

# NORRIS, MURRAY & PELOQUIN, LLC

Legal Counsel to Employers and Schools

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## Speaking Engagements

**19th Annual School Law Conference 2019**  
**Friday, March 29, 2019**

Melissa Murray will join Peter Raffalli (Bullying and Cyberbullying Clinic, Children's Hospital), and Michelle Moor (Moor, Perlman & Gregg) on a panel to discuss Bullying and Harassment Nine Years After Passage of Massachusetts' Anti-Bullying Law at the MCLE School Law Conference in Boston.



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## SJC Holds Failure To Grant Lateral Transfer May Constitute Adverse Employment Action

In *Yee v. Massachusetts State Police*, the Supreme Judicial Court (SJC) decided for the first time whether failure to grant a lateral transfer can constitute an adverse employment action. The answer: It can. The Court held that where there is a material difference between two positions in terms of opportunity to earn compensation, or in the terms, conditions or privileges of employment, an employer's failure to grant a lateral transfer may constitute an adverse employment action under M.G.L. c. 151B.

Yee was a lieutenant in the State Police assigned to Troop H, South Boston. He identifies as a Chinese Asian-American. In December, 2008, Yee applied for a lateral transfer to Troop F headquartered at Logan Airport. All state police lieutenants are paid the same base pay and benefits, regardless of where they are assigned. Yee requested the transfer because of the better overtime and detail opportunities in Troop F.

Between his 2008 request and September 2012, seven (7) lieutenants, all white males, were transferred or promoted to Troop F. In September, 2012, Yee wrote a letter alleging discrimination. Two days later another white male, Lydon, was transferred from Troop H to Troop F even though he had not requested a transfer. Lydon was in Troop F for two years before returning to Troop H. In Troop F, he made over \$30,000 per year in overtime and details. In 2014, Yee filed a complaint in superior court alleging discrimination on the basis of age, race and national origin. The court granted summary judgment for the State Police. The judge believed the evidence of Lydon's earnings from two years in Troop F were insufficient to defeat summary judgment. Yee appealed and the SJC transferred the case on its own motion.

The SJC's holding is consistent with federal precedent that a denial of opportunities to work overtime may suffice to support an unlawful discrimination claim under Title VII. The Court determined that although Yee's evidence was sparse—he only presented Lydon's 2-year earnings to show greater opportunities in Troop F—the State Police, with access to every officer's overtime and detail earnings, failed to provide any contradictory evidence showing equal earning opportunities in Troops H and F. The summary judgment order was vacated and the case was remanded to superior court for further proceedings.

The Court's decision means that employers must also affirmatively consider **potential** opportunities an employee may be deprived of when evaluating an employment decision.

## BSEA Issues Revised Hearing Rules

The Bureau of Special Education Appeals (BSEA) has issued revised Hearing Rules for Special Education Appeals, effective March 1, 2019. The revised rules were developed and have been issued in response to differentiated monitoring and support activities conducted by the U.S. Department of Education's Office of Special Education Programs (OSEP) during an on-site visit to the Massachusetts DESE in 2017, a public comment period and ongoing dialogue with OSEP. A copy of the revised rules is available on our website and on the BSEA's website: <https://www.mass.gov/orgs/bureau-of-special-education-appeals>.