



**SPEAKING
ENGAGEMENT**

Leo Peloquin will speak on August 10, at the Massachusetts Municipal Lawyers Association’s “Public Employment Law Update” program in Sturbridge.

His topic is the Civil Service Commission, with an emphasis on bypasses and minimizing the chances that they will be overturned.

WE'RE MOVING!

Our office is moving on July 22, 2017 to:
**220 Norwood Park South,
Suite 1D
Norwood, MA 02062**

**NO BULLYING:
NONE**

Can an employee sue a city or town because of a supervisor’s verbal or non-verbal conduct considered humiliating, or even for abusive acts or omissions by a co-worker? Senate Bill No. 1013, with nearly 50 co-sponsors, would provide a cause of action in superior court, if the plaintiff suffered physical or psychological harm from an abusive environment. More on this next month.

No Need To Create New Position To Accommodate Employee

An employer need not create a position nor re-establish a position to accommodate an employee with a disability. That was the holding in Audette v. Town of Plymouth et. al., 858 F.3d 13 (May 26, 2017), a recent decision by the First Circuit Court of Appeals in which the Court determined that the Plymouth Police Department (Department) had not violated the Americans with Disabilities Act (ADA) by failing to assign an injured police officer to a data entry job, an assignment that no longer existed. The Court’s decision affirmed an earlier decision by a Massachusetts federal court.

Michelle Audette (Audette) joined the Plymouth Police Department in 1986. In 2010 and 2012, she suffered on duty injuries to her right ankle, which prevented her from working full duty. In June 2013, she underwent ankle surgery. While Audette was on medical leave, another injured police officer was temporarily assigned to a light duty position catching up on a data reporting backlog for the National Incident Based Reporting System (NIBRS). This temporary position was in place from May 30, 2013 to October 6, 2013. After that the officer who had been assigned to this work was transferred to another light duty assignment (station officer duties) and the position was closed.

On October 9, 2013, Audette submitted a doctor’s note indicating she could return to light-duty work on October 21, 2013. She requested that she be assigned to the NIBRS data entry position as a reasonable accommodation. Upon receiving her request, the Police Chief advised Audette that the data entry position was no longer available, and assigned her to a light duty position as a station officer, where she continued working until she re-injured her ankle in September 2014.

In August 2014, Audette filed a disability discrimination claim based on the Department’s failure to assign her to the data entry position. While traditional disability discrimination cases require a worker to show she is capable of performing the essential functions of her job with or without reasonable accommodation, the district court noted that a worker who claims he or she was unfairly denied a transfer must demonstrate she “can perform the essential functions of the position she desires.” Audette failed to meet this burden because the position sought did not exist. The First Circuit affirmed the denial of Audette’s claim and agreed that while an employee may request a transfer or reassignment as a reasonable accommodation, there needs be to an actual vacancy/position to transfer into.

The Court’s decision helps clarify an employer’s responsibility under the ADA. While it is well established that the ADA requires employers to provide reasonable accommodation to disabled employees so that they can perform the essential duties of their jobs, many employers worry they need to create a position that does not exist to accommodate a disabled employee. This case reaffirms that “an employer is not required by the ADA to create a new job for an employee, nor re-establish a position that no longer exists.” Employers are encouraged to consult CLP counsel when navigating challenging requests for an accommodation.

