity of the *Burke*

compensates "traditional tort-like harms," it ought to be viewed under the tort umbrella.[115] Commentators have also considered Title VII discrimination suits to be a species of tort law.[116]

What does all of this have to do with Massachusetts's damages cap? Put simply, a legitimate argument can be made that the cap (deemed inapplicable to chapter 151B discrimination claims) can still be applied to claims brought under Title VII. Given *Burke* and its progeny, it seems clear that most Title VII discrimination claims, particularly those seeking compensatory and/or punitive damages, are torts. At the very least, it would appear that Title VII claims are causes of action "based on tort," as that phrase is liberally used in section 85K. Accordingly, Massachusetts charities, although they may have lost the chapter 151B battle, can still argue that their damages for successful Title VII discrimination claims should be capped at $20,000.

IV. CONCLUSION

Did the Supreme Judicial Court in *Ayash* misinterpret section 85K when it held that chapter 151B discrimination claims are not causes of action "based on tort"? Or worse, did the court engraft new language onto the damages cap?[117] Perhaps—but that chapter is now closed. Charities that are sued for employment discrimina-

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holding"); Drase v. United States, 866 F. Supp. 1077, 1079 n.1 (N.D. Ill. 1994) (noting that "*Burke* may not apply to Title VII actions filed after the 1991 changes to the Civil Rights Act"). Of course, it should be noted that the Supreme Court has deemed the Age Discrimination in Employment Act of 1967 not "tort-like" because its monetary remedies "are limited to back wages, which are clearly of an 'economic character,' and liquidated damages, which . . . serve no compensatory function." Comm'r. v. Schleier, 515 U.S. 323, 336 (1995). Title VII, as indicated, is not so constrained.

115. *In re Webb*, 214 B.R. at 558.

116. *See* Mark McLaughlin Hager, *Harassment As a Tort: Why Title VII Hostile Environment Liability Should be Curtailed*, 30 CONN. L. REV. 375 (1998); Juanita Williams, Comment, *Title VII Discrimination (The Dignitary Tort): Is it Personal?*, 18 T. MARSHALL L. REV. 263 (1993).

117. Clearly, the Supreme Judicial Court recognizes that the "time tested wisdom of the separation of powers" requires courts "to avoid judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions." Pielech v. Massasoit Greyhound, Inc., 668 N.E.2d 1298, 1302 (Mass. 1996) (quoting Commonwealth v. A Juvenile, 334 N.E.2d 617 (Mass. 1975)) (citation and internal quotation marks omitted). The Supreme Judicial Court reaffirmed this principle less than one week after its decision in *Ayash*. Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1161 (Mass. 2005) ("Th[e] principles [of separation of powers] call for the judiciary to refrain from intruding into the power and function of another branch of government . . . .") (quoting LIMITS v. President of the Senate, 604 N.E.2d 1307 (Mass. 1992)) (alteration in original) (citation and internal quotation marks omitted).

tion under state law can no longer seek refuge in section 85K. The question of whether the cap applies to Title VII discrimination claims, however, may be another story.