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CHAPTER 4

Labor and Employment Law

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§ **4.1. Introduction.** During the *Survey* year, there were a number of very significant decisions issued by the Supreme Judicial Court in the area of labor and employment law. These cases addressed issues involving mixed-motive discharges in the public sector, the legal status of labor unions, preemption under federal labor law of state libel and tortious interference with employment claims, the constitutionality of agency shop rebate procedures, the validity of multi-year contractual commitments, and the open meeting law.[1]

§ **4.2. Public Sector Mixed-Motive Discharges.** During 1981, in *Trustees of Forbes Library v. Labor Relations Commission,*[1] the Supreme Judicial Court held that the Labor Relations Commission (the "Commission") could find a discharge from employment unlawful under chapter 150A of the General Laws, the state private sector labor statute, only if it found "that the employee would not have been discharged but for his protected activity. . . . If, however, a lawful cause would have led the employer to the same conclusion even in the absence of protected conduct, the discharge must not be disturbed."[2] In addition to adopting this "but for" test, the Court set forth the allocation of the burden of proof in unlawful discharge cases under chapter 150A,[3] selecting the allocation of the bur-

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§ 4.1. [1] The Massachusetts Appeals Court decided several factually interesting cases in the area of labor and employment law, but these decisions did not break significant new legal ground. *See, e.g.*, Trinique v. Mount Wachusett Community College Faculty Association, 14 Mass. App. Ct. 191, 437 N.E.2d 564 (1982) (involving the duty of fair representation); Local 1111, International Association of Fire Fighters, AFL-CIO v. Labor Relations Commission, 14 Mass. App. Ct. 236, 437 N.E.2d 1079 (1982) (involving whether a determination by the Labor Relations Commission on a bargaining unit and certified representative is a final order for purposes of appeal); Babcock v. Labor Relations Commission, 14 Mass. App. Ct. 650, 441 N.E.2d 786 (1982) (involving a mixed-motive discharge).

§ 4.2. [1] 1981 Mass. Adv. Sh. 2183, 428 N.E.2d 124. *See* Ross, *Labor and Employment Law*, 1981 ANN. SURV. MASS. LAW § 7.2, at 168-73.

[2] 1981 Mass. Adv. Sh. 2183, 2185-86, 428 N.E.2d 124, 126.

[3] *Id.* at 2186, 428 N.E.2d at 127.

den of proof used in sex discrimination cases.[4] Under that allocation, the employee must bear the ultimate burden of persuasion, but may rely on a prima facie showing to shift to the employer a limited burden of producing evidence.[5] If the employer states a lawful reason for its decision and produces supporting facts, the prima facie case is rebutted.[6] The burden of persuasion then is on the employee, who must prove by a preponderance of evidence that the alleged lawful reason was not the actual reason for the dismissal.[7]

During the *Survey* year, the Supreme Judicial Court in *Southern Worcester County Regional Vocational School District v. Labor Relations Commission*[8] considered the appropriate legal standard and burden of proof which should govern unlawful discharge cases arising in the public sector under chapter 150E of the General Laws.[9] The Court also considered the remedial powers of the Commission under chapter 150E.[10] The Court applied the *Forbes Library* test, holding that the Commission could determine that a discharge violates chapter 150E if it is proven that the employee would not have been discharged *but for* his protected activity.[11] Additionally, as in *Forbes Library,* the Court ruled that the employee must bear the ultimate burden of persuading the Commission that the discharge is unlawful.[12] As to the remedial powers of the Commission, the Court held that the Commission has the power to direct a school committee to reinstate a teacher even if reinstatement means that the teacher attains tenure.[13]

The *Southern Worcester* case arose when eight non-tenured teachers filed a complaint with the Commission alleging that their termination violated section 10(a)(1)-(4) of chapter 150E.[14] The Commission issued a complaint and after hearings[15] ruled that the Southern Worcester County Regional Vocational School District (the "School District") had committed unfair labor practices and ordered the teachers reinstated with back pay, and without prejudice to the teachers' seniority and tenure rights.[16]

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[4] *Id.* at 2190, 428 N.E.2d at 127-28.
[5] *Id.* at 2190, 428 N.E.2d at 128.
[6] *Id.*
[7] *Id.*
[8] 386 Mass. 414, 436 N.E.2d 380 (1982).
[9] *Id.* at 414, 436 N.E.2d at 381. G.L. c. 150E, §§ 1-15 is the statute governing public sector labor relations in Massachusetts.
[10] 386 Mass. at 414-15, 436 N.E.2d at 380-81.
[11] *Id.* at 415, 436 N.E.2d at 381.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 416-17, 436 N.E.2d at 382-83.
[15] *Id.* at 417, 436 N.E.2d at 383.
[16] *Id.*

The School District appealed and a judge of the superior court affirmed the Commission's decision and ordered the School District to comply with the Commission's ruling.[17] The School District appealed to the Massachusetts Appeals Court which reversed and remanded the case to the Commission.[18] The Commission then applied for further appellate review and the Supreme Judicial Court granted the application in order to set out the legal standard and burden of proof governing unlawful discharge cases arising in the public sector under section 10(a)(1) and (3) of chapter 150E.[19]

The Court began by considering the legal standard to be applied in discharge cases arising under section 10(a)(1) and (3) of chapter 150E.[20] The School District argued that the Commission had applied an incorrect legal standard and burden of proof.[21] The Commission had employed the dominant motive, or "but for" test.[22] In allocating the burden of proof, the Commission had followed the standard used in Massachusetts sex discrimination cases.[23] The Court observed that the standard which the Commission had employed was that which the Court had adopted for private sector unlawful discharge cases in *Forbes Library*.[24] The Court stated that both the legal standard and burden of proof used in *Forbes Library*, which were applied by the Commission in *Southern Worcester*, also apply to unlawful discharge claims arising under Chapter 150E.[25] According to the Court, this approach strikes an "equitable balance between the rights of an employer whose duty . . . is to promote the efficiency of public services through its public employees, and the rights of a non-tenured public school teacher to be secure in his employment, free from discrimination due to his union activity."[26]

The Court next turned to the School District's argument that the Commission's decision was not supported by substantial evidence and, therefore, should be reversed.[27] Noting that it was not free to make a *de novo* review, the Court found that the Commission's decision was supported by substantial evidence.[28] According to the Court, the teachers in question

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 417-18, 436 N.E.2d at 383.
[22] *Id.* at 418, 436 N.E.2d at 383.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 419, 436 N.E.2d at 384.
[26] *Id.* (citing Pasco County School Bd. v. Florida Pub. Employees Relations Comm'n, 353 So.2d 108, 117 (Fla. App. 1977)).
[27] *Id.*
[28] *Id.* at 420, 436 N.E.2d at 384. The Court referred to the statutory definition of

were active members of their union, the Bay Path Association, a fact known to their employer, and they had good work records.[29] The Court found, based on such factors, that the teachers had established a prima facie case of unlawful anti-union discrimination.[30] While the School District offered evidence in rebuttal, the Court pointed out that it was for the Commission alone to determine credibility.[31]

Finally, the Court turned its attention to the question whether the Commission had the authority to direct a school committee to reinstate a teacher even where, as here, reinstatement meant that the teacher would be granted tenure.[32] The School District argued that the school committee alone had authority to grant tenure under sections 41 and 42 of chapter 71 of the General Laws.[33] The Court found, however, that the statutory provisions which grant public employees the right to form, join and assist unions and to engage in lawful, concerted activities limits the school committee's right to refuse to renew the employment of a non-tenured teacher.[34] Accordingly, the Court concluded that the Commission has authority to order reinstatement of a teacher who has been discriminated against for engaging in union activity.[35] The Court observed that this includes an order to rehire a non-tenured teacher.[36] The School District argued, however, that under *School Committee of Danvers v. Tyman*,[37] a school committee could not be forced to "delegate . . . its authority to make decisions concerning tenure."[38] The Court pointed out, however, that the school committee here had not attempted to delegate its authority over tenure to the Commission.[39] Instead, the Court stated, the Legislature had limited the power of the school committee to deny tenure.[40] In a footnote, the Court observed that it had recently limited the "nondelegability doctrine" in *Blue Hills Regional District School Committee v. Flight*,[41] where the Court had ordered the enforcement of an arbitrator's

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"substantial evidence" which is, under G.L. c. 30A, § 1(6), "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 419-20, 436 N.E.2d at 384.

[29] *Id.* at 420, 436 N.E.2d at 384.

[30] *Id.*

[31] *Id.* at 420-21, 436 N.E.2d at 384-85.

[32] *Id.* at 421, 436 N.E.2d at 385.

[33] *Id.*

[34] *Id.* at 422, 436 N.E.2d at 385.

[35] *Id.* at 422, 436 N.E.2d at 386.

[36] *Id.*

[37] 372 Mass. 106, 112-14, 360 N.E.2d 877, 880-82 (1977).

[38] 386 Mass. at 423, 436 N.E.2d at 386 (citing School Committee of Danvers v. Tyman, 372 Mass. 106, 111, 360 N.E.2d 877, 880 (1977)).

[39] *Id.*

[40] *Id.*

[41] 1981 Mass. Adv. Sh. 1240, 421 N.E.2d 755.

decision to promote a teacher who had suffered sex discrimination,[42] a decision which also ordinarily is a nondelegable managerial prerogative. In the Court's view, denying a teacher tenure because of union activity was equally unlawful.[43] Therefore, the Court concluded, the nondelegability doctrine does not apply to this case.[44]

The *Southern Worcester* decision is interesting in two respects. Recently, the United States Supreme Court, in *National Labor Relations Board v. Transportation Management Corp.*,[45] held that, although the General Counsel of the Board has the burden of persuading the Board that anti-union animus contributed to a decision to discharge an employee, once that burden has been met, the burden shifts to the employer to prove that the employee would have been discharged for a lawful reason notwithstanding the employee's protected activities.[46] This allocation of the burden of proof differs significantly from the allocation enunciated by the Supreme Judicial Court in *Forbes Library*[47] and now in *Southern Worcester*.[48] The Supreme Judicial Court has chosen an allocation of the burden of proof similar to that which was rejected by the Supreme Court. The allocation approved by the Supreme Judicial Court leaves the employer with an easier task than under the National Labor Relations Act. Since the Massachusetts standard is based on the Court's own independent reasoning, and not on the First Circuit's standard, it is unlikely that the Supreme Judicial Court will alter its standard in light of *Transportation Management*.

The Court's application of the *Forbes Library* principles to the public sector was predictable.[49] The Court's resolution of the remedy issue in *Southern Worcester* was less so. It is obvious that the Court had to contend with two countervailing policies in reaching its conclusion that the Commission may require reinstatement even if it results in a teacher obtaining tenure. On the one hand, the policy of protecting public employees from unlawful conduct by their employers should dictate reinstatement with tenure, if tenure would have been obtained had the employee not been wrongfully dismissed. On the other hand, the policy of allowing school committees the prerogative to grant or deny tenure for valid reasons suggests that the Commission should not have the authority

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[42] 386 Mass. at 423 n.10, 436 N.E.2d at 386 n.10 (citing Blue Hills Regional Dist. School Comm. v. Flight, 1981 Mass. Adv. Sh. 1240, 1242, 421 N.E.2d 755, 756).

[43] *Id.* at 423-24, 436 N.E.2d at 386.

[44] *Id.* at 424, 436 N.E.2d at 386.

[45] 51 U.S.L.W. 4761 (U.S. June 15, 1983).

[46] *Id.* at 4764.

[47] *See supra* notes 3-7 and accompanying text.

[48] *See supra* notes 12, 25-26 and accompanying text.

[49] *See* Ross, *Labor and Employment Law*, 1981 ANN. SURV. MASS. LAW § 7.2, at 172.

to issue an order resulting in tenure. Wrestling with these policies, the Court concluded that, in the circumstances of this case, the former policy outweighed the latter. Thus, the Court held that the Commission could order reinstatement, although such was equal to granting tenure. In so holding, perhaps the Court was influenced by the fact that a grant of tenure is not a guarantee of continued employment if there are legitimate, nondiscriminatory reasons for termination.

Since the reinstatement ordered by the Commission in its original decision was not challenged by the School District, the Court may not have considered whether there exists any middle ground available to accommodate both policies. A middle ground of sorts was found by the Massachusetts Appeals Court in a different context in *Puglisi v. School Committee of Whitman*.[50] There, the Appeals Court addressed the remedy for a decision of a school committee to discharge a principal made in violation of the open meeting law.[51] Instead of indirectly granting tenure to the principal by crediting the time elapsed during the pendency of the litigation, the Appeals Court determined that the plaintiff was only entitled to back pay from the date of the wrongful discharge.[52] In reaching this conclusion, the Appeals Court noted that there was no evidence of bad faith by the school committee in appealing a lower court's ruling.[53] The court stated that "[t]he fault inherent in ordering reinstatement . . . is that reinstatement may be read as conferring entitlement to the position."[54] The Appeals Court ordered that the principal receive an award of back pay from the date of the wrongful discharge to the date when the school committee acted in conformity with the open meeting law on the issue whether the principal should be dismissed or otherwise disciplined.[55]

The distinction between *Puglisi* and *Southern Worcester*, of course, is that in *Southern Worcester* the school committee had exhibited bad faith in the decision not to reappoint the teachers, and had not merely violated a procedural requirement as in *Puglisi*. Nevertheless, the practicalities of a remedy which allows the school committee to give final consideration to the tenure decision, directing it to do so without regard to the union activities of the teachers, are evident. The *Puglisi* court admonished, "[r]einstatement . . . may by indirection punish teaching personnel and students as well as the school committee by burdening the system with an incompetent."[56] In *Southern Worcester*, the Supreme Judicial Court

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[50] 1981 Mass. App. Ct. Adv. Sh. 46, 414 N.E.2d 613.
[51] *Id.* at 47, 414 N.E.2d at 613.
[52] *Id.* at 51 & n.6, 414 N.E.2d at 615 & n.6, 616.
[53] *Id.* at 51, 414 N.E.2d at 615.
[54] *Id.* at 50, 414 N.E.2d at 615.
[55] *Id.* at 51, 414 N.E.2d at 615-16.
[56] *Id.* at 50 n.5, 414 N.E.2d at 615 n.5.

made it clear that this Appeals Court admonition will not apply when it is determined that the teacher would have attained tenure but for the School District's unlawful discrimination.

§ **4.3. Labor Union as a Party Plaintiff or Defendant.** At common law labor unions, as unincorporated associations, could neither sue nor be sued as legal entities.[1] They were considered merely aggregations of individuals pursuing a common purpose.[2] As a result, in order to sue a labor union it was procedurally necessary to join as parties those individuals who were alleged to be and were fairly representative of the class composed of all union members.[3] Only members who participated in, authorized, or ratified the union's conduct could be liable.[4] With the Supreme Judicial Court's decision in *Diluzio v. United Electrical, Radio and Machine Workers of America, Local 274,*[5] decided during the *Survey* year, this cumbersome procedural requirement will no longer be necessary and labor unions, henceforth, may sue and be sued in their own names.

In *Diluzio*, the plaintiff sued to recover damages to herself and to her automobile which occurred when she drove through the defendants' picket line at her place of employment.[6] She sued the national union, the local union and certain individual union members.[7] The trial judge granted the defendant unions' motion to dismiss on the ground that unions, as unincorporated associations, are not subject to suit as separate entities.[8] The Supreme Judicial Court granted the plaintiff's petition for direct appellate review.[9]

The Court held that labor unions are legal entities for the purposes of suing and being sued.[10] The Court's departure from the long-standing common law rule was based upon its analysis of the changes which have taken place with respect to the status of labor unions.[11] The Court ob-

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§ 4.3. [1] Pickett v. Walsh, 192 Mass. 572, 589, 78 N.E. 753, 760 (1906); *see* Labor Relations Comm'n v. Boston Teachers Union, Local 66, 374 Mass. 79, 93, 371 N.E.2d 761, 771 (1977).

[2] Note, *Unincorporated Associations*, 9 AKRON L. REV. 602, 604 (1976).

[3] Forkosch, *The Legal Status and Suability of Labor Organizations*, 28 TEMP. L.Q. 1, 15-16 (1954).

[4] *Id.*

[5] 386 Mass. 314, 435 N.E.2d 1027 (1982).

[6] *Id.* at 314-15, 435 N.E.2d at 1028.

[7] *Id.*

[8] *Id.* at 315, 435 N.E.2d at 1028.

[9] *Id.*

[10] *Id.* at 314, 435 N.E.2d at 1028.

[11] *Id.* at 318, 435 N.E.2d at 1030.

served that the circumstances facing labor unions when the common law rule was established no longer existed; at common law they were "struggling for their existence and for recognition."[12] The Court stated:

> Now "[u]nions have become endowed with great privileges and responsibilities as representatives of their members. Existence of such privileges must be accompanied by a correlative duty not to misuse them to the injury of [the public or] individual union members. Immunity for liability for misuse is inconsistent with basic notions of justice." . . . . "It would be unfortunate if an organization with as great power as [a labor union] has in the raising of large funds and in directing the conduct of [its] members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in the course of such strikes."[13]

The Court next addressed the defendants' contention that the Court "should await legislative action on this issue."[14] Quoting from *Lewis v. Lewis*,[15] the Court rejected the notion of leaving this matter to the vagaries of the political process, stating:

> "[I]t is within the power and authority of the court to abrogate [a] judicially created rule; and the mere longevity of the rule does not by itself provide cause for us to stay our hand if to perpetuate the rule would be to perpetuate inequity. When the rationales which gave meaning and coherence to a judicially created rule are no longer vital, and the rule itself is not consonant with the needs of contemporary society, a court not only has the authority but also has the duty to examine its precedents rather than to apply by rote an antiquated formula."[16]

The Court thereupon reversed the judgment dismissing the plaintiff's complaint.[17] The Court expressly limited its holding "to labor unions only, leaving to further development the rules to be applied in cases involving other types of unincorporated voluntary associations."[18]

Diluzio is consistent with modern law on the issue.[19] There are only three other states which follow the old common law rule.[20] The practical difficulties in conforming with the procedural requirements of the old common law rules are obvious. After the *Diluzio* decision, plaintiffs will no longer be discouraged from suing labor unions because of the burdens

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[12] *Id.*

[13] *Id.* (citations omitted).

[14] *Id.* at 318-19, 435 N.E.2d at 1030.

[15] 370 Mass. 619, 351 N.E.2d 526 (1976).

[16] 386 Mass. at 318-19, 435 N.E.2d at 1030-31.

[17] *Id.* at 318-19, 435 N.E.2d at 1031.

[18] *Id.* at 319 n.6, 435 N.E.2d at 1031 n.6.

[19] *See id.* at 315 n.2, 435 N.E.2d at 1028 n.2 for a listing of state statutes, court rules, and decisions which permit labor unions to sue or to be sued.

[20] *See id.* at 316 n.3, 435 N.E.2d at 1029 n.3 (The three states are Illinois, Missouri and West Virginia).

of joining all of its members.[21] It is only surprising that this change was not forthcoming sooner.

§ 4.4. State Libel and Tortious Interference with Employment Claims — Preemption by Federal Law. Over the years state and federal courts have struggled to reconcile federal labor policy with the rights of parties to seek redress in state courts for allegedly tortious conduct. During the *Survey* year, the Supreme Judicial Court addressed this preemption issue in *Tosti v. Ayik,*[1] a case involving state claims of libel and tortious interference with employment. The *Tosti* Court held that such state court actions are not preempted if the plaintiff demonstrates actual malice in accordance with the principles enunciated by the United States Supreme Court in *New York Times Co. v. Sullivan.*[2]

The state court action in *Tosti* arose after the defendants published an article in a local union newspaper which stated that the plaintiff was performing bargaining unit work contrary to the collective bargaining agreement and that he was punching repair tickets without the requisite work having been done.[3] Copies of the newspaper were distributed to union and management personnel.[4] On the morning following the day when the article was distributed, the plaintiff was called to the plant manager's office, where the article was mentioned.[5] Two days later the plaintiff was fired.[6] The plaintiff then sued alleging that the article libeled him and that the defendants had tortiously interfered with his employment.[7] A jury found for the plaintiff and the defendants appealed.[8] The Supreme Judicial Court granted the defendant's request for direct appellate review.[9]

The Court began by addressing the issue of preemption of the libel claim. The Court properly followed the principles set down by the United States Supreme Court in *Linn v. Plant Guard Workers*,[10] which estab-

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[21] One example of how procedural burdens are being lightened is Rule 4(d)(2) of the Massachusetts Rules of Civil Procedure, 365 Mass. 735 (1974), which provides for service of process upon "an unincorporated association subject to suit within the Commonwealth under a common name."

§ 4.4 [1] 386 Mass. 721, 437 N.E.2d 1062 (1982).

[2] *Id.* at 723, 729, 437 N.E.2d at 1064, 1067 (citing New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964)).

[3] *Id.* at 722, 437 N.E.2d at 1063.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 722-23, 437 N.E.2d at 1063-64.

[9] *Id.* at 721, 437 N.E.2d at 1062 (reporter's note).

[10] 383 U.S. 53 (1966). The statutory definition appears at 29 U.S.C. § 152(9) (1976).

lished that libel claims arising in the context of a "labor dispute" are not governed entirely by state law, since federal law superimposes a malice requirement.[11] Turning to the question of whether the article was published in the context of a "labor dispute," the Court cited the broad statutory definition of that term.[12] The Court noted that "[r]arely have courts found concerted union activity to fall outside this broad statutory definition."[13] The Court determined that the term "should be broadly and liberally construed."[14] Under such a construction, the Court readily concluded that the article in question was published in the context of a labor dispute,[15] since the allegedly defamatory statements could not be separated from the protected activity concerning the terms and conditions of employment.[16]

The Court then examined the manner in which the United States Supreme Court has reached an accommodation between federal labor law and state libel remedies. The Court noted that whether "partial preemption of state libel remedies" applies "cannot depend on some abstract notion of what constitutes a 'labor dispute'; rather, application of [the actual malice standard] must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated."[17] Because Congress wanted to protect the use of "free-wheeling language" in a labor dispute context, the Court pointed out, the Supreme Court has required that the *New York Times* actual malice standard be applied in such instances.[18] The Court rejected the plaintiff's contention that the actual malice standard could not be raised for the first time on appeal, observing that this involved an issue of subject matter jurisdiction which may be raised initially on appeal.[19] The Court stated that, in enacting the federal labor laws, Congress " 'deprived the States of the power to act' . . . in a defamation case arising from a labor dispute absent the correct application of the *New York Times* standard."[20]

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[11] 386 Mass. at 723, 437 N.E.2d at 1064.

[12] *Id.*

[13] *Id.*

[14] *Id.* (quoting Hasbrouck v. Sheet Metal Workers Local 232, 586 F. 2d 691, 694 n.3 (9th Cir. 1978)).

[15] *Id.* at 723-24, 437 N.E.2d at 1064.

[16] *Id.* at 724, 437 N.E.2d at 1064. The allegedly defamatory statements were those made to injure the reputation of the plaintiff. *See id.* The protected activity was a dispute over supervisory personnel doing bargaining unit work. *See id.*

[17] *Id.* (citing Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 279 (1974)).

[18] *Id.* at 724-25, 437 N.E.2d at 1065.

[19] *Id.* at 725, 437 N.E.2d at 1065.

[20] *Id.* (citing Linn v. Plant Guard Workers, Local 114, 383 U.S. 53, 59 (1966)).

On the issue of preemption of the tortious interference with employment claim, the Court concluded that such a claim is not preempted when the plaintiff proves that a libel made with actual malice is the basis of such interference.[21] In the absence of Supreme Court precedent directly addressing this issue, the Court borrowed the three part test established in *Linn* to support its result.[22] According to the Court this test considered: "first, the presence of an overriding State interest; second, whether the underlying conduct (the alleged libel) is protected under the National Labor Relations Act (NLRA); and third, the risk that the State cause of action would interfere with the effective administration of national labor policy."[23] Applying this test, the Court concluded that there is an overriding State interest in protecting its citizens from tortious conduct, that the intentional circulation of defamatory materials is not protected activity, and that there is little risk that the interference with the employment cause of action, if based on libel made with actual malice, would interfere with the effective administration of national labor policy.[24] Judgment was reversed and a new trial was ordered for the purpose of applying the principles enunciated by the Court to both the libel and the interference with employment claims.[25]

The *Tosti* decision is certainly consistent with the principles set forth by the United States Supreme Court in *Linn v. Plant Guard Workers,*[26] *Farmer v. Carpenters Local 25,*[27] and *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin.*[28] The resolution of labor law preemption issues, however, may be less straightforward in the future. In the recent decision of *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board,*[29] the United States Supreme Court may have signalled the beginning of an erosion of preemption principles as applied to state tort claims in the context of labor disputes. The Supreme Court held that the National Labor Relations Board may not halt the prosecution of a state court lawsuit, regardless of the plaintiff's motive in bringing the suit, unless the suit lacks a reasonable basis in fact or law.[30] Under the decision, both retaliatory motive and lack of reasonable basis in bringing the lawsuit are essential prerequisites to the issuance of a cease-and-desist order against a state suit.[31] In the course of its opinion, the Supreme

[21] *Id.* at 726, 437 N.E.2d at 1065.
[22] *Id.* at 727, 437 N.E.2d at 1066.
[23] *Id.*
[24] *Id.* at 728-29, 437 N.E.2d at 1066-67.
[25] *Id.* at 729, 437 N.E.2d at 1067.
[26] 383 U.S. 53 (1966).
[27] 430 U.S. 290 (1977).
[28] 418 U.S. 264 (1974).
[29] 51 U.S.L.W. 4636 (May 31, 1983).
[30] *Id.* at 4641.
[31] *Id.*

Court enunciated principles that are certain to be relied upon in future cases by plaintiffs seeking to expand the availability of state court relief for tortious conduct in the context of a labor dispute.[32] Emphasizing the importance of access to the courts, the Supreme Court stated:

> We should be sensitive to these First Amendment values in construing the NLRA in the present context. As the Board itself has recognized, "going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right."
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> Moreover, in recognition of the States' compelling interest in the maintenance of domestic peace, the Court has construed the Act as not preempting the States from providing a civil remedy for conduct touching interests "deeply rooted in local feeling and responsibility." It has therefore repeatedly been held that an employer has the right to seek local judicial protection from tortious conduct during a labor dispute.[33]

The tone of the Supreme Court's statements suggests that its emphasis is shifting. Prior to this opinion, the sense from reading the Supreme Court's opinions in this area was that the principle of preemption was paramount and would be permitted to give way only under very limited and compelling circumstances. The emphasis of the Supreme Court in *Bill Johnson's Restaurants*, on the other hand, appears to center on the importance of protecting rights of parties to seek state court relief for tortious conduct.

Some commentators are certain to emphasize that the quoted language should not be read too broadly. They will note that the issue that was addressed was the right of access to the courts for redress of allegedly tortious conduct and not the principles to be applied in determining whether particular causes of action are preempted. Whatever the interpretation of *Bill Johnson's Restaurants*, there is certainly more law to be made on the issue of preemption of state court claims for tortious conduct in the context of a labor dispute.

§ **4.5. Agency Shop Agreements — Rebate Procedures.** As in many states which have public employee collective bargaining laws, Massachusetts public employers are permitted, pursuant to chapter 150E, section 12 of the General Laws, to enter into agency shop agreements with unions representing their employees.[1] Pursuant to such agreements, employees

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[32] *See id.* at 4639.

[33] *Id.* (citations omitted).

§ 4.5. [1] G.L. c. 150E, § 12, as amended by Acts of 1977, c. 903, provides in pertinent part:

> The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment . . . of a service fee to the employee organization which in accordance with the provisions of

are required, as a condition of employment, to pay a service fee in an amount equal to union dues to unions which represent them in collective bargaining.[2] The purposes for which a union can use these service fees, however, are not unlimited. In *Abood* v. *Detroit Board of Education*,[3] concerning a Michigan law governing agency shop agreements, the United States Supreme Court held that while employees may be forced to finance collective bargaining, contract administration and grievance adjustment expenses, they may not be required to support social, political or speech activities of the labor organization.[4] In these latter instances, the Court held, the first amendment prohibits unions from requiring any employee to contribute to the support of an ideological cause he may disapprove of as a condition of holding a job as a public school teacher.[5]

During the *Survey* year, the Supreme Judicial Court addressed a number of issues regarding the payment of agency service fees in *School Committee of Greenfield* v. *Greenfield Education Association*.[6] The case

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this chapter, is duly recognized by the employer or designated by the [Labor Relations] Commission as the exclusive bargaining agent for the unit in which such employee is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting . . . . The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for:

(1) contributions to political candidates or political committees formed for a candidate or political party;

(2) publicizing of an organizational preference for a candidate for political office;

(3) efforts to enact, defeat, repeal or amend legislation unrelated to the wages, hours, standards of productivity and performance, and other terms and conditions of employment, and the welfare or the working environment of employees represented by the exclusive bargaining agent or its affiliates;

(4) contributions to charitable, religious or ideological [sic] causes not germane to its duties as the exclusive bargaining agent;

(5) benefits which are not germane to the governance or duties as bargaining agent, of the exclusive bargaining agent or its affiliates and available only to the members of the employee organization.

It shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or agency fee status in the employee organization or its affiliates.

[2] *See id.*

[3] 431 U.S. 209 (1977).

[4] *Id.* at 234-37.

[5] *Id.* at 235.

[6] 385 Mass. 70, 431 N.E.2d 180 (1982).

arose when two public school teachers, who were not members of the Greenfield Education Association (the "Association"), refused to pay the service fee required as a condition of employment pursuant to the Association's collective bargaining agreement with the Greenfield School Committee (the "School Committee").[7] The Association sought dismissal of the teachers whose refusal to pay the fee was based upon their objections to the uses to which the fees would be put.[8] The Association agreed to drop its demand for termination if the teachers agreed to pay the disputed sums into an escrow account pending an evaluation by the Massachusetts Labor Relations Commission (the "Commission") of the allowable amount of the fee.[9] The teachers refused and the School Committee voted not to dismiss them.[10] The Association thereupon sought arbitration, pursuant to the provisions of the collective bargaining agreement, of its claim that the refusal of the School Committee to dismiss the teachers breached the agreement relating to agency service fees.[11] The instant proceeding arose when the School Committee brought an action in superior court for a declaratory judgment as to whether it could dismiss the teachers without violating their statutory or constitutional rights.[12] The teachers brought a cross-claim asserting that a rebate procedure whereby it would have to pay the Association and then petition for a rebate of the fee violated their first amendment rights.[13] The superior court issued a partial summary judgment for the School Committee and denied the Association's motion for summary judgment on the teachers' cross-claim.[14] The Supreme Judicial Court granted the Association's motion for direct appellate review.[15]

The Court first addressed the issue whether these facts presented an "actual controversy."[16] The Court answered this question affirmatively, noting that the School Committee was caught between the plain terms of the collective bargaining agreement and the teachers' statutory and constitutional rights.[17]

The second issue involved whether the trial judge erred in granting a

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[7] *Id.* at 72-73, 431 N.E.2d at 182-83.

[8] *Id.* at 73, 431 N.E.2d at 183.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 73-74, 431 N.E.2d at 183.

[13] *Id.* at 71, 431 N.E.2d at 183.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 74, 431 N.E.2d at 183. The School Committee's action was before the superior court in part under G.L. c. 231A, § 1 which allows the court to issue a declaratory judgment "in any case in which an actual controversy has arisen." *Id.*

[17] *Id.*

stay of arbitration since section 2 of Chapter 150C expresses a preference for arbitration of labor disputes, permitting stays only where there is no "agreement to arbitrate" or "the claim sought to be arbitrated does not state a controversy covered by the provision for arbitration."[18] The Court held that where, as here, the interests of the employees and their bargaining representative are in direct conflict and it is not clear that the employer would represent the interests of the employees, a stay of arbitration may be granted.[19]

The third question reviewed by the Court involved an issue of primary jurisdiction, specifically whether the Association's motion for summary judgment on the teachers' cross-claim should have been allowed since the issues in litigation were within the special competence of the Commission.[20] The Court concluded that the principle of primary jurisdiction "does not apply . . . when the issue in controversy turns on questions of law which have not been committed to agency discretion."[21] The Court concluded that the issues here were legal in nature and were thus not committed to the jurisdiction of the Commission.[22] Further, the Court found that resolution of the issues would affect many nonparties, "making it appropriate for judicial rather than administrative determination."[23]

The issue which received most of the Court's attention involved the constitutionality of chapter 150E, section 12.[24] The Court noted that all parties agreed that the teachers were bound to pay their proportional share of the expenses of collective bargaining and grievance adjustment and that they could not be forced to contribute to the social, political or speech activities of the Association.[25] The issue which remained was whether the teachers were required to pay the fee to the Association and

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[18] *Id.*

[19] *Id.* at 75, 431 N.E.2d at 184.

[20] *Id.* at 75-76, 431 N.E.2d at 184. *See supra* notes 13-14 and accompanying text.

[21] *Id.* at 76, 431 N.E.2d at 184 (citing Murphy v. Administrator of the Div. of Personnel Administration, 377 Mass. 217, 221, 386 N.E.2d 211, 214 (1979)).

[22] *Id.*

[23] *Id.* The Court noted, however, that the factual issues would remain after the legal questions were answered. *Id.* The Court left the issues to the Labor Relations Commission to resolve in the future. *Id.* at 76, 431 N.E.2d at 184-85. The Commission will determine the amount an employee organization and its affiliates can lawfully assess as an agency service fee, in light of this decision. *Id.* at 76, 431 N.E.2d at 185.

[24] *Id.* at 77-86, N.E.2d at 185-90. Before reaching the constitutional issue, the Court briefly disposed of a contention by the teachers and the School Committee that the discharge of tenured teachers is prohibited without good cause pursuant to G.L. c. 71, § 42 and that dismissal for failure to pay an agency service fee is not good cause. *Id.* at 77, 431 N.E.2d at 185. The Court found it unnecessary to reach this issue because no decision to discharge the teachers had been made. *Id.*

[25] *Id.* at 78, 431 N.E.2d at 185.

then exhaust the Association's rebate procedures before challenging the amount of the fee before another tribunal.[26]

The Court rejected the Association's contention that the teachers were required to submit to the Association's rebate procedures as their primary remedy, concluding that such a requirement would render the statute constitutionally suspect on first amendment grounds.[27] The Court noted that section 12 does not clearly require the use of union rebate procedures, which must exist in some form under the statute, to the exclusion of all other remedies or require that unions be given use of the agency fees in the interim.[28] The Court followed *Ball v. Detroit,*[29] holding that "the statutory right of the organization to the permissible amount [of the service fee] is outweighed by the potential that impermissible amounts will be used, even temporarily, in violation of the dissenting teachers' First Amendment rights."[30]

The Court also refused to permit the Association to receive the entire fee pending proof of legitimacy, since this would not only deprive the teachers of the opportunity to engage in expressive activities themselves with those funds, but would also force them to at least temporarily subsidize the objectionable activities of the Association.[31] The Court remarked that dissenting employees may constitutionally be required to pay the disputed fee into a neutral escrow account pending adjudication of the permissible fee by the Commission.[32]

Finally, the Court concluded that when a fee is challenged by an employee before the Commission, the burden of justifying the fee rests with the union.[33] The Court counselled, however, that the Commission should give prompt attention to such complaints in order to accommodate the competing interests involved, noting that protecting rights of dissenting employees is "not a justification for allowing an association to be 'crippled by non-access to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment.' "[34]

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[26] *Id.*

[27] *Id.* at 79, 431 N.E.2d at 186.

[28] *Id.* at 81, 431 N.E.2d at 187. A rebate procedure allows the union to collect the service fee for improper as well as proper uses, a percentage being returned to the employee at the end of the year based on the amount improperly used. See *id.* at 78 n.4, 431 N.E.2d at 186 n.4.

[29] 84 Mich. App. 383, 269 N.W.2d 607 (1978).

[30] 385 Mass. at 83, 431 N.E.2d at 188.

[31] *Id.* at 83-84, 431 N.E.2d at 189.

[32] *Id.* at 84-85, 431 N.E.2d at 189.

[33] *Id.* at 85, 431 N.E.2d at 189.

[34] *Id.* at 85, 431 N.E.2d at 189-90 (citing White Cloud Educ. Ass'n v. White Cloud Bd. of Educ., 101 Mich. App. 309, 319, 300 N.W.2d 556, 563 (1980).

In December of 1982, the Labor Relations Commission promulgated regulations for dealing with complaints challenging agency service fees.[35] These regulations include a requirement that the complaining party pay into a neutral escrow account a sum equal to the agency service fee.[36] The new regulations also specify various allowable and non-allowable collective bargaining representation expenses.[37]

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[35] 341 Mass. Admin. Reg. 47-55 (December 9, 1982) (codified in MASS. ADMIN. CODE tit. 402, § 17.00).

[36] 341 Mass. Admin. Reg. 51-52 (codified in MASS. ADMIN. CODE tit. 402, § 17.07).

[37] In pertinent part, the new regulations provide:

17.04: Impermissible and Permissible Costs

(1) Costs attributable to the following shall be deemed impermissible in computing a service fee:

(a) Expenditures for political candidates or political committees formed for a candidate or political party;

(b) Establishing and publicizing of an organizational preference for a candidate for political office;

(c) Lobbying or efforts to enact, defeat, repeal or amend legislation or regulations unrelated to wages, hours, standards of productivity and performance, and other terms and conditions of employment of employees represented by the bargaining agent or its affiliates;

(d) Expenditures for charitable, religious or ideological causes not germane to a bargaining agent's duties as the exclusive representative;

(e) Benefits and activities which are:

1. not germane to the governance or duties of the bargaining agent, and

2. available only to the members of the employee organization which is the exclusive bargaining agent;

(f) Fines, penalties or damages arising from the unlawful activities of a bargaining agent or a bargaining agent's officers, agents or members;

(g) Overhead and administrative costs allocable to any activity listed in sections (a) through (f) above.

(2) Costs attributable to the following shall be deemed permissible to the extent that they are not deemed impermissible under 402 CMR 17.04(1) above.

(a) Preparation, negotiation, and ratification of collective bargaining agreements;

(b) Adjusting employee grievances and complaints;

(c) The public advertising of positions on the negotiating of, or provisions in, collective bargaining agreements, as well as on matters relating to the collective bargaining process and contract administration;

(d) Purchasing of materials and supplies used in matters relating to the collective bargaining process and contract administration;

(e) Paying specialists in labor law, negotiations, economics and other subjects for services used in matters relating to working conditions and to the collective bargaining process and contract administration;

(f) Organizing within the charging party's bargaining unit;

(g) Organizing bargaining units in which charging parties are not employed, including units where there is an existing exclusive bargaining agent;

(h) Defending the employee organization seeking a service fee against efforts by other unions or organizing committees to gain representation rights in

In *Greenfield School Committee*, the Court correctly recognized that if the teachers had been required to pursue the portion of their agency service fees allegedly collected for improper purposes only through the complex rebate procedures of the various teacher associations which received a share of the fee,[38] then the restrictions on agency service fees under chapter 150E, section 12[39] would be meaningless. Accordingly, the Court held that the teachers had the option of bringing their rebate claims before the Labor Relations Commission.

§ 4.6. Approval of Multi-year Contractual Commitments — Nondelegable Duty Doctrine — Notice and Hearing. Perhaps the most significant decision of the Supreme Judicial Court in the public sector labor and employment law field during the *Survey* year was *Boston Teachers Union, Local 66 v. School Committee of Boston.*[1] This decision involved three cases which had been consolidated for determination of the rights and obligations of various parties in the second year of a collective bargaining agreement between the Boston Teachers Union, Local 66 (the "BTU") and the School Committee of the City of Boston (the "School Committee").[2] *Boston Teachers Union* establishes significant precedent in sev-

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units represented by the employee organization seeking an agency fee or by its affiliates;

(i) Proceedings involving jurisdictional controversies under the AFL-CIO constitution or analogous provisions governing bargaining agents that are not affiliated with the AFL-CIO;

(j) Lobbying or efforts to enact, defeat, repeal, or amend legislation or regulations relating to wages, hours, standards of productivity and performance, and other terms and conditions of employment of employees represented by the bargaining agent or its affiliates;

(k) Paying costs and fees to labor organizations affiliated with the bargaining agent seeking an agency fee;

(l) Meetings and conventions;

(m) Publications of the bargaining agent seeking a service fee;

(n) Lawful impasse procedures to resolve disputes arising in connection with negotiating and enforcing collective bargaining agreements;

(o) Professional services rendered to the exclusive bargaining agent and its affiliates;

(p) Wages and benefits for persons employed by the bargaining agent;

(q) All other activities not listed in 402 CMR 17.04(1);

(r) Overhead and administrative costs allocable to any item in 402 CMR 17.04(2)(a) through (q) above.

341 Mass. Admin. Reg. 49-50.

[38] The rebate procedures of the various associations are discussed by the Court. 385 Mass. at 78 n.4, 431 N.E.2d at 186 n.4.

[39] *See supra* note 1.

§ 4.6. [1] 386 Mass. 197, 434 N.E.2d 1258 (1982).

[2] *Id.* at 198, 434 N.E.2d at 1260. In the first case, the BTU sought declaratory and

eral important areas of public sector labor law.

On August 29, 1980, the School Committee concluded the negotiation of a three-year agreement with the BTU, subject to appropriation of funds by the city council and the mayor.[3] The agreement contained a job security clause which for the first two years of the agreement protected the jobs of teachers and nurses who had tenure or a permanent appointment.[4] The required funds were appropriated to implement the first year of the agreement. On March 12, 1981, however, the mayor notified the School Committee that he would not provide any funds for fiscal year 1981-82 beyond those which the School Committee could appropriate in its own right pursuant to law.[5] No action was taken on a formal request that the mayor and city council appropriate the additional funds necessary to implement the second year salary increases.[6]

As a result of the inability to obtain funding from the mayor and the city council, the School Committee notified 2,261 tenured teachers and permanently appointed nurses that the School Committee would vote on their layoff or dismissal.[7] The parties agreed that such a layoff or dismissal would violate the job security clause of the agreement between the School Committee and the BTU.[8] Injunctive relief was sought in the superior court by the BTU to enforce the job security provision and to prevent the layoffs and dismissals.[9] The School Committee sought a declaration of the obligations of the city council, the mayor and the School Committee with respect to the funding and implementation of the

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injunctive relief to prevent the lay-off of over two thousand tenured teachers and permanently employed school nurses. In the second case, the School Committee sought a declaration of the duties of the city council, the mayor and the School Committee with regard to the funding and implementation of the collective bargaining agreement. In the third case, the BTU sought declaratory and injunctive relief to force the mayor to submit to the city council the School Committee's request for an appropriation of $8.2 million to fund the salary increases in the second year of the collective bargaining agreement. *Id.* at 198-99, 434 N.E.2d at 1260.

[3] *Id.* at 200, 434 N.E.2d at 1261.

[4] *Id.* at 200-01, 434 N.E.2d at 1261.

[5] *Id.* at 201, 434 N.E.2d at 1261. Chapter 224 of the Acts of 1936 prescribes the method for financing the Boston Public Schools. This method authorizes the School Committee itself to appropriate funds for general school purposes up to a limit calculated by a statutory formula. *Id.* at 197, 200, 434 N.E.2d 1258, 1261. If additional funds are necessary, the School Committee must seek monies through the usual municipal finance channels, and request, through the mayor, a supplemental appropriation by the city council. *Id.* The mayor may decline to submit the request, however, provided such action is not repugnant to chapter 150E. *Id.*

[6] *Id.* at 201, 434 N.E.2d at 1261.

[7] *Id.* at 202, 434 N.E.2d at 1262.

[8] *Id.*

[9] *Id.* at 198, 434 N.E.2d at 1260.

agreement.[10] The Supreme Judicial Court ordered direct review of the claims on its own initiative.[11]

The Court held that the mayor and the city council are required to appropriate the funds necessary to implement the second year economic provisions, rejecting the argument that the enforceability of those economic provisions is subject to the annual appropriation process.[12] The Court stated:

> We think that the requirement in [section] 7(b) [of chapter 150E], that the employer submit a request to the appropriate legislative body for an appropriation sufficient to fund the cost items for the agreement, applies only to funds needed in the first year of the agreement, and that an appropriation funding the first year of the contract constitutes an approval by the legislative body of the entire agreement.[13]

This interpretation, according to the Court, was the only way section 7(b), which provides for the submission of a request for appropriation "within thirty days after the date on which the agreement is executed by the parties" and for the return of cost items for further bargaining if the legislative body rejects the request, could be construed consistently with section 7(a), which authorizes contracts of up to three years' duration.[14]

The Court found several sources of support for its holding. The Court noted that its holding was consistent with *Mendes v. Taunton,*[15] in which it held that salary increases for city workers provided for in the second year of collective bargaining agreements are effective despite the provi-

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[10] *Id.* at 198-99, 434 N.E.2d at 1260. In a third claim, the BTU sought declaratory and injunctive relief to compel the mayor to submit to the city council the school committee's request for funds to implement the second year salary increases under the agreement. *Id.* at 199, 434 N.E.2d at 1260. *See supra* note 2.

[11] *Id.* at 198, 434 N.E.2d at 1260.

[12] *Id.* at 203, 434 N.E.2d at 1262.

[13] *Id.* at 204, 434 N.E.2d at 1263.

[14] *Id.* The pertinent provisions of G.L. c. 150E, § 7 state:

> (a) Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years. The agreement shall be reduced to writing, executed by the parties, and a copy of such agreement shall be filed with the Commission and with the house and senate committees on ways and means forthwith by the employer.
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> (b) The employer, other than the board of regents of higher education, the chief administrative justice of the trial court or the state lottery Commission, shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to fund the cost items contained therein; provided, that if the general court is not in session at that time, such request shall be submitted at the next session thereof. If the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining. The provisions of the preceding two sentences shall not apply to agreements reached by School Committees in cities and towns in which the provisions of section thirty-four of chapter seventy-one are operative.

[15] 366 Mass. 109, 315 N.E.2d 865 (1974).

sions of chapter 44, section 33A of the General Laws,[16] and noted that a contrary conclusion "would render virtually ineffective the important provision in [the predecessor of chapter 150E, section 7(a)] which permits three-year collective bargaining contracts for municipal employees."[17] As additional support for its holding, the Court relied upon the legislative history of chapter 150E, section 7(d)(f), which provides that, if there is a conflict between the terms of a collective bargaining agreement and chapter 44, section 33A, the terms of the agreement prevail.[18] The Court found the legislative history demonstrated the Legislature's intent "to remove any obstacle to the enforceability of clauses in collective bargaining agreements that provide for future salary increases."[19] The Court further noted that the Legislature has authorized other types of multi-year municipal agreements.[20] Since it would be absurd to suggest that the enforceability of such contracts is conditional upon an annual appropriation, the Court found that it would also be anomalous for economic improvements to be subject to annual appropriations.[21] In sum, the Court determined that approval of the first year economic items constitutes a commitment to fund incremental cost items in subsequent contract years.[22] According to the Court, employees who failed to receive their salary increases pursuant to the contract had a remedy of either suing the city for breach of contract or filing a grievance under section 8 of chapter 150E.[23]

The Court next turned to the issue whether the job security clause in the contract was enforceable.[24] The Court found that it is now well-established that there are certain prerogatives exercised by public employers which cannot be limited by a collective bargaining agreement.[25] The Court observed that this principle had been employed to invalidate certain contractual commitments entered into by school committees "in order that collective actions not distort the normal political process for controlling public policy."[26] In the course of establishing this non-

[16] In pertinent part, G.L. c. 44, § 33A states:
"No new [municipal] position shall be created or increase in rate made by ordinance, vote or appointment during the financial year subsequent to the submission of the annual budget unless provision therefore has been made by means of a supplemental appropriation. . . ."

[17] 386 Mass. at 204, 434 N.E.2d at 1263 (quoting Mendes v. Taunton, 366 Mass. 109, 113, 315 N.E.2d 865, 869 (1974)). G.L. c. 149, § 178I was the predecessor of G.L. c. 150E, § 7(a).

[18] 386 Mass. at 205, 434 N.E.2d at 1263.

[19] *Id.*

[20] *Id.* at 208-09, 434 N.E.2d at 1265.

[21] *Id.* at 209, 434 N.E.2d at 1265.

[22] *Id.* at 210, 434 N.E.2d at 1265-66.

[23] *Id.* at 210-11, 434 N.E.2d at 1266.

[24] *Id.* at 211, 434 N.E.2d at 1266.

[25] *Id.* (citing School Committee of Braintree v. Raymond, 369 Mass. 686, 343 N.E.2d 145 (1976) and Chief of Police of Dracut v. Dracut, 357 Mass. 492, 258 N.E.2d 531 (1970)).

[26] *Id.*

delegable managerial prerogative precept, the Court noted, certain commitments relating to matters such as class size and teaching load had been distinguished and sustained "where there [was] no change in educational policy and funds [were] available to implement the terms of the agreement."[27]

Against this background, the Court concluded that a contractual restriction on "the ability of a school committee to determine *on an annual basis* the size of its teaching staff intrudes into an area of exclusive managerial prerogative."[28] Noting that the General Laws accord school committees "general charge of all the public schools," the Court concluded:

> Essential to the management of the public schools is the ability to determine the appropriate size of the teaching staff in light of available funds. We do not believe that the Legislature, in chapter 150E, meant to permit school committees to bargain away their managerial powers in this area.[29]

The Court read into chapter 71, section 42 of the General Laws, the teacher tenure statute, a legislative intent that the authority in question remain beyond the reach of collective bargaining.[30] The Court observed that section 42, in discussing dismissals of tenured teachers, provides that "[n]either this nor the preceding section shall affect the right of a committee to dismiss a teacher whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable."[31] This provision, the Court noted, demonstrated an intent that "general economy and efficient use of scarce funds [be considered] analogous considerations in the decision to reduce staff size."[32] The Court concluded that section 42 "can therefore be said to illustrate a policy of leaving the entire area of decision-making to the managerial discretion of the school committee."[33] Nevertheless, the Court held that a job security clause "is enforceable for periods not spanning more than one fiscal year," recognizing that "the interest in protecting the managerial prerogative of the school committee . . . diminishes once the year's budget has been established" and that the impact of a mid-year layoff on a teacher would likely be acute.[34]

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[27] *Id.* at 211-12, 434 N.E.2d at 1267. (citing Boston Teachers Union, Local 66 v. School Committee of Boston, 370 Mass. 455, 464, 350 N.E.2d 707, 714 (1976).

[28] *Id.* at 212, 434 N.E.2d at 1267 (emphasis added).

[29] *Id.* (footnote omitted).

[30] *Id.* at 212-13, 434 N.E.2d at 1267.

[31] *Id.* at 212, 434 N.E.2d at 1267.

[32] *Id.* at 212-13, 434 N.E.2d at 1267.

[33] *Id.* at 213, 434 N.E.2d at 1267.

[34] *Id.* at 213, 434 N.E.2d at 1267-68. The Court then specified numerous related matters which are within the legitimate scope of collective bargaining. *Id.* at 213, 434 N.E.2d at 1268. Among these were matters relating to the timing of lay-offs and the number and identity of the employees affected. *Id.*

Before leaving this issue, the Court addressed the subsidiary question of whether the mayor and the city council had standing to challenge the validity of the job security clause.[35] The Court found they did have standing, stating that the basis for this finding was the unique method of financing the Boston public schools.[36] The Court indicated that, ordinarily, "a job security clause should be enforceable against the legislative body of a municipality if the school committee decides as a matter of educational policy that the clause ought to be enforced and requests an appropriation of the necessary funds."[37] The Court concluded, however, that in the case of Boston, the School Committee could not force the mayor and city council to appropriate funds for the maintenance of the job security clause, since under its system of financing the schools the primary funding responsibility was the School Committee's.[38]

The final issue addressed by the Court was whether the tenured teachers who were to be laid off were entitled to individual hearings pursuant to chapter 71, section 42.[39] The court referred to *Milne v. School Comm. of*

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[35] *Id.* at 214, 434 N.E.2d at 1268.

[36] *Id. See supra* note 5.

[37] 386 Mass. at 214, 434 N.E.2d at 1268.

[38] *Id.*

[39] *Id.* at 214-15, 434 N.E.2d at 1268. G.L. c. 71, § 42 provides in pertinent part:

> The School Committee may dismiss any teacher, but no teacher and no superintendent, other than a union superintendent and the superintendent of schools in the city of Boston, shall be dismissed unless by a two thirds vote of the whole committee. . . . In every such town a teacher or superintendent employed at discretion under section forty-one or a superintendent employed under a contract, for the duration of his contract, shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause, nor unless at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his dismissal is proposed; nor unless, if he so requests, he has been given a hearing before the School Committee which may be either public or private at the discretion of the School Committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. . . . Neither this nor the preceding section shall affect the right of a committee to dismiss a teacher whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable. In case a decrease in the number of pupils in the schools of a town renders advisable the dismissal of one or more teachers, a teacher who is serving at the discretion of a School Committee under section forty-one shall not be dismissed if there is a teacher not serving at discretion whose position the teacher serving at discretion is qualified to fill. No teacher or superintendent who has been lawfully dismissed shall receive compensation for services rendered thereafter.

Manchester,[40] where it had determined that the notice and hearing requirements of section 42 did not apply to dismissals based solely on an actual decrease in student enrollments. Building on *Milne*, the Court held that section 42 does not require notice and a hearing when a tenured teacher is dismissed solely because of budgetary considerations.[41] The Court concluded: "Logic dictates that dismissals based solely on budgeting considerations be treated no differently than dismissals made because of declining enrollments."[42] The Court then found that, given its construction of section 42, the protection from dismissal because of a decrease in student enrollment enjoyed by a tenured teacher when there is a nontenured teacher in a position which the tenured teacher is qualified to fill applies equally to a tenured teacher dismissed solely for budgetary reasons.[43] Although this protection exists, the Court held, the hearing requirements still do not apply.[44] In a footnote, the Court suggested that the inapplicability of the notice and hearing requirements to situations in which the tenured teacher can demonstrate that there is a nontenured teacher in a position which the tenured teacher is qualified to fill is a defect in section 42.[45] The Court remanded the cases to the Superior Court for proceedings consistent with its opinion.[46]

It will be interesting to observe whether the Court's holding that the appropriation of funds to implement first year economic improvements is tantamount to a multi-year economic commitment will have any practical effect upon collective bargaining in the public sector. Traditionally, town meetings are presented with budgets which seek approval of the coming year's economic costs. In light of the implications of this case, it would appear prudent for a public employer, which has negotiated a multi-year collective bargaining agreement, to explain to the relevant legislative body the economic costs in all years of the agreement and make it clear that its approval of the first year costs will constitute approval of costs associated with subsequent contract years. The questions whether there will be fewer multi-year contracts because legislative bodies will no longer have "a string" on costs for improvements in future contract years, whether this case will lead public employers to seek provisions in contracts making enforceability of second and third year economic changes conditional upon further appropriations, and whether the legislative body may expressly negate the presumption that its first year appropriation is

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[40] 381 Mass. 581, 410 N.E.2d 1216 (1980).
[41] 386 Mass. 197, 216, 434 N.E.2d 1258, 1269.
[42] *Id.* at 215, 434 N.E.2d at 1269.
[43] *Id.* at 216, 434 N.E.2d at 1269.
[44] *Id.*
[45] *Id.* at 216 n.22, 434 N.E.2d at 1269 n.22.
[46] *Id.* at 217, 434 N.E.2d at 1270.

an approval of the second and third year cost items, await future resolution.

A provision such as the no-layoff guarantee which was present in *Boston Teachers Union* is of central importance to a contract settlement. After *Boston Teachers Union*, unions may reconsider the desirability of separability clauses which preserve the integrity of the remainder of the contract when a particular provision is invalidated. At the very least, it is likely that they will wish to preserve their right to negotiate a substitute provision. The decision also poses the question whether, absent a separability clause, a union may obtain an order invalidating the agreement on the ground that, by reneging on a commitment, particularly one of major significance, the employer has denied the union the benefits of its bargain.

The Court's conclusion that the chapter 71, section 42 notice and hearing requirements do not apply to layoffs and dismissals based exclusively on budgetary considerations would appear to involve a degree of judicial legislating. Rationally, the Legislature should have so provided, but it did not. When the Court noted that its construction of section 42, here and in *Milne*, may have detected a flaw in that section, it was identifying the basis for the conclusion that the Legislature did not contemplate the result reached here by the Court. It remains to be seen whether the Legislature will act on the Court's suggestion that the law be amended to accord some remedy to a tenured teacher facing lay-off who wishes to demonstrate that he or she is qualified to fill a position presently occupied by a nontenured teacher.

§ 4.7. Open Meeting Law — Litigation Strategy and Disciplinary Action Exemptions. Litigation between the City of Boston and its teachers during the *Survey* year was not limited to the *Boston Teachers Union* decision.[1] The fiscal strife in the Boston Public Schools during 1982 produced a second Supreme Judicial Court opinion, *Doherty v. School Committee of Boston*.[2] The issues in *Doherty* involved the application of chapter 39, section 23B of the General Laws, the Massachusetts open meeting law.

The Supreme Judicial Court has stated that the open meeting law was "designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based."[3] The statute sets forth the general proposition that "all meetings of a governmental body be open to the public."[4] The Supreme Judicial Court has recognized, however, that

§ 4.7. [1] The *Boston Teachers Union* decision is discussed in section 6 of this chapter.

[2] 386 Mass. 643, 436 N.E.2d 1223 (1982).

[3] Ghighione v. School Committee of Southbridge, 376 Mass. 70, 72, 378 N.E.2d 984, 987 (1978).

[4] G.L. c. 39, § 23B states in pertinent part: "All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section."

the statute also contemplates that there will be instances when "[p]ublic officials . . . might be unduly hampered in the performance of their duties if all gatherings of members of included governmental bodies must be open to the public."[5] The statute enumerates specific exemptions from the general proposition that meetings must be open.[6] Among meetings which are exempt are: (1) those for the purpose of taking disciplinary action against a public employee;[7] and (2) those discussing strategy with respect to litigation "if any open meetings would have a detrimental effect on the . . . litigating position of a governmental body."[8]

In *Doherty,* the Court determined that the exemption involving disciplinary action does not permit a meeting to consider layoffs of teachers for budgetary reasons to be held in executive session.[9] The Court held, however, that the litigation strategy exemption does allow such layoffs to be considered without an open meeting.[10] Moreover, the Court concluded, when a governmental body is entitled to meet in executive session under an exemption, there is no requirement that it reconvene in open session to ratify the actions taken in executive session.[11]

Doherty arose in connection with efforts to invalidate the decision of the School Committee of the City of Boston (the "School Committee") to lay off teachers and nurses, which was made in executive session and not ratified in open session.[12] The trial court judge ruled that the School Committee did not violate the open meeting law by conducting its deliberations in executive session, but that the School Committee was obliged to reconvene in open session to ratify its action because there was no showing that an open meeting would have had a detrimental effect on the litigation position of the School Committee.[13] The Supreme Judicial Court ordered direct appellate review on its own initiative of the resultant cross appeals.[14]

The plaintiffs' appeal contended that the School Committee's action should be invalidated because the affected teachers were entitled to notice and an opportunity to be heard pursuant to Chapter 39, section 23B, when

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[5] Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72-73, 378 N.E.2d 984, 987 (1978).

[6] G.L. c. 39, § 23B(1)-(7).

[7] G.L. c. 39, § 23B(2).

[8] G.L. c. 39, § 23B(3).

[9] 386 Mass. at 646-47, 436 N.E.2d at 1226 (1982).

[10] *Id.* at 647-48, 436 N.E.2d at 1226-27.

[11] *Id.*

[12] *Id.* at 644-45, 436 N.E.2d at 1225. For some background on the layoff controversy, see section 6 of this chapter.

[13] *Id.* at 645-46, 436 N.E.2d at 1225.

[14] *See id.* at 643, 436 N.E.2d at 1224 (reporter's note).

disciplinary actions are considered in executive session.[15] The Court found this argument inapplicable since the layoffs were not disciplinary dismissals, but, rather, were based solely on budgetary considerations.[16] The Court explained that policy considerations favoring the exemption of disciplinary action from the open meeting law were not present when the School Committee considered neither the dismissal nor the misconduct of any particular individual.[17]

In its appeal the School Committee argued that it was authorized to meet in executive session to discuss litigation strategy and, further, that the judge had erred when he declared that the School Committee had to reconvene in open session.[18] The Court sustained the School Committee's appeal, ruling that the School Committee was authorized to meet in executive session and was not obligated to reconvene in open session to ratify action taken in executive session.[19] The Court first noted that nothing in the litigation strategy exemption, chapter 39, section 23B(3), expressly required the School Committee to reconvene in executive session if, at the time the executive session was held, litigation was being threatened and discussion in an open meeting "might have an adverse impact on the committee's litigation position."[20] Turning to the question whether the litigation strategy exemption did, in fact, apply to the instant case, the Court held that it did even though no litigation was actually pending on this issue because other factually related cases were being litigated.[21]

This is a reasonable and welcome application of the litigation strategy exemption. A public employer which faces a likely judicial challenge to its contemplated actions could be severely compromised by having to conduct its deliberations in public. The Court recognized that, despite the strong public policy considerations favoring open meetings of governmental bodies, the public interest would be ill-served if deliberations of the type illustrated in *Doherty,* which are likely to lead to litigation, are open to the public.

During the 1981 *Survey* year, these commentators observed that the Court appeared to construe the open meeting statute very strictly, even when public policy favored a less rigid interpretation in certain instances.[22] The Court then seemed to be saying that it would not imply limitations on the general obligation that meetings must be conducted in

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[15] *Id.* at 646, 436 N.E.2d at 1225-26.
[16] *Id.* at 646-47, 436 N.E.2d at 1226.
[17] *Id.* at 646, 436 N.E.2d at 1226.
[18] *Id.* at 647, 436 N.E.2d at 1226.
[19] *Id.* at 647-48, 436 N.E.2d at 1226-27.
[20] *Id.* at 647, 436 N.E.2d at 1226.
[21] *Id.* at 648, 436 N.E.2d at 1226-27.
[22] *See* Ross, *Labor and Employment Law*, 1981 ANN. SURV. MASS. LAW. § 7.9, at 192-96.

open session, and that any such limitations would have to be promulgated by the Legislature. In *Doherty,* however, reason and logic prevailed. The question remains whether the Court will view *Doherty* as a case of limited application because of the particularly severe fiscal circumstances present there and the certain litigation which was likely to ensue from the School Committee's decision, or whether the litigation strategy exemption will be applicable whenever a public body reasonably believes that litigation may result from its actions. The answer to this question awaits further court decision. Given the past hesitancy of Massachusetts courts to broadly construe the exemptions from the open meeting law,[23] these commentators suggest that future application of the litigation strategy exemption may not be as broad as *Doherty* suggests. It is certain, however, that, until it is judicially curtailed, public bodies will use the litigation strategy exemption to a greater degree than in the past.

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[23] *See* District Attorney for Northwestern District v. Board of Selectmen of Sunderland, 1981 Mass. App. Ct. Adv. Sh. 740, 418 N.E.2d 642.