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DOCKET NO. 20-1434

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

On Appeal from a Final Judgment of the United States District Court,
District of Massachusetts

GERALD ALSTON, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

PRENTICE PILOT; ESTIFANOS ZERAI-MISGUN; JUANA BAEZ; ROGELIO RODAS; CRUZ SANABRIA; DEMETRIUS OVIEDO; DEON FINCHER,
Plaintiffs,

v.

TOWN OF BROOKLINE, MA; BOARD OF SELECTMEN OF THE TOWN OF BROOKLINE; BETSY DEWITT, in her individual and official capacities; KENNETH GOLDSTEIN, in his individual and official capacities; NANCY DALY, in her individual and official capacities; JESSE MERMELL, in his individual and official capacities; STANLEY SPIEGEL; SANDRA DEBOW, in her individual and official capacities; JOSLIN MURPHY, in her individual and official capacities; LOCAL 950, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; NEIL WISHINSKY, in his individual and official capacities; BERNARD GREENE, individually and in his official capacity; BEN FRANCO, in her individual and official capacities; NANCY HELLER, in her individual and official capacities,
Defendants-Appellees.

AMICI CURIAE BRIEF OF LAWYERS FOR CIVIL RIGHTS, THE BOSTON SOCIETY OF VULCANS OF MASSACHUSETTS, AND THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE IN SUPPORT OF THE PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* file the following disclosure. Lawyers for Civil Rights, the Boston Society of Vulcans of Massachusetts, and the Charles Hamilton Houston Institute for Race and Justice are all non-profit unincorporated entities or non-profit corporations that do not have parent corporations or issue stock in any form.

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INTEREST OF AMICI CURIAE[1]

Lawyers for Civil Rights ("LCR") fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy, in collaboration with law firms and community partners. As part of this work, LCR has long sought to root out discrimination in the workplace. This has included challenges to policies and practices that contribute to the barriers vulnerable employees face when reporting discrimination in the workplace.

Founded in 1969, the **Boston Society of Vulcans of Massachusetts** ("BSVM") is a community-based non-profit organization of Black and Latino firefighters and local civilians, who work together to empower urban Boston residents to pursue public safety careers and to promote knowledge and safety skills through prevention education programs and resources. During BSVM's 30-plus years of serving the urban community, it has been instrumental in addressing cultural and gender diversity in the Boston Fire Department, including helping to bring the *Beecher* litigation that challenged discriminatory employment practices for firefighters and resulted in a consent decree that transformed the hiring process for

[1] As required by Local Rule 29(c)(5), *amici curiae* state that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person—other than *amici curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

firefighters in Massachusetts. *Bos. Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). BSVM therefore has a strong interest in ensuring that federal anti-discrimination laws are properly interpreted and applied, that unfair and unjust barriers do not stand as obstacles to hiring, and that there is retention of minority individuals for public safety positions.

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School ("CHHIRJ") was launched in September 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision *Brown v. Board of Education*, repudiating the doctrine of "separate but equal" schools for Black and white children. Our long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. This must include ensuring freedom from discrimination in public service and appropriate redress when public entities create or ignore work environments that foster or tolerate racial disparagement and deny equality of opportunity and advancement to Black people and other people of color.

Pursuant to Fed R. App. P. 29(a)(2), all parties have consented to the filing of this amicus brief.

INTRODUCTION

In granting summary judgment for the Town of Brookline and the Brookline Select Board, the District Court concluded that it was not required to give deference to the factual findings of the Massachusetts Civil Service Commission unless the elements of issue preclusion were met. Indeed, the Commission had already ruled, after ten full days of hearing, that the Town improperly terminated Gerald Alston from his employment as a Brookline firefighter on the basis of systemic racism and employment discrimination.

Despite the Commission's thorough factual findings on the very same issues, and without any analysis whatsoever as to issue preclusion, the District Court rejected the Commission's findings in a footnote, and without further discussion or analysis. While in many cases a Civil Service Commission ruling will not preclude civil rights claims later brought in federal court, the District Court's invocation of issue preclusion in this case required its application of that legal standard. Had the District Court undertaken a proper analysis, it would have concluded that the elements of issue preclusion were met and deferred to the Commission's factual findings as a basis to deny summary judgment.

Instead, the District Court made contrary findings to the Commission and granted summary judgment to the Defendants—an act that in itself demonstrates there are disputed issues of fact for trial. Moreover, as a matter of policy, at the very

least the District Court should have relied on the findings of the Commission—the agency specifically charged with investigating employment discrimination claims of public employees—rather than substituted its own judgment to make contrary findings. For any of these reasons and, as further set forth below, this Court should vacate the District Court's summary judgment order in favor of the Town of Brookline and the Brookline Select Board and remand for trial.

BACKGROUND

On May 30, 2010, a white Brookline Fire Lieutenant, Paul Pender, made the racist comment, "fucking [n-word]," on the voicemail of his African American Fire Department colleague, Brookline Firefighter Gerald Alston. Add. 281; Add. 172.[2] The Massachusetts Civil Service Commission ("Commission" or "CSC") found that during the years that followed this incident, the Town of Brookline ("Town") conducted several investigations that confirmed Pender's discriminatory conduct, but it nevertheless promoted him to Captain. When Alston complained about this, the Town engaged in further discriminatory and retaliatory conduct, which two psychiatrists found took a psychological toll on him. On October 5, 2016, the Brookline Select Board voted to terminate Alston. Add. 284. The Town's response to Pender's conduct and its treatment of Alston, including his termination, have been

[2] References to the Addendum and Appendix herein will be indicated as "Add." and "A." respectively.

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key issues in the disputes between the parties in state and federal litigation as well as before the Commission.

During the period between Pender's 2010 racist comment and Alston's 2016 termination, Alston filed two lawsuits against the Town and its employees. First, on June 17, 2013, Alston filed a Complaint in Massachusetts Superior Court, Norfolk County (Case No. 1382CV00898), alleging racial discrimination and retaliation under the Massachusetts anti-discrimination statute, M.G.L. c. 151B, § 4. The court dismissed the case on procedural grounds on July 8, 2014.

Second, on December 1, 2015, Alston filed a Complaint in District Court (Case No. 1:15-cv-13987-GAO)—the lawsuit underlying this appeal. Alston raised claims of racial discrimination and retaliation against the Town and Select Board members in their official and individual capacities (collectively the "Town Defendants") under the First and Fourteenth Amendments, as well as 42 U.S.C. § 1981, § 1983 and § 1985. *See* A. 60–114; A. 315–17.

With respect to the Fourteenth Amendment claims, Alston alleged that:

> [T]he Town Defendants violated the Fourteenth Amendment guarantee of equal protection and freedom from racial discrimination by executing a policy, practice, and custom of opposing racial equality, enforcing racial subordination, engaging in affirmative action and favoritism towards white residents and employees, and retaliating against persons who protest racial discrimination.

A. 315–16. Alston's Fourth Amended Complaint also alleged that his October 2016 termination was "for pretextual reasons." A. 287.

Shortly after Alston's October 2016 termination, he filed a timely appeal of his discharge at the Commission, arguing that his termination violated civil service rules because it was discriminatory. Add. 173. The Commission subsequently held a full evidentiary hearing over ten days in July 2018, which included a series of stipulated facts, testimony from fourteen live witnesses, and 280 exhibits. Add. 173–74. On February 14, 2019, the Commission issued its 83-page decision ("Commission Decision" or the "Decision") finding that the Town failed to show just cause for terminating Alston and ordered that he be returned to his position without loss of compensation or other rights.[3] Add. 254. Importantly, the Commission's Chairman found that:

> After reviewing all of the evidence, including the testimony of Firefighter Alston, I have concluded that Mr. Pender's use of the racial epithet "fucking [n-word]", coupled with subsequent actions and inactions by Town officials at all levels, which compounded the racist comment into an avalanche of unfair, arbitrary, capricious and retaliatory behavior that infringed on Firefighter Alston's civil service rights, made it impossible for him to perform his job as a Brookline firefighter.

See Add. 241.

One month after the Commission's Decision, the Town Defendants moved for summary judgment in the District Court. The summary judgment record contained

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[3] The Commission's Decision was affirmed on August 2, 2019 by the Massachusetts Superior Court, Suffolk County (Case No. 1984CV00853). A. 4252–66. The Town's further appeal of the Decision to the Massachusetts Appeals Court is still pending (2020-P-0105).

approximately 160 exhibits including the Commission's Decision, written discovery responses, and dozens of deposition transcripts and affidavits including those of Alston, Pender, and other Town Defendants and officials. A. 464–624. Over 100 exhibits submitted to the District Court overlapped with those presented to the Commission. *Id*. Because the same core set of facts underlie Alston's District Court claims and Commission claims, Alston's opposition to the Town Defendants' motion for summary judgment argued that:

> The facts presented at the civil service hearing, and the inferences drawn from those facts, were plainly sufficient to permit a reasonable fact finder—the chair of the Commission—to reject the Town's claim to have terminated Alston in good faith and for non-discriminatory and non-retaliatory reasons. It is not a leap to conclude that [a] reasonable jury, with the benefit of a full trial, could reject the same defenses proffered by the Defendants in this case. A jury would also be permitted to find, as did the Commission, that Alston's termination was retaliatory and discriminatory on the basis of race.

A. 2947. Alston also argued that:

> At trial, the Defendants may be precluded from even arguing these issues notwithstanding that the statutes to be applied here are different than the ones at issue in the civil service proceeding.

Id.

On April 2, 2020, the District Court granted the Town Defendants' motion for summary judgment. Add. 280–88. It also summarily rejected Alston's arguments regarding consideration of the Commission's Decision and the potential application of issue preclusion, stating in a footnote only that:

> In February 2019, the Massachusetts Civil Service Commission ("CSC") concluded that the Town did not have just cause to terminate Alston under the state civil service law. *See* Mass. Gen. Laws ch. 31, § 1. Alston argues that the CSC's findings and conclusions are binding on this Court, and his opposition to summary judgment relies heavily on the CSC decision. However, federal courts are not required to give deference to the findings of state administrative agencies unless they satisfy the necessary elements of issue preclusion: (1) the issues raised in the two actions are the same; (2) the issue was actually litigated in the earlier action; (3) the issue was resolved by a valid and binding final judgment; and (4) the determination of the issue was necessary to that judgment. *See Jones v. City of Bos.*, 845 F.2d 28, 33 (1st Cir. 2016); *Manganella v. Evanston Ins. Co.*, 700 F.3d 585, 591 (1st Cir. 2012). Here, the CSC decision does not require deference because it does not satisfy these requirements. Alston makes no developed argument to the contrary.

Add. 284. In other words, the District Court rejected the Commission's Decision on the basis that the elements of issue preclusion had not been satisfied without any analysis whatsoever.

Nor did the District Court address the alternative argument that even if the Commission Decision was not entitled to preclusive effect, it was nevertheless strong evidence that a rational fact-finder could determine that race discrimination underlaid the Town Defendants' decision to terminate Alston, thereby raising genuine issues of material facts. Ignoring the mountain of evidence before it, the District Court found that "Alston has not produced evidence that would raise a triable dispute." Add. 287. This conclusion was ironic, given that the District Court analyzed substantially the same set of facts as the Commission (including two key psychiatric expert reports about Alston), arrived at the opposite conclusion as the

Commission, and then averred that there was no genuine dispute. This Court should reverse the District Court's summary judgment order and remand the case for trial.

ARGUMENT

I. The District Court Erred in Concluding That the Elements of Issue Preclusion Had Not Been Met in This Case as a Basis for Disregarding the Commission's Decision

The District Court's conclusory assertion that the elements of issue preclusion were not met in this case constitutes a legal error. While a Commission ruling will not necessarily preclude civil rights claims later brought in federal court, the unique circumstances of this case required the District Court to conduct the issue preclusion analysis. "The applicability *vel non* of preclusion principles is a question of law" and is therefore reviewed *de novo*. *Manganella v. Evanston Ins. Co.*, 700 F.3d 585, 590 (1st Cir. 2012) (quoting *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 (1st Cir. 1995)). Had the District Court undertaken a proper, thorough analysis, it would have concluded that the elements of issue preclusion were satisfied, and summary judgment would not have been granted.

A. Federal Courts Routinely Apply Issue Preclusion to the Factual Findings of State Administrative Agencies

The United States Supreme Court has held that a state agency's factual findings have preclusive effect in federal courts. In *Univ. of Tenn. v. Elliott*, the Supreme Court held that:

> [w]hen a state agency "acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,", federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

478 U.S. 788, 797–98 (1986) (internal citation omitted).[4] Analyzing Section 1983 claims, the *Elliott* court also held that "Congress, in enacting the Reconstruction civil rights statutes, did not intend to create an exception to general rules of preclusion." *Id*.[5]

This Court has also determined that "courts generally favor application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." *Glob. Naps, Inc. v. Mass. Dep't of Telecomms. & Energy*, 427 F.3d 34, 44, n. 8 (1st Cir. 2005) (internal citations and quotations omitted). This is especially true "when the issue has been decided by an administrative agency, be it state or federal, which acts in a judicial capacity." *Id*. (citing *Elliott*, 478 U.S. at 798); *see also U.S. v. Utah Constr. & Min. Co.*, 384 U.S. 394, 422 (1966).

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[4] In *Brunson v. Wall*, 405 Mass. 446, 448–50, 541 N.E.2d 338, 339–40 (1989), the Massachusetts Supreme Judicial Court confirmed that decisions of state administrative agencies acting in a judicial capacity have preclusive effect under the laws of the Commonwealth of Massachusetts.

[5] *See Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc.*, 820 F.2d 892, 893 (7th Cir. 1987) (applying *Elliott* to federal common-law rules of preclusion under the reconstruction civil rights statutes).

Issue preclusion applies when: (1) both the proceedings involved the same issue of law or fact; (2) the parties actually litigated the issue in the prior proceeding; (3) the first court actually resolved the issue in a final and binding judgment; and (4) its resolution of that issue of law or fact was essential to its judgment (i.e., necessary to its holding). *See Glob. Naps*, 427 F.3d at 44 (citing *Monarch Life Ins. Co.*, 65 F.3d at 978).

As shown below, scrutiny of the underlying facts of this case demonstrates that each of the four elements of issue preclusion have been met. Therefore, this Court must hold that the District Court erred in failing to defer to the Commission's findings and reverse the District Court's summary judgment order.

1. The District Court and Commission Analyzed the Same Issues

The first element in the preclusion analysis is whether "the issues raised in the two actions are the same." *Jones v. City of Bos.*, 845 F.2d 28, 33 (citing *Manganella*, 700 F.3d at 591). "The identity of the issues need not be absolute; rather, it is enough that the issues are in substance identical." *Id*. (citing *Manganella*, 700 F.3d at 591; *Montana v. U.S.*, 440 U.S. 147 (1979)). Although Commission proceedings often differ from related federal litigation, in this case the issues are substantively identical.

Here, both the Commission and the District Court were presented with, and analyzed, the same core facts regarding Pender's 2010 racial epithet, subsequent

discriminatory and retaliatory conduct directed at Alston (including a December 2013 incident in which Alston found the word "Leave" written on the door to his seat on the fire engine (the "Leave Incident")), the actions or inactions of the Town in response to these incidents (including Pender's promotion, the Town's investigations into the reported incidents, and the return-to-work conditions imposed on Alston), as well as the effect of all of these distressing events on Alston's mental health. Add. 177–79, 200–01, 280–84.

The Commission also heard testimony and reviewed the reports of two psychiatrists who evaluated Alston and found that his mental health was detrimentally impacted by these incidents and the failures of the Town to properly respond to them. Add. 213–17, 222, 243. The District Court considered these same incidents, reviewed the same psychiatric reports, and considered the adequacy of the Town's response to these incidents, noting that Alston's "vigorous" disagreement with the Town's actions "hangs over this entire controversy." Add. 280–84.

In addition, the core legal issues before the Commission and the District Court were also substantially identical. Both bodies assessed whether Alston was subject to racial discrimination as a Brookline Firefighter and in his termination. The Commission explained its charge to evaluate "fundamentally unfair" treatment that "fall[s] within the penumbra of prohibited conduct," including "discrimination or

retaliation in violation of [] civil rights or other laws." Add. 240. The Commission further stated:

> it is appropriate for the Commission to take notice of that misconduct in order to fulfill the statutory mandate to assure 'fair treatment' of civil service employees, free from 'arbitrary and capricious' acts, 'without regard' for an employee's 'race' or other protected status, and 'with proper regard' for civil service law and an employee's 'constitutional rights as citizens.'

Id. (citing M.G.L. c. 31, § 1). To determine whether "just cause" existed to terminate Alston, the Commission "focus[ed] on the fundamental purpose of the civil service system – to guard against political considerations, favoritism, and ***bias in government employment decisions***." Add. 239 (emphasis added; citations omitted).

The District Court similarly framed the issue before it as whether Alston was subjected to employment discrimination under the rubric of the Reconstruction Statutes, §§ 1981 and 1983, using the standards applicable to suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*, and applied the *McDonnell Douglas* framework to his employment discrimination claims. Add. 285–86. Under this framework the District Court concluded—contrary to the Commission—that Alston "ha[d] not presented evidence on the basis of which a trier of fact could conclude that the reasons asserted by the Town [for his termination] were a pretextual excuse for an actually discriminatory intent and action." Add. 287–88.

Where both the Commission and the District Court analyzed substantially the same evidence and issues related to employment discrimination as set forth above, there can be no doubt that the first element of issue preclusion is satisfied.

2. The Issue of Discrimination was Actually Litigated by the Commission

An issue is "actually litigated" for preclusion purposes when the parties had a full opportunity to litigate and took full advantage of that opportunity. *Manganella*, 700 F.3d at 594 (citing *FleetBoston Fin. Corp. v. Alt*, 638 F.3d 70, 81 (1st Cir. 2011)). "The appropriate question is whether the issue was subject to an adversary presentation and consequent judgment that was not a product of the parties' consent." *Sterling Equip., Inc. v. Gibson*, No. CV 18-11230-RGS, 2019 WL 2870734, at *3 (D. Mass. July 3, 2019).

The hearing before the Commission was litigated as part of an adversarial process. Both parties were represented by counsel during the Commission's ten-day hearing, where the Town called eleven out of fourteen witnesses and submitted 180 out of 280 exhibits. Add. 174. The Town also had an opportunity to, and did in fact, conduct a thorough cross-examination of each of the three witnesses called by Alston, in support of its defense that its actions were not discriminatory. Add. 173–74. In short: the Town mounted a fulsome defense and specifically argued (as it did before the District Court) that there was just cause to terminate Alston and that there was no evidence that the return-to-work conditions placed on Alston were

"discriminatory or retaliatory." Add. 236–37. Thus, the issue of whether Alston's termination was the result of improper bias or discrimination was "actually litigated" before the Commission. *See Herrera v. Churchill McGee, LLC*, 680 F.3d 539, 547–50 (6th Cir. 2012) (finding plaintiff had "adequate opportunity to litigate" despite agency declining to hold a hearing because plaintiff had the opportunity to present evidence in support of his claims).

3. The Commission's Decision was Resolved by a Valid and Binding Final Judgment

In addition to being "actually litigated," to have preclusive effect, the issue must also have been "determined by a valid and final judgment." *See Lannan v. Levy & White*, 186 F. Supp. 3d 77, 88 (D. Mass. 2016) (citing *Jerosz v. Palmer*, 436 Mass. 526, 766 N.E.2d 482, 487 (2002)). Here, the Commission's Decision is valid and final. Add. 173. The Decision resulted in a binding order that Alston be returned to his position without loss of compensation or other rights. Add. 254. In addition, the Massachusetts Superior Court affirmed the Decision. A. 4252–66. Although the Town has further appealed the Decision, this is of no moment in determining its preclusive effect. A judgment may be final and subject to preclusive effect, despite the pendency of appeal. *Currie v. Group Ins. Comm'n*, 290 F. 3d 1, 16 (1st Cir. 2002) (Woodlock, J. dissenting) (citing *O'Brien v. Hanover Ins. Co.*, 692 N.E.2d 39, 44 (Mass. 1998)); *see also Elliott*, 478 U.S. at 792; *McInnes v. State of Cal.*, 943 F.2d 1088, 1096 (9th Cir. 1991) (reviewability of administrative decision does not impact

preclusive effect). Therefore, the Decision stands as a final judgment on the issue of whether Alston's termination was the result of discrimination.

4. The Commission's Determination of the Discrimination Issue was Necessary to its Judgment

Finally, the resolution of the litigated issue—here, racial discrimination—"must also have been 'necessary to the decision actually rendered,' not just to reach the same outcome." *Photographic Illustrators Corp. v. Orgill, Inc.*, 370 F. Supp. 3d 232, 242 (D. Mass. 2019), *aff'd*, 953 F.3d 56 (1st Cir. 2020) (quoting *Manganella*, 700 F.3d at 594). In some cases, a "just cause" determination at the Commission may touch on, but not fully encompass, racial discrimination claims. Here, however, the Commission's analysis of whether Alston's termination was the result of discrimination was absolutely necessary to its conclusion that the Town failed to show just cause for terminating Alston's employment. The Commission explained that:

> [t]he Town acted in bad faith and in a manner prohibited by basic merit principles which requires, in relevant part, fair treatment of employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion with proper regard for basic rights in this civil service chapter and constitutional rights as citizen.

Significantly, it also determined that:

> [w]hen a municipality's own violation of a tenured employee's rights has prevented the employee from returning to work, as here, the Town cannot use that inability to work as just cause for discharging the employee from his tenured position.

In other words, the determination of whether Alston's termination was the result of discrimination was the central issue examined by the Commission and, therefore, necessary to its Decision.

The strong evidence of issue preclusion in this case is hardly a close call and entirely different from other cases where this Court has declined to give preclusive effect to a decision of the Commission. *See Jones*, 845 F.3d at 33–34. For example, in *Jones*, this Court held there was no preclusive effect, for the purpose of federal civil rights litigation, where the core issues being litigated in federal court were not at issue before the Commission. There, this Court found that the central issue analyzed by the Commission—whether suspicion of illicit drug use resulting from a positive hair test was "just cause" for terminating a tenured public employee—was "a further question not germane to the District Court's inquiry" of whether the Boston Police Department had shown that the hair test was consistent with business necessity under Title VII. *Id*. at 34.

The same cannot be said here, where the issues before the Commission and the District Court were substantially the same: did the Town's reliance on Alston's inability to comply with the Town's return-to-work conditions, in light of previous discriminatory actions and inactions by the Town, constitute "just cause" for his termination or was it "pretextual"?

In sum, an analysis of all four elements of issue preclusion shows that the court erred in granting summary judgment to the Town Defendants. Accordingly, this Court should vacate the summary judgment order and remand the case for trial.

B. Federal Courts Should Heed the Factual Findings of Administrative Agencies with Expertise and a Specialized Role

Not only did the District Court fail to conduct an issue preclusion analysis, it also improperly disregarded the factual findings of the Commission—an agency that, unlike the District Court, has specialized expertise in evaluating employment discrimination. Federal courts routinely defer to the factual findings of administrative agencies when performing an appellate function, and for good reason. Those agencies are charged with a narrow role and bring their experience and expertise to the task in each such matter before them. *See Quinn v. City of Bos.*, 325 F.3d 18, 33–34 (1st Cir. 2003). Moreover, state agency decisions are highly probative, admissible, and subject to a jury's consideration where, as here, the parties and proceedings are the same. *See Davignon v. Hodgson*, 524 F.3d 91, 113 (1st Cir. 2008). Even if this Court determines that the Commission's factual findings were not entitled to preclusive effect, the District Court erred by ignoring the admissibility of the Decision at trial and substituting its own judgment for that of the agency specifically charged with evaluating claims of employment discrimination to conclude there were no disputed issues of fact and grant summary judgment to the Town Defendants. This decision should be vacated.

"The deference typically owed by a court to an administrative agency derives from the fact that the agency has been entrusted by a legislative body to administer a statute enacted under that branch's separate constitutional authority." *See Quinn*, 325 F.3d at 33–34. Moreover, "[t]hat deference is particularly strong where the agency's expertise comes into play." *Pepperell Assocs. v. U.S. E.P.A.*, 246 F.3d 15, 22 (1st Cir. 2001); *see Town of Brookline v. Gorsuch*, 667 F.2d 215, 220 (1st Cir. 1981) ("Greater deference is given where the agency decision relates to factual matters in which the agency has special technical expertise, as well as to matters of apparently mixed factual and legal issues in which the agency has expertise").

Fact deference was initially constructed by the Supreme Court and is now codified in the Administrative Procedure Act of 1946 which provides that fact-finding in formal administrative adjudication may be overturned by reviewing courts only if an agency's factual determinations are "unsupported by substantial evidence." *See Tex. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440–41 (1907); 5 U.S.C. § 706.

This Court has recognized the principle of deference to an agency's factual findings. *See Ross v. Framingham Sch. Comm.*, 44 F. Supp. 2d 104, 112 (D. Mass. 1999), *aff'd*, 229 F.3d 1133 (1st Cir. 2000) (acknowledging that a reviewing district court is directed to give due deference to an administrative hearing officer's findings of fact); *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 117 (1st Cir. 2015) (stating

that the court defers to the factual determinations so long as they are supported by substantial evidence and a rational basis in the facts on the record).

The Commission is precisely the type of agency to which deference should be afforded by federal courts. The Civil Service System constitutes an essential part of the personnel system for public employees in the state government. *Purpose of the Civil Service System, 39 Mass. Prac., Administrative Law & Practice* § 14:9. The fundamental purpose underlying its enactment was to free public employees from political pressure and arbitrary separation from the public service. *Id*. According to the Massachusetts Appeals Court, the fundamental purpose of the Commission is "to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control." *See City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304, 682 N.E.2d 923, 926 (1997). The rights of all parties and of the public are entrusted to the Commission, which has the "solemn and important duty of administering the law faithfully and impartially." *DiRado v. Civil Serv. Comm'n*, 352 Mass. 130, 134, 224 N.E.2d 193, 196 (1967) (citing *Moore v. Civil Serv. Comm'n*, 333 Mass. 430, 433, 131 N.E.2d 179, 181 (1956)). On appeal, a court reviewing a decision by the Commission is "bound to accept the findings of fact of the commission's hearing officer, if supported by substantial evidence." *See City of Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 188, 936 N.E.2d 7, 13 (2010).

Although the District Court was not reviewing the Commission's Decision in an appellate function in this case, at the very least the Decision was substantial evidence that the District Court should have relied on. This is especially true here, where it is clear the Commission used its expertise to examine substantially the same evidence and the same issues presented to the District Court.

In a similar context, this Court has explicitly affirmed the introduction of a state agency decision at trial in parallel federal litigation. In *Davignon*, five Massachusetts correctional officers claimed that they were suspended by the Sheriff in retaliation for their First Amendment activities. 524 F. 3d at 96. On appeal, the Sheriff challenged the District Court's admission of a Massachusetts Labor Relations Commission decision addressing whether the Sheriff violated various sections of M.G.L. 150E (the collective bargaining law). *Id*. at 112. This Court held that the decision was admissible under the public records exception to the rule against hearsay, and that it overcame the Sheriff's Federal Rule of Evidence 403 objection because the decision was "highly probative" of the issues in the federal litigation "given both the identity of the parties and the fact that the decision pertained to the same incidents that gave rise to this federal action." *Id*. at 113. All of that is equally true here, where the Town and Town Defendants (in their official capacity) are identical, and where the same issues were in dispute before the

Commission and District Court.[6] Thus, because the Commission Decision here is also "highly probative" evidence, it was error for the District Court to disregard it at the summary judgment stage.

II. In the Alternative, the District Court's Contrary Conclusion to That of the Civil Service Commission Demonstrates That Genuinely Disputed Issues of Material Fact Remain for Trial

When considering a motion for summary judgment, the District Court must assume that any disputes of material fact—including disputes regarding the opinions offered by competent experts—could be resolved by the jury in the non-moving party's favor. *See Jones*, 845 F.3d at 32. On appeal, this Court must also so assume, and consider the summary judgment ruling *de novo*. *Id*. Here, the very fact that the Commission and the District Court evaluated the same evidence differently shows that there are genuinely disputed issues of material fact and that summary judgment should not have been granted. Again, the Commission's conclusion was made not just with a written record, but with the benefit of ten days of live testimony from fourteen relevant witnesses. Add. 173–74. Notably, the Commission made a starkly different assessment of this live evidence than the District Court made on the papers.

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[6] *See* Add. 125 ("[A]n official sued in his official capacity 'is a proxy for the government entity that employs him and is in privity with that entity.'") (quoting *Goldstein v. Galvin*, 719 F.3d 16, 23 (1st Cir. 2013) (internal citation omitted)).

A. The District Court and the Commission's Diverging Analyses of the Expert Evidence Should Have Precluded Summary Judgment

A District Court cannot grant a motion for summary judgment unless the movant demonstrates there are no genuine issues of material fact and he or she is entitled to judgment as a matter of law. *Sensing v. Outback Steakhouse of Fla., LLC*, 575 F.3d 145, 152 (1st Cir. 2009). A "genuine issue" is one that could be resolved in favor of either party; a "material fact" is one that has the potential of affecting the outcome of the case. *Id.* The disputed facts underlying Alston's allegations of wrongful termination were both genuine and material; accordingly, summary judgment should not have been granted.

With regard to the critical issue of whether Alston was able to return to work with conditions, both the District Court and the Commission considered the opinions of two expert psychiatrists who examined Alston, yet the District Court and the Commission arrived at completely different conclusions about the experts' opinions—an outcome that underscores that disputed issues remain for trial.

The District Court's analysis focused on whether the Town's decision to terminate Alston was based on employment discrimination.[7] After assuming that Alston satisfied his *prima facie* case, the District Court considered whether the Town

[7] Because Counts I and II of the Fourth Amended Complaint allege employment discrimination, the District Court determined that the three-stage, burden-shifting framework outlined in *McDonnell Douglas* applies. A. 286–319; Add. 285–86; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

had shown a non-discriminatory reason for Alston's termination. In doing so, it credited the reports of two psychiatrists (Dr. Carter and Dr. Price) who had evaluated Alston and made recommendations for his return-to-work conditions. Add. 287. The Court determined that because Alston "refused" to comply or cooperate with the conditions, his termination was not discriminatory. *Id.* ("Both psychiatrists recommended essentially the same return-to-work conditions for Alston, and it is undisputed that he never complied with those conditions . . . [Alston] refus[ed] to cooperate with the return-to-work process"). The District Court also found that Alston had "not presented evidence on the basis of which a trier of fact could conclude that the reasons asserted by the Town were a pretextual excuse for an actually discriminatory intent and action." Add. 287–88.

The Commission, on the other hand, came to the opposite conclusion. First, the Commission declined to rely on Dr. Carter's testimony, finding, in part, that she did not have the proper expertise to make her findings and that she failed to review the duties and responsibilities of a Brookline firefighter. *Id.* Second, although the Commission agreed with Dr. Price's assessment that, "hearing a racial slur from a Lieutenant he trusted was especially troubling to Alston because it called into question how he was really perceived by his fellow firefighters and raised concern about whether others would have his back in dangerous situations" and that "[t]here is evidence that Alston developed psychological symptoms in response to hearing

the racial slur from his Lieutenant," the Commission did not agree with her conclusion that Alston would be able to return to work upon meeting the conditions outlined in her report. Add. 241–43. Instead, the Commission determined that certain actions and inactions of the Town—which Dr. Price did not consider—resulted in additional stress and psychological strain on Alston including the Town's:

- Failing to comprehend the seriousness of Mr. Pender's use of the racial epithet and failing to take necessary steps to repair the damage Mr. Pender had done that would have enabled Firefighter Alston to return to the workplace;

- Enabling retaliatory behavior against Firefighter Alston by Mr. Pender and others and enabling Mr. Pender to paint himself as the victim; and

- Attacking Firefighter Alston's credibility and taking other actions that appeared to lack bona fide and proper regard for fundamental fairness and good faith.

Add. 244. In other words, the Commission disregarded one expert entirely due to a lack of qualifications (Dr. Carter) and did not credit at least part of the live testimony of the other expert (Dr. Price).

The Commission and District Court's vastly different analyses of the evidence and contrary conclusions show that there are genuine issues of material fact as to whether Alston could return to work with conditions. The finder of fact should be able to consider whether Alston refused to return to work as the Town argues (and as credited by the District Court), or if he was incapable of doing so based on the psychological turmoil he had experienced as a direct result of the actions and

inactions of the Town in responding to discriminatory and retaliatory incidents (as the Commission found).

B. The District Court Improperly Limited the Facts Considered on Summary Judgment

The District Court also erred in relying on its earlier claim preclusion ruling to exclude critical, disputed evidence from the summary judgment record. Add. 287. Notwithstanding that the Magistrate Judge who analyzed the facts found that claim preclusion ***did not*** apply in this case, the District Court barred Alston from bringing claims in federal court that could have been brought in his state court action. Add. 123–29. In its summary judgment order, the District Court erroneously declined to consider the Town Defendants' discriminatory and retaliatory conduct prior to July 8, 2014—the date that the state court case was dismissed. Add. 287. In other words, the District Court improperly used its claim preclusion ruling to exclude ***factual evidence of discrimination and retaliation*** that took place during the pendency of Alston's state court action simply because it decided that ***claims*** arising during that period were precluded in this lawsuit.

Perhaps sensing its error, the District Court then attempted to justify its ruling to ignore this evidence, by stating there was nothing in the record prior to the date the state court action had been dismissed which would have changed its summary judgment analysis:

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> … even if the claim-splitting foreclosure ruling had not been made or was erroneous, there is no basis in the events between late December 2013 and mid-July 2014 for a conclusion other than the one discussed in the text for the reasons discussed therein.

Add. 287.

But this analysis was clearly flawed, as one of the key, disputed retaliatory incidents Alston alleged occurred in December 2013—the Leave Incident. *See supra* at 9. The District Court's conclusion that the Leave Incident had no bearing on Alston's discrimination claims is directly contradicted by the fact that the Commission relied on this event, and others during the December 2013-July 2014 time frame, to come to the opposite conclusion. *See* Add. 200–08. For example, the Commission found that the May 2014 investigation into the Leave Incident, which culminated in the Town's finding that the word "Leave" could have been written by members of an MIT fraternity, "seemed to defy commonsense and understandably cause Alston to question whether the Town was seeking to find an acceptable, alternative explanation to what appear[ed] to be a clear message that Fire Fighter Alston was not welcome in the Brookline Fire Department." Add. 249.

Moreover, the arbitrary nature of the District Court's ruling to disregard discriminatory and retaliatory events that could have been brought in the state court action is further exposed by the fact that it expressly considered the initial 2010 racial incident and the Town's response to it, both of which predated the Leave Incident.

See Add. 281 ("It is this [2010] incident, and Alston's vigorous disagreement with [the Town's response], that hangs over this entire controversy"). Add. 280–84.

This pattern of discrimination and retaliation cannot be cleanly separated from the analysis of wrongful termination in the way the District Court attempted. The Report and Recommendations of Magistrate Judge M. Kelly Page, who found that claim preclusion did not apply, made this same observation:

> The Town defendants do not ask the court to bar the present proceeding under the doctrine of claim preclusion, but ask the court to excise the facts alleged in the first case from the present case. Obviously, ***such a ruling would complicate the trial of the case***; at argument on January 5th, ***the Town defendants conceded that a jury would have to hear the initial facts concerning the voicemail incident in order to understand the case.***

Add. 129 (emphasis added). As Magistrate Judge Page held, in an employment discrimination case, it is impossible to separate the facts of termination from the facts and evidence of prior discriminatory and retaliatory incidents—but that is exactly what the District Court did. *See Barlatier v. Loc. Motion, Inc.*, No. 16-CV-11916-LTS, 2018 WL 6307861, at *3 (D. Mass. Dec. 3, 2018) (denying summary judgment because whether prior discriminatory incidents were the motivation behind plaintiff's termination was a question of fact for trial).

At bottom, the Court's invocation of its claim preclusion ruling to eliminate relevant discriminatory and retaliatory evidence from consideration on summary judgment was error. A proper analysis of such evidence indicates that genuine issues

of material fact remain genuinely disputed and that this Court should vacate the summary judgment order and remand the case for trial.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request that this Court vacate the District Court's grant of summary judgment and remand this case for trial.

Dated: July 16, 2020

Respectfully Submitted,

LAWYERS FOR CIVIL RIGHTS;
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Dated: July 16, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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