UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GERALD ALSTON, Individually and on behalf of all others similarly situated, ***Plaintiff*****,** **v.** **Town of Brookline,** ***et al., Defendants.***	**Civil Action No. 1:15-cv-13987-GAO** **LEAVE TO FILE EXCESS PAGES GRANTED ON 1/12/16**

DEFENDANT TOWN'S MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS

Defendants the Town of Brookline, the Town's Board of Selectmen ("Board"), and the individual defendants in their official capacities[1] (collectively, the "Town") respectfully submit this memorandum in support of their Partial Motion to Dismiss the Complaint and Jury Demand of Plaintiff Gerald Alston ("Complaint") regarding Plaintiff's race discrimination claim against the Town under 42 U.S.C. §§ 1981 and 1983, and his First Amendment retaliation claim against the Town under § 1983.

The gravamen of the allegations of the Complaint is as follows: Plaintiff is a Town firefighter who alleges that the Board of Selectmen, as the Town's final policy-maker with regard to his Town employment and because of the Board's own racial bias (Plaintiff is Black) and desire to punish him for First Amendment activity, "endorsed" a psychiatrist's conditions for his return to work from a leave of absence arising from certain on-the-job "going postal" statements he made (the psychiatrist's conditions are at Ex. 12), which statements were found to have violated the Town's Workplace Safety Policy. Plaintiff does not agree to comply with the psychiatrist's recommendations that he be receiving psychiatric treatment and that he engage the Town in an exploration of possible workplace accommodations in advance of his return to work, which the psychiatrist recommended to assist him with avoiding another on-the-job outburst. Nor does he agree, despite his

[1] A suit against an official in his/her official capacity is a suit against the government entity. *Rosaura Bldg. Corp. v. Municipality of Mayaguez,* 778 F.3d 55, 62 (1st Cir. 2015) (citing cases).

documented history of cocaine use while an active employee and his hospitalization for alleged workplace stress on the heels of one incident of such use, to permit the Town to test him for drug use for a period of time following his return to work. And so he remains on leave.

The vast remainder of Plaintiff's 55-page, 167-paragraph Complaint surveys the stain of race discrimination that he alleges is part of the Town's (and the Nation's) several hundred-year-long history, attempts to weave in unrelated allegations of race discrimination by other employees when the Board of Selectmen did not have jurisdiction over them or when the Complaint alleges no knowledge or role by it with regard to the alleged misconduct (under the rubric of accusations against the "Town"),[2] reiterates a 2010 slur by Plaintiff's supervisor that he had unsuccessfully litigated twice previously, once at the Massachusetts Commission Against Discrimination ("MCAD") and then in Superior Court)[3], and which is long since time-barred, and cites various political and policy decisions by the Board, Town Meeting, and Town officials that are not actionable by Plaintiff because they state no constitutional misconduct against him personally. As the below makes clear, the Complaint appears to largely be a continuation of a policy campaign begun several years ago by Plaintiff's counsel Brooks Ames regarding the proper role of the Town's (then-denominated) human relations commission while he was a Town official on that body (member and Chair of its Diversity Subcommittee).

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[2] If the Court allows these allegations to remain in this lawsuit, the evidence will show that some were clearly drawn from public MCAD and court complaints that the Town has already litigated and that were found to have been without merit. Plaintiff apparently asks this Court to indulge re-litigation of these unrelated individual employment discrimination claims as a claim of constitutional misconduct against Plaintiff personally.

[3] The Complaint concedes that Plaintiff allowed the Superior Court action to slip away due to his non-compliance with discovery requirements. *See infra* and Complaint, ¶¶ 12, 107.

I. BACKGROUND

The following summarizes the pertinent allegations of the Complaint, documents on which the Complaint relies and which are therefore incorporated by reference into it, and certain public record documents.[4]

A. Town Organization

The Board of Selectmen is comprised of five (5) Selectmen, whom voters elect for staggered three-year terms. Art. 3.1.1, Town By-Laws.[5] The Board's composition in the relevant time frame has consisted of the following:

- **2010**: Named defendant Nancy Daly (2005-present, ¶ 24), named defendant Betsy DeWitt (2006-2015, ¶ 20), named defendant Ken Goldstein (2009-2015, ¶ 22), named defendant Jesse Mermell (2010-2013, ¶ 21), and Richard Benka (2011-14, *see* Ex. 1 & n.4).
- **2014:** Named defendants DeWitt, Goldstein, and Daly, in addition to Neil Wishinsky (2013-present, ¶ 23) and Ben Franco (2013-present, Ex. 2 & n.4).[6]
- **2015:** Named defendants Daly and Wishinsky, Selectmen Franco (*see supra*), and Bernard Greene and Nancy Heller (Ex. 3 & n.4).

The Board of Selectmen is the appointing authority for Department Heads within its jurisdiction (which does ***not*** include the School, Library, and Town Clerk Departments) and for Division Heads within the Department of Public Works ("DPW"), including DPW's Parks Division. 1985 Mass. Acts ch. 270; 1981 Mass. Acts ch. 32, § 1; Art. 3.17, Town By-Laws (*see* n.5); *see also infra* in this section below. It is also the appointing authority for the Fire Department, 1973 Mass. Acts ch. 534, and the Police Department. G.L. c. 41, § 97 and Ex. 4 (certified Town Meeting vote accepting G.L. c. 41, § 97) & n.4.[7]

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[4] In connection with this motion to dismiss, the Court may consider documents outside of the four corners of the Complaint that are incorporated by reference in the complaint, matters of public record, and other matters susceptible to judicial notice. *Lydon v. Local 103, Int'l Brotherhood of Elec. Workers,* 770 F.3d 48, 53 (1st Cir. 2014) (quoting *Giragosian v. Ryan,* 547 F.3d 59, 65 (1st Cir. 2008), quoting, in turn, *In re Colonial Mortg. Bankers Corp.,* 324 F.3d 12, 20 (1st Cir. 2003)).

[5] The Town's by-laws are available online at http://brooklinema.gov/DocumentCenter/Home/View/353.

[6] This document also reflects that Attorney Ames ran unsuccessfully for the Board in 2014.

[7] Under Art. 3.1.2.A (*see* n.5), the Selectmen bear the title of "Fire Commissioners," but "their responsibilities and authority are not enhanced, diminished or altered in any fashion from those that exist

The DPW Commissioner is otherwise the appointing authority for DPW. 1981 Mass. Acts ch. 32, § 1. The Town's Parks and Recreation Commission is otherwise the appointing authority for the Recreation Department. 1963 Mass. Acts ch. 13, §§ 3, 4; 1981 Mass. Acts ch. 32, § 1, Section 5. The School Superintendent is the appointing authority for school principals, and the principals are the appointing authorities for their schools. G.L. c. 71, § 59B. The School Superintendent is appointed by the School Committee, G.L. c. 71, § 37, which is comprised of nine (9) independently elected persons serving staggered three (3) year terms. Art. 3.2, Town By-Laws (*see* n.5).

Town Meeting is the legislative body for the Town. Art. 2.1, Town By-Laws (*see* n.5). The Town has an Advisory Committee established pursuant to Art. 2.2 of the Town By-Laws (*see* n.5) and G.L. c. 39, § 16. Advisory Committee members are appointed by the Town Meeting Moderator, Art. 2.2, who is independently elected by Town voters. G.L. c. 39, § 14. Named Defendant Stanley Spiegel is a Town Meeting Member and Advisory Committee Member. Complaint, ¶ 25.

B. <u>Allegations Relating to Plaintiff</u>

Plaintiff has been employed by the Town as a firefighter since 2002. Complaint, ¶ 17. Almost 6 years ago, in May 2010, while Plaintiff was on injury leave, his wife found a voice mail message on Plaintiff's cell phone from his supervisor, then-Lt. (now Captain) Paul Pender, containing a racial slur ("f*cking n***er"[8]). *Id.,* ¶¶ 77, 79, 80. On July 27, 2010, Plaintiff filed a written complaint with the Fire Chief, which precipitated an internal investigation and Lt. Pender's transfer out of Plaintiff's station. *Id.,* ¶¶ 84, 86, 89. Plaintiff requested that the Town <u>not</u> fire Lt. Pender. *Id.,* ¶ 84. The internal investigation was

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under applicable Laws by virtue of bearing such titles, nor shall the Board be involved in the day-to-day administration, operations or management of the … Fire Department[]."

[8] The evidence will show that the Complaint's description of the slur (¶80) is different from a recording of it Plaintiff produced in the Superior Court case discovery and presented to the Town in connection with its original investigation.

allegedly intentionally "slow and long" to create "the impression that [Plaintiff's] claims … lacked merit," although the Complaint concedes that within several weeks ("mid-August") the Board knew of the misconduct and disciplined Lt. Pender with a two-shift suspension. *Id.,* ¶¶ 7, 88-89.[9] Additional steps taken by the Town to address the slur included:

- ordering Pender to a mediation with Plaintiff, *id.,* ¶ 91;
- adopting a new "zero tolerance" anti-discrimination policy, *id.,* ¶ 90; and
- retaining the Massachusetts Commission Against Discrimination ("MCAD") in 2010-2011 to train the Town's workforce, *id.,* ¶¶ 8, 129 (fourth bullet point).

Later in 2010, Lt. Pender received the Medal of Valor from then-United States Attorney General Eric Holder at the White House. *Id.,* ¶¶ 6.[10]

In the period of time following the slur, Lt. Pender covered as acting captain on some occasions, but he was not permanently promoted to Captain until May 2013. *Id.,* ¶¶ 7, 92, 105.[11] Plaintiff raised various concerns in the slur's aftermath, and the Town investigated them. *Id.,* ¶¶ 8, 35(d), 99, 102, 113, 115.[12]

In May 2012, Plaintiff filed a charge of discrimination with the MCAD that complained 1) about Lt. Pender's slur two years earlier, 2) that his civil rights were violated because in 2010 Lt. Pender had been promoted (this Complaint now concedes that this was a temporary promotion to *Acting* Captain, not an appointment by the Board of Selectmen), and 3) that his civil rights were violated when the new Fire Chief enquired of Plaintiff how he would feel about being assigned to work with Lt. Pender at that point. *Id.,* ¶ 101 and Ex 5 &

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[9] The Complaint alleges that during the course of the investigation, HR Director DeBow asked Plaintiff how long he wanted Pender to suffer and called him an "a**hole". *Id.,* ¶ 87. If these allegations remain in the case, they will be vigorously denied.

[10] Selectman Mermell "tweeted" a congratulatory message regarding Lt. Pender's achievement. *Id.,* ¶ 6.

[11] HR Director DeBow allegedly did nothing when Plaintiff complained to her about Pender's 2010 acting captain promotion. *Id.,* ¶ 96.

[12] Plaintiff complains that HR Director DeBow's investigatory reports depicted Plaintiff as being disruptive and overly-sensitive for the purpose of suggesting that he was imagining or fabricating his complaints. *Id.,* ¶ 99. The evidence will show that they do not. What they will show is that (aside from the 2010 slur investigation) Plaintiff repeatedly refused to participate in internal investigations by providing information that would have assisted the Town with determining the merit of his complaints.

n.4. On November 19, 2012, Plaintiff filed an Amended Charge of Discrimination with the MCAD conceding that the original Charge was time-barred or non-actionable and substituting new allegations stating that unnamed firefighters ostracized him, unnamed "chiefs" ordered the conduct, and he reported all of this to unnamed "chiefs" and unnamed Human Resources personnel, who did nothing. *Id.* and Ex 6 & n.4.

The Town investigated Plaintiff's MCAD allegations, but could not substantiate Plaintiff's allegations. *Id.,* ¶ 102.[13] The investigation was allegedly a sham. *Id.* In April and May 2013, the Town did not temporarily promote Plaintiff to acting lieutenant even though he was the "senior man", and it did not investigate his complaint about this. *Id.,* ¶ 106.[14]

Following Lt. Pender's permanent promotion to Captain in May 2013, Plaintiff filed his MCAD allegations in Superior Court, *Id.,* ¶ 101 and Ex. 7 & n.4, as reported by the Boston Globe that fall. *Id.,* ¶ 107.[15]

In December 2013, Plaintiff found the word "leave" "on the door behind [Plaintiff's] jacket." *Id.,* ¶ 112. Plaintiff photographed the "leave" message and told other firefighters that "this is the kind of thing that makes people go postal." *Id.* The Town began an investigation of Plaintiff's "going postal" comment under the Town's Workplace Safety Policy and had him submit to a psychiatric fitness-for-duty examination. *Id.,* ¶ 116.[16] While

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[13] If these time-barred allegations are allowed to proceed, the evidence will show that Plaintiff refused to participate in this internal investigation.
[14] The evidence will show that to the contrary, Plaintiff did not cooperate with the Town's attempt to investigate it.
[15] Following the Globe coverage, Selectmen Daly distributed at a Town committee meeting an unpublished version of a retired Black Town firefighter's letter to the editor of a local newspaper stating the writer's opinion that Plaintiff's Superior Court complaint allegations were "ignorant, false and deceitful." *Id.,* ¶ 109. Town Meeting and Advisory Committee member Stanley Spiegel distributed the published version of the letter to Town Meeting members, stating that he was providing it to them to supply them with another viewpoint. *Id.,* ¶¶ 25, 110. At some point (the Complaint does not say when), Selectman DeWitt misstated to Town Meeting members that the investigation into the slur had been conducted under the Town's antidiscrimination policy, when that policy had not yet been adopted. *Id.,* ¶ 108.
[16] The evidence will show that Plaintiff made statements on multiple dates in addition to the "going postal" statement conceded in the Complaint -- including statements specifically about "shootings" -- and did so while exhibiting agitation. Moreover, just prior to being placed on leave, he said he was concerned about his own ability to focus on his job.

it initially issued a stay away order to Plaintiff, the Town lifted that order in early January after the Town's psychiatrist opined that Plaintiff was not an immediate threat. *Id.,* ¶ 117-18. However, the Town's psychiatrist determined that Plaintiff was not fit for duty. *Id.,* ¶¶ 11, 120, 123. The Town also initiated an investigation into the "leave" incident under the anti-discrimination policy. *Id.,* ¶ 115.[17]

In connection with the Superior Court action, the Town received Plaintiff's medical records showing that he had tested positive for cocaine on a day when he had shown sufficient symptoms of stress at work to be hospitalized, and more cocaine use in the months prior to December 2011. *Id.,* ¶¶ 100, 122. It provided the records to the Town's psychiatrist for review in connection with his fitness-for-duty determinations. *Id.,* ¶ 123. The Town's psychiatrist examined Plaintiff again, and as before, determined that Plaintiff was psychiatrically not fit for duty. *Id.,* ¶¶ 11, 120, 123.

Upon Plaintiff's being found unfit for duty, the Town placed him on unpaid administrative leave during which time he was compensated through his sick leave and other leave banks. *Id.,* ¶¶ 11-12, 120, 126. The Complaint alleges that the Town's placement of Plaintiff on unpaid leave upon being determined unfit for duty, with resort to his leave banks, was done with the purpose of terminating him. *Id.,* ¶ 11.

In May 2014, the Town determined that Plaintiff had violated the Town's Workplace Safety Policy and it set conditions for his return to work, including two years of random drug-testing. *Id.,* ¶¶ 119, 125. The investigations were allegedly "shams" and the workplace safety policy investigation result was "false". *Id.,* ¶¶ 112-19.[18]

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[17] The evidence will show that Plaintiff did not participate in either investigation (under the Workplace Safety Policy and under the anti-discrimination policy), including declining to provide all photographs he indicated to the Fire Chief he had in his possession depicting the "leave" writing. *See also* n.18 *infra.*

[18] The Complaint alleges that HR Director DeBow did not contact Alston until three (3) months after the incident. *Id.,* ¶ 115. During the investigation, HR Director DeBow had asked Plaintiff to supply her with all of his photographs of the "leave" writing, but he directed her to his attorney in the Superior Court

During the summer of 2014, the Superior Court entered final judgment against Plaintiff on that complaint due to his failure to comply with discovery. *Id.,* ¶¶ 12, 107; *see also* Ex. 9 & n.4. (In July 2015, the Superior Court denied Plaintiff's Mass. R. Civ. P. 60(b) motion for relief from this final judgment, partly on the basis of the Town's repeated need to file discovery motions and Plaintiff's non-compliance with discovery. Ex. 10 & n.4 *supra.*[19])

Plaintiff finally exhausted his leave banks in October 2014. *Id.,* ¶¶ 12, 120, 126. HR Director DeBow attempted to schedule a reasonable accommodation meeting with Plaintiff to discuss his work status. *Id.,* ¶ 127. On the pretense of being fearful that this was a set-up for termination,[20] Plaintiff's counsel asked to speak with then-Board Chair Ken Goldstein. *Id.,* ¶ 128. Chairman Goldstein canceled his meeting with Plaintiff's Counsel after a Town attorney emailed Attorney Ames, suggesting that his representation of Plaintiff could violate the State Ethics Law, as he had been a "municipal employee" – a member of the Town's human relations commission and Chair of its Diversity Sub-Committee – when that body undertook to investigate Plaintiff's Superior Court "ostracizing" allegations, and Attorney Ames was therefore potentially subject to the "forever ban" of G.L. c. 268A, § 18(a). *Id.*, ¶ 128; *see also* Ex. 11 & n.4. The email suggested to Attorney Ames that he seek an opinion directly from the State Ethics Commission regarding this question. Ex. 11 & n.4.

In late November and early December 2014, Plaintiff and others communicated to the Selectmen various matters, including a request for a racial climate review of the Fire Department, a request for an outside review of various matters, and a request for a hearing. *Id.,* ¶ 131. Plaintiff also asked to be put back on paid administrative leave. *Id.,* ¶¶ 120, 126,

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lawsuit even though the investigation was outside of the scope of the lawsuit, and she informed him of this in a further attempt to obtain the photographs. *Id.,* ¶ 115, Ex. 8 & n.4; *see also* n.17 *supra*.

[19] *See* the on-line docket at: http://www.masscourts.org/eservices/?x=DLo1dRwOxmBbv-CHQ71kicVC0sWkQi09vHkzFrTdmgm542A*-eJUfHz8BLPocacUwIUEGHmTtRkhpT2hRjIOkw.

[20] The Complaint alleges that Plaintiff was concerned because the Town had called in another firefighter for a reasonable accommodation meeting and then pressured him into early retirement, but it does not disclose the race of this firefighter. *Id.,* ¶ 127.

131. The Selectmen retained a Latino board member of the Lawyers Committee for Civil Rights to conduct an outside review as Plaintiff had requested, which was limited to a review on the papers rather than a *de novo* review. *Id.,* ¶¶ 14, 129, 144. Plaintiff alleges that the outside review was a sham. *Id.,* ¶ 144.

The Complaint accuses "the Town" of having "leaked" the contents of Plaintiff's personnel file to Mr. Spiegel but does not suggest who did this. *Id.,* ¶ 124.[21]

In January 2015, then-Chair Goldstein undertook to personally meet with Plaintiff and Attorney Ames (with Town Counsel Murphy present) to discuss Plaintiff's concerns. *Id.,* ¶ 136. The Complaint contains a slew of accusations against Chairman Goldstein and Town Counsel Murphy arising from that meeting, including that Goldstein said that Mr. Spiegel was free to defame Plaintiff, that he (Chair Goldstein) accused Plaintiff of threatening his family because he is Black, and that during the meeting, Town Counsel Murphy made repeated and gratuitous references to the slur. *Id.*[22]

Following a public protest in support of Plaintiff, Plaintiff demanded another fitness for duty examination with a different psychiatrist. *Id.,* ¶¶ 14, 139. The Town accommodated this additional request, and returned him to paid administrative leave after he participated in the evaluation in February 2015. *Id.,* ¶ 139. This new psychiatrist also concluded that

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[21] The evidence will show that there was no such "leak." The Complaint also alleges that Plaintiff's counsel complained to Town Counsel Murphy about Mr. Spiegel's alleged statements to third parties regarding Mr. Alston, and she investigated it. *Id.,* ¶¶ 132-33. Her investigation was allegedly a "sham." *Id.,* ¶ 133. When, following the Spiegel incident, Plaintiff and Attorney Ames wanted to view the original of Plaintiff's personnel file, Town Counsel Murphy made arrangements for someone to be present during the original personnel file review, who was a police detective assigned to her office. *Id.,* ¶ 134. Attorney Ames contacted Chairman Goldstein complaining about the detective's presence. *Id.* After speaking with Town Counsel Murphy, Chairman Goldstein called back Attorney Ames and told him that the detective would leave. *Id.*

[22] The Town will vigorously deny these allegations. The Town brings to this Court's attention that Attorney Ames is both a key witness and Plaintiff's trial counsel, which could raise an issue down the road under Supreme Judicial Court Disciplinary Rule ("DR") 3.7 ("Lawyer As Witness"). It will be essential to the Town's defense to depose Attorney Ames regarding this meeting once discovery is underway. The Town raises this possible issue at this early juncture to enable the Court and the parties to consider it in orderly fashion.

Plaintiff could only return to work on certain conditions. *Id.* ***First***, she said that Plaintiff should receive mental health treatment, including meeting with a therapist weekly and a psychiatrist monthly, for at least one month prior to returning to work (in order to establish a relationship with his treatment providers) and for at least 1 year following it, in order "to help him to be better able to handle stressors he is likely to encounter upon returning to work." *Id.,* ¶ 139; *see also* Ex 12 at 47-48 & n.4. She further stated that Plaintiff should sign "appropriate releases" so that Plaintiff's treatment providers "can report failure to comply with treatment and any concerns about safety to the Town's HR Department or otherwise designated agent." *Id.,* ¶ 139; *see also* Ex 12 at 48 & n.4. ***Second***, she said that the Town should attempt to enlist Plaintiff in a discussion regarding reasonable accommodations (which the Town had attempted to do in November 2014, *see supra* and ¶ 127[23]). Complaint, ¶ 139; Ex 12 at 48-49 & n.4. ***Third,*** Plaintiff should undergo at least? two years of random toxic screens to assure that he remains drug free, given evidence that Plaintiff had used cocaine and marijuana, and because use of such drugs "would diminish his capacity to perform his essential job functions and would increase the risk of violent behavior." Complaint, ¶ 139; Ex. 12 at 49 & n.4.[24] The Complaint alleges that Plaintiff was determined to be fit by a psychiatrist that he independently retained, but does not state that he has ever supplied this psychiatrist's evaluation to the Town for its consideration regarding his work status. *See id.,* ¶¶ 15, 141.[25]

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[23] The evidence will show that because Attorney Ames insisted that several members of the public be in attendance at Plaintiff's November 2014 workplace accommodation meeting with the Fire Chief and HR Director in addition to him as Plaintiff's counsel, this meeting did not go forward.

[24] Town Counsel Murphy and HR Director DeBow allegedly directed the second psychiatrist not to change Plaintiff's return-to-work conditions. *Id.,* ¶ 15. The evidence will show this did not happen.

[25] The evidence will show that as of this date Plaintiff has not done so.

Plaintiff has not agreed to the psychiatrists' conditions for returning to work and now insists that the full Board of Selectmen meet with him. *Id.,* ¶¶ 136, 140.[26] This lawsuit seeks payment for damages, punitive damages and Attorney Ames's attorneys' fees related to Plaintiff's leave status under these circumstances. *Id.,* ¶ 142, "Relief Requested".

C. "Municipal Policy/Custom"

The Complaint alleges that in the 18th century, some private Town residents owned slaves and the Town named a school after one of them. *Id.,* ¶ 37. Various Town committee race- and diversity-related efforts beginning in the 1950's constituted cynical window dressing. *Id.,* ¶ 41. A study from half a century ago identified housing discrimination in the private real estate market. *Id.,* ¶ 38. The Town hired relatives of existing Town employees, who were White. *Id.,* ¶ 39. Various allegedly discriminatory decisions and actions were taken during the period 2005-2015 by various employees and departments not under the jurisdiction of the Board of Selectmen (*see* Section I(A). *Id.,* ¶¶ 43, 47, 51, 60 (DPW); *id.,* ¶¶ 45-46 (Recreation Department)[27]; *id.,* ¶ 52 (Schools - hiring), ¶ 57 (Schools - student discipline)[28], ¶ 58 (Schools - teacher discipline).[29]

Plaintiff's allegations regarding the Police Department (for which the Selectmen are the appointing authority) concern an allegedly discriminatory civil service by-pass decision

[26] If these allegations remain in the case, former Chair Goldstein and Town Counsel Murphy will vigorously deny Plaintiff's and Attorney Ames's rendition of this meeting. Plaintiff makes a demand for a meeting with the full Board in the face of this lawsuit seeking to establish municipal liability based on every step any Town official has taken – most of which is non-actionable – and when, the evidence will show, then-Chair Goldstein's good faith agreement to meet with Plaintiff and Attorney Ames at Ames's request ended with what the Town will maintain are false accusations against him and Attorney Ames's own ridiculing of him in the "re-Tweeting" of a cartoon depicting Attorney Ames's rendition of that meeting that he (Attorney Ames) posted on his personal "Twitter" account. *See* n.40 *infra.*
[27] The Recreation Department allegations allege involvement by HR Director DeBow and a Town Counsel prior to Town Counsel Murphy's appointment in 2013, ¶ 28, but no allegation of involvement by the Board.
[28] The paragraph alleges involvement by Town Counsel Murphy but no allegation of involvement by the Board.
[29] The paragraph alleges involvement by Town Counsel Murphy but no allegation of involvement by the Board. The Complaint also alleges a discriminatory promotional decision in an unidentified department, making it impossible to determine the appointing authority. *Id.,* ¶ 44. Nor does this paragraph explicitly refer to any involvement by the Board.

in 2008,[30] and an allegedly discriminatory altercation involving a White police officer and a Black town meeting member in 2008 that involved a prior Town Counsel and another unidentified white Town official. *See id.,* ¶¶ 28, 49. They include an allegation of light discipline of white officers in 2012 without identifying the decision-maker. *Id.,* ¶ 54.[31]

With regard to the Fire Department (also for which the Selectmen are the appointing authority), Plaintiff alleges that the **Board of Selectmen** disciplined a ***White*** firefighter with the stiffest of discipline, ***termination*** (discipline greater than a 5-day suspension is within the purview of the appointing authority, *see* n.31) and that a White firefighter was "protected" after several arrests by unidentified decision-makers. *Id.,* ¶ 59.

Plaintiff also alleges that in 2013, the Board of Selectmen hired a White candidate over a more-qualified Black candidate for Planning Director and did not sufficiently factor in a need for the successful candidate to have affordable housing experience, and appointed only Whites to the hiring committee for that position (without alleging this was despite the existence of more qualified Black candidates for the hiring committee). *Id.,* ¶ 55.

Plaintiff also alleges that in the same time period, the Board of Selectmen appointed a ***Black*** man as a ***department head***, *id.,* ¶¶ 36(f), 146, and recruited a ***Black man*** to run for a vacant seat on the Board in a political campaign. *Id.,* ¶ 147.

The Complaint otherwise contains an allegation of individual discriminatory conduct on the basis of **sex** in connection with a 2011 investigation (both parties in the underlying incident were White) involving HR Director DeBow and a single Selectman (not the full Board), defendant Daly. *Id.,* ¶ 53.

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[30] With regard to the 2008 allegedly discriminatory hiring decision, the Complaint alleges that in 2013, HR Director DeBow, Police Chief and Town Counsel Murphy discouraged the applicant from reviewing her file, and that Town Counsel Murphy misstated her ranking on the civil service examination, without alleging any involvement by the Board. *Id.,* ¶ 50. While Attorney Ames was a member of it and Chair of its Diversity Subcommittee, the human relations commission undertook her cause. *Id.,* ¶ 67; Ex. 11 at 2.

[31] The Civil Service law, G.L. c. 31, § 41, requires that discipline greater than five (5) days suspension be imposed by the appointing authority, but permits lesser discipline by subordinates.

D. Diversity-Related Policy and Legislative Actions and Debates, 2010-Present

The Complaint maintains that the following states constitutional misconduct against Plaintiff personally that warrants an award of damages, punitive damages and Attorney Ames's attorneys' fees: In 2010, Town Meeting passed a resolution calling for enhanced diversity measures by Town government. *Id.,* ¶ 62.[32] The Selectmen tasked HR Director DeBow with reporting back regarding the Town's diversity practices rather than task a committee with examining this. *Id.,* ¶¶ 62-63. In 2011, Selectman DeWitt stated that a committee would be formed to look at the Town's diversity practices, but it was never filled and instead she, Selectman Mermell, and staff met about the matter. *Id.,* ¶ 64-65. Selectman DeWitt misspoke in stating to Town Meeting members and citizens that the Town had recently adopted an affirmative action policy. *Id.,* ¶¶ 64, 67. Beginning in 2012, the Town's Human Relations Commission (of which Attorney Ames was a member and Chair of its Diversity Subcommittee, *see id.,* ¶ 69 and Ex. 11 at 2) wanted to undertake responsibility for investigating Town-related employment discrimination complaints. *Id.,* ¶¶ 12, 66-67. After Plaintiff filed his Superior Court complaint in 2013, Attorney Ames's commission attempted to investigate the matters Plaintiff's court complaint raised, but the Board of Selectmen declined to release the internal investigation reports, Selectman DeWitt declined to attend a commission meeting to discuss a matter in litigation, and Selectman DeWitt authorized Town Counsel to prevent the Fire Chief from attending its meetings to discuss the work culture in the Fire Department. *Id.,* ¶¶ 12, 111. Also beginning in 2013, the efforts by Attorney Ames's commission to undertake an investigation role regarding workplace complaints were hampered by certain Board appointments of individuals who disagreed with that role, and by the Board's decision not to appoint others who supported it. *Id.,* ¶ 12, 69-72. Chairman

[32] As the resolution wound its way through the legislative process, Selectman Daly allegedly commented that the petitioner should not expect Brookline "to look like Boston." *Id.,* ¶ 62.

Goldstein allegedly told one Black applicant for the commission that he did not support his application because the applicant had engaged in name-calling against a Black committee member ("house servant"). *Id.,* ¶¶ 72. The Town Moderator (who is an independently-elected official, *see* Section I(A) *supra*, and who is not named in this Complaint at all) instructed a Black applicant for Attorney Ames's commission not to call Town officials racist on the floor of Town Meeting while Town Meeting was debating a resolution pertaining to the vacancies on the commission. *Id.,* ¶¶ 18, 73. The Selectmen created a new committee that proposed eliminating investigation of Town employment discrimination complaints from the commission's duties, which **Town Meeting** – **the Town's elected legislative body** – **approved** in 2014, with the Selectmen's support. *Id.,* ¶¶ 18, 69, 74. In 2015, the Selectmen recruited a Black man to run for an open seat on the Board, and the Town's voters elected him into office. *Id.,* ¶ 147. The Complaint attacks the Selectmen's support of him on the basis that he had not stopped efforts to limit the role of the commission regarding Town employment discrimination complaints, *inter alia*. *Id.,* ¶ 147. It also attacks the Selectmen's appointment of a Black diversity director (who is staff support to the same commission) who had frustrated that commission's efforts in 2013 to assume this role, *inter alia*. *Id.,* ¶ 146.

The Complaint alleges that the Town has not completed a racial climate review of the Town's workforce Plaintiff requested in late 2014 (which reflects Attorney Ames's proposal to the commission in 2013, while he was a member). *Id.,* ¶¶ 14, 143; *see also* Ex. 11 at 2.

II. ARGUMENT

A. Legal Standards and Overview

1. Standard of Review for Motions to Dismiss

In *Rodriguez-Ramos v. Hernandez-Gregorat,* 685 F.3d 34, 39-40 (2012), the First Circuit articulated the current legal standard applicable to motions to dismiss:

> "[W]e disregard statements in the complaint that merely offer "legal conclusion[s] couched as … fact[]" or "threadbare recitals of the elements of a cause of action." *Ocasio-Hernandez v. Fortuno-Burset,* 640 F.3d 1, 12 (1st Cir. 2011) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937 … (2009)). The remaining, non-conclusory allegations are entitled to a presumption of truth, and we draw all reasonable inferences therefrom in the pleader's favor. *See id.* "The make-or-break standard … is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief." *Sepulvedo-Villarini v. Dep't of Educ. of P.R.,* 628 F.3d 25, 29 (1st Cir. 2010). To survive a motion to dismiss, a complaint must, in other words, "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S. Ct. at 1949.

2. Legal Standard Applicable to Plaintiff's §§ 1981/1983 Discrimination and § 1983 First Amendment Retaliation Claims

With regard to Plaintiff's § 1981 discrimination claim and § 1983 Equal Protection Clause ("EPC") claims, he must show "1) that he was selected for adverse treatment compared with others similarly situated, and 2) that the selection for adverse treatment was based on his race." *PowerComm, LLC v. Holyoke Gas & Elec. Dept.,* 657 F. 3d 31, 35-36 (1st Cir. 2011) (racial animus required for § 1981 claims); *Rios-Colon v. Toledo-Davila,* 641 F.3d 1, 4 (1st Cir. 2011) (§ 1983); *Rivera v. Puerto Rico Aqueduct and Sewers Auth'y,* 331 F.3d 183, 191-92 (1st Cir. 2001) (§ 1983, intentional discrimination required as with Title VII); *Quarterman v. City of Springfield,* 716 F. Supp. 2d 67 (D. Mass. 2009) (invidious discrimination, §§ 1981 and 1983); *see also Hernandez v. New York,* 500 U.S. 352, 359-60 (1991) (only **intentional discrimination** violates EPC); *Washington v. Davis,* 426 U.S. 229, 239, 242 (**same**).

To make out a First Amendment retaliation claim, a plaintiff must show, *inter alia,* that the speech was a substantial or motivating factor in an **adverse employment action**. *O'Connor v. Stevens,* 994 F.2d 905, 912-13 (1st Cir. 1993). Under First Amendment jurisprudence, there is a cognizable adverse action only where the action "would place substantial pressure on even one of thick skin to conform." *Rodriguez-Garcia v. Miranda Marin,* 610 F.3d 756, 766 (1st Cir. 2010) (citing *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1218 (1st Cir. 1989)). Under either theory (EPC or First Amendment retaliation), the adverse action must result in a work situation that is "'unreasonably inferior' to the norms for the position." *Ayala-Sepulveda v. Municipality of San German,* 671 F.3d 24, 31-32 (1st Cir. 2012) (citing *Rodriguez-Garcia v. Miranda Marin,* 610 F.3d 756, 766 (1st Cir. 2010)).

3. Municipal Liability Standard

A municipality may be liable under §§ 1981 and 1983 only where a municipal policy or custom is the "moving force" inflicting the injury, as there is no *respondeat superior* liability under either § 1981 or § 1983. *Connick v. Thompson,* 563 U.S. 51, 131 S. Ct. 1350, 1359 (2011); *Board of County Comm'rs of Bryan Cty. v. Brown,* 520 U.S. 397, 403, 117 S. Ct. 1382, 1388 (1997); *City of Canton, Ohio v. Harris,* 489 U.S. 378, 386, 109 S. Ct. 1197, 1203 (1989) (citing cases); *Rosaura Bldg. Corp.,* 778 F.3d at 62; *Powell v. City of Pittsfield*, 143 F. Supp. 2d 94, 113-14 (D. Mass. 2001) (municipal policy or custom required for municipal § 1981 liability, citing *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 735-36 (1989)). "Policy" refers to decisions of a "duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality," *Brown,* 520 U.S. at 403, 117 S. Ct. at 1388, such as a "'policy statement, ordinance, regulation or decision officially adopted and promulgated by'" an official in charge. *Suprenant v. Rivas,* 424 F.3d 5, 19 (1st Cir. 2005) (quoting *Monell v. Dept. of Soc. Servs.,* 436 U.S. 658, 690, 98 S. Ct. 2018 (1978)); *see also Rodriguez-Garcia v. Miranda-Marin,* 610 F.3d 756, 769 (1st Cir.

2010); *Silva v. Worden,* 130 F.3d 26, 31 (1st Cir. 1997). If it is a decision that is challenged as policy, a plaintiff must show a "'deliberate choice to follow a course of action made from among various alternatives by the official or **officials responsible for establishing final policy with respect to the subject matter in question**.'" *Walden v. City of Providence,* 596 F.3d 38, 55 (1st Cir. 2010) (emphasis added, quoting *Pembaur v. City of Cincinnati,* 475 U.S. 569, 106 S. Ct. 1292 (1986)); *see also Brown,* 520 U.S. at 405, 117 S. Ct. at 1389; *Silva,* 130 F.3d at 31 (officials must be ones with "*final authority* to establish municipal policy with respect to the action) (emphasis in original); *Rodriguez-Garcia,* 610 F.3d at 769. Here, as the Complaint concedes, the final policy-maker with regard to Plaintiff's employment as a firefighter is the five-member Board of Selectmen. *See* Section I(A); *see also Rosaura Bldg. Corp.,* 778 F.3d 62 (mayors in Puerto Rico have ultimate authority over employment decisions); *Rodriguez-Garcia,* 610 F.3d at 770 (mayor was the final policy-maker regarding plaintiff's employment, due to hiring/firing authority under Puerto Rico law).

A municipal "custom" exists where municipal "practices [are] so persistent and widespread as to practically have the force of law." *Connick,* 563 U.S. at 60-61, 131 S. Ct. at 1359; *Brown,* 520 U.S. at 403, 117 S. Ct. at 1388. They "'must be so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice.'" *Walden,* 596 F.3d at 57-58 (recordings of telephone calls within police department was not so widespread or well-settled as to have force of law) (quoting *Bisbal-Ramos v. City of Mayaguez,* 467 F.3d 16, 24 (1st Cir. 2006)); *see also Silva,* 130 F.3d at 31-32 (to establish municipal "custom," there must be actual or constructive knowledge of it by final policy-makers); *Coyne v. City of Somerville,* 972 F.2d 440 (1st Cir. 1992) (granting motion to dismiss, as 4 or 5 alleged instances of hiring of "cronies" over 10 years does not establish a municipal "custom"); *Kinan v. City of Brockton,* 876 F.2d 1029, 1035 (1st Cir. 1989) (plaintiff must show

"acquiescence" by "policy-maker" to "custom … as to which he has actual or constructive knowledge"; not shown where incident post-dated policy-maker's tenure).

4. Overview/Preliminary Application of Legal Standards

Based on the foregoing, the Court should wholly ignore the allegations contained in Paragraphs 1, 16, 31-36, 40, 93, 98 and 145 as reciting threadbare legal conclusions, and turn to the remaining allegations to determine their sufficiency. *See* Section II(A)(1).

Next, the Court should determine whether the Complaint sufficiently alleges a municipal ***policy*** of **intentional** race discrimination or First Amendment retaliation based on either a written policy or decision-making by the Town's final policy-maker with regard to Plaintiff's employment, which is the Board of Selectmen. *See* Sections I(A), II(B)(1) and (B)(2). Plaintiff does not allege that the Town has a written policy providing for such unconstitutional conduct; therefore, Plaintiff may only rely on Board of Selectmen decision-making that was the "moving force" behind any constitutional injury he personally suffered. *See* Sections II(B)(2) and (B)(3).

To the extent Plaintiff relies on an unconstitutional Town ***"custom,"*** Plaintiff must allege that **this Board** of Selectmen **intentionally**, and **because of its own animus** based on race or First Amendment exercise, **acquiesced** to a **widespread, settled practice** of race discrimination or First Amendment retaliation of which it knew or had constructive knowledge (since this Board is not vicariously liable for any unlawful motives of others), and that such acquiescence was the moving force behind Plaintiff's own constitutional injury. *Id.*

B. The Allegations Do Not Sufficiently State Invidious Discrimination or First Amendment Retaliation By This Board Causing Plaintiff Injury

In an unavailing attempt to embroider a depiction of a "municipal policy or custom" to serve as a vehicle for Plaintiff's demand for damages, punitive damages, and Attorney Ames's attorneys' fees from the Town, the Complaint sweeps a host of action or inaction by

various departments and independently elected officials under the rubric of "The Town", when under applicable law they are not under jurisdiction of the Board of Selectmen, the final policy-maker with regard to Plaintiff's employment. The following can be dismissed out-of-hand as failing to state any "municipal policy or custom" by the Board that was the "moving force" behind Plaintiff's own alleged constitutional injury:

- Claims arising from the conduct of Mr. Spiegel (who is under the jurisdiction of the Town Moderator, an independently elected official (*see* Section I(A)), such as those set forth in ¶¶ 73, 110, 132, 136.[33]
- Claims relating to the School Department, which is under the jurisdiction of the School Committee, independently elected officials (*see* Section I(A)), such as those set forth in ¶¶ 36(f), 52 (referring, *inter alia,* to discriminatory hiring decision 23 years earlier), 57, 58.
- Claims arising from conduct and decision-making within the jurisdiction of DPW dating back as much as 10 years, including the DPW Parks Division (the DPW Commissioner is the appointing authority for DPW, *see* Section I(A)), such as those set forth in ¶¶ 43, 47, 51, 60, without allegation of knowledge or acquiescence by this Board of Selectmen.
- Claims dating back almost 10 years arising from conduct and decision-making relating to the Recreation Department, which is under the jurisdiction of the Parks and Recreation Commission (*see* Section I(A)), such as those set forth in ¶¶ 45-46, without allegation of knowledge or acquiescence by this Board of Selectmen.
- Assorted other claims related to race reaching back to the 18th century, such as those in ¶¶ 37-41.

Similarly, the Complaint alleges a host of conduct by individual Selectmen, Town Counsel, the HR Director and other Town officials and departments without any accompanying allegation of knowledge or acquiescence by this or any Board of Selectmen as a body. *See, e.g.,* ¶¶ 6 (former Selectman Mermell's congratulatory "tweet" to Lt. Pender for receiving the Medal of Valor), 14 (Town Counsel), 15 (Town Counsel and the HR Director), 45, 47, 48, 50, 53, 57, 58, 62, 64, 65, 72, 73, 77, 79, 81-84, 87, 96, 99, 101, 108-10, 112, 113, 115, 127, 128, 132, 133-38, 144.

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[33] Paragraph 136 alleges that former Chair Goldstein is individually liable because he indicated to Plaintiff at his January 2015 meeting with him and Attorney Ames that Mr. Spiegel was not under the jurisdiction of the Board.

Plaintiff's allegations pertaining to the period 2005-2015 (¶¶ 42-60) concern actions or decisions (much of which does not form any basis for colorable discrimination claims) by parties other than this Board (or any preceding Board, in many cases), and they do not reflect any suggestion of knowledge or acquiescence by this Board from which its own animus could be inferred for purposes of stating a claim of discriminatory and/or retaliatory municipal policy-making or custom. *See* ¶ 48 (2007 incident of a police officer's alleged unlawful arrest of Black town meeting member; then-Board's role was to promote officer (which did not constitute adverse action against the Black town meeting member), and create an ad hoc committee to review incident); ¶ 49 (2008 alleged discriminatory civil service bypass; no allegation that then-Board knew that hiring decision involved a bypass[34]); ¶ 50 (town officials discouraged the bypassed 2008 Black police candidate from reviewing her personnel file and provided incorrect information about her civil service examination score, which does not constitute colorable adverse action; in any event, no allegation that Board knew or should have known); ¶ 53 (alleged sex discrimination in crediting male Advisory Committee member over female staff member in connection with sham investigation (which does not constitute colorable adverse action); no allegation of involvement by the Board as a body (Complaint alleges involvement by a single Selectman only)); ¶ 54 (light discipline of police officers without any allegation of involvement by the Board, *see* n.31); ¶ 55 (allegation that only White people were appointed to hiring committee without comparator candidate

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[34] The Complaint reflects, and the evidence will show, that Attorney Ames, as a member of the human relations commission and Chair of its Diversity Subcommittee, personally petitioned Town officials in 2013 regarding the matters involving the 2008 by-passed police candidate. *See* Complaint, ¶ 67; Ex. 11 at 2 & n.4; *see also* Ex. 14 (minutes reflecting Diversity Committee's hearing of the 2008 police candidate's complaint while Attorney Ames was Chair). This lends support to the merit of the Town's suggestion that he seek an opinion from the State Ethics Commission regarding his representation of Plaintiff (whose complaints the human relations commission had taken up while he was on it) against his former municipal employer in light of the Ethics Law's "forever ban" (the Complaint challenges the suggestion to seek further advice as "baseless and intended to intimidate", *see* ¶ 128; Ex. 11 & n.4). Further below, the Town points out that the allegation that Plaintiff's own constitutional rights were violated by a Town lawyer's suggestion to Plaintiff's lawyer – a former Town official -- obtain an opinion from the relevant State enforcement agency does not state a claim.

information or any other suggestion of discriminatory decision-making); ¶ 56 (allegation of protection of White firefighter without any allegation of involvement by the Board).

To establish municipal liability based on a discriminatory or retaliatory "custom", Plaintiff must allege that the Board of Selectmen deliberately chose – because of its own racial animus, or because of its own desire to punish Plaintiff for his First Amendment activity -- not to act in the face of actual or constructive knowledge that its own subordinates were engaging in a widespread, well-established pattern of constitutional misconduct. Plaintiff's "custom" allegations regarding conduct under the Board's jurisdiction described above are thin to say the least, and fall well short of the legal standard.[35] *See* Section II(C) *supra*; *Coyne,* 972 F.2d at 440 (4-5 incidents over 10 years was insufficient). Indeed, the Complaint alleges that in 2015, **this Board** ***fired*** a ***White*** firefighter for misconduct. *Id.,* ¶ 59. In 2014, **this Board** ***hired*** a ***Black*** candidate as diversity director, and in 2015, **this Board** ***recruited*** a ***Black*** candidate to run in an election for the Board of Selectmen. *Id.,* ¶¶ 146-47. Moreover, the Complaint doesn't purport to allege any "custom" of First Amendment retaliation at all, but a sole accusation relating to School matters under the jurisdiction of the School Committee. *Id.,* ¶ 58.

Given the foregoing, Plaintiff may use § 1981 and § 1983 only as a vehicle to challenge conduct by the Board of Selectmen (the final decision-maker with regard to his employment) that pertains to him specifically, with the exception of claims that are non-colorable or precluded for the reasons set forth below.

[35] Plaintiff's own Complaint illustrates the point beautifully, where he attempts to weave in allegations from hundreds of years ago involving long-dead parties in an attempt to establish municipal "custom" liability.

C. The Court Should Dismiss Claims That Do Not State Colorable Disparate Treatment or First Amendment Retaliation

In addition (and in the alternative), the Town points out that large swaths of the Complaint allege conduct that does not state actionable disparate treatment or First Amendment retaliation, as follows:

- The allegations summarized in Section I(D) relate to policy- and politics-related decisions by the Selectmen and various Town bodies and officials -- *e.g.,* a revamped Town by-law voted by Town Meeting removing investigation of job discrimination matters from the human relations commission's jurisdiction[36] -- that did not amount to adverse job action (an "unreasonably inferior" job situation, *see supra* Section II(B)), or to constitutional misconduct, by this Board against Plaintiff. *See, e.g.,* ¶¶ 12, 18, 61-75, 111, 145-147. As is evident from that section and Ex. 11, Attorney Ames, as a former member of the human relations commission and Chair of its Diversity Subcommittee, was a staunch advocate for active assumption by the human relations commission -- a citizen body -- of an investigatory role regarding sensitive workplace complaints (including, at the time Gerald Alston's Superior Court complaint allegations). He apparently seeks to use this lawsuit as a vehicle to challenge those policy decisions. Such efforts are unavailing. Attorney Ames is not entitled to recoup attorneys' fees from the public fisc under the rubric of fee-shifting statutes such as § 1981 and § 1983 for the purpose of challenging the policy choices of Town Meeting, the Board, and various Town officials.
- Paragraph 128 regards an email by a Town attorney bringing to Attorney Ames's attention a possible conflict of interest under the State Ethics Law, given Ames's prior special municipal employment as a member (and Diversity Subcommittee Chair) of the human relations commission at a time that this body took up the matters raised in Plaintiff's Superior Court complaint, and given Ames's subsequent representation of Plaintiff in this action raising the same matters, now in a role adversarial to his former special municipal employer. *See* Ex. 11; *see also* Ex. 14 (minutes reflecting Diversity Committee's hearing of 2008 police candidate's complaint while he was Chair, also referenced as a basis for this action in the Complaint, *see* ¶¶ 49-50). Ames's claim for attorneys' fees based on a suggestion to seek an opinion from the applicable State enforcement agency regarding the Ethics Law's "forever ban" and his former special municipal employment is a misuse of § 1981 and § 1983.
- Apparently, every investigation the Town took regarding Plaintiff's various complaints over the past 6 years were "shams." *See, e.g.,* ¶¶ 14, 99, 102, 113, 115, 116, 118, 119, 133.[37] For purposes of this motion to dismiss, the Town does not challenge the "sham"-related allegations regarding the Workplace Safety Policy investigation (¶¶ 115, 116, 118, 119), which relate to Plaintiff's current leave status

[36] In Paragraph 75, the Complaint maintains that the "Board of Selectmen" "abolished" the commission, but elsewhere the Complaint concedes that it was Town Meeting that made the policy choices involving the commission. *See* ¶ 74 (passage of "article in Town Meeting").

[37] Again, the evidence will show that generally, Plaintiff did not cooperate with the Town's attempts to investigate his complaints.

based on the two psychiatrists' opinions and return-to-work conditions. Otherwise, these allegations do not allege that the "sham" investigations resulted in colorable "adverse job action" within the meaning of § 1981 and § 1983. These allegations, and Plaintiff's allegation that the Town did not investigate his complaint about not being made acting lieutenant (¶ 106[38]), do not state adverse job action or constitutional misconduct by this Board against Plaintiff.

- The allegations regarding the promotions of Lt. (now Captain) Pender, accommodating his travel to Washington to receive the Medal of Valor from the U.S. Attorney General, and lack of response to Plaintiff's expressed unhappiness about Lt. Pender's promotions did not amount to constitutional misconduct against Plaintiff and those allegations do not state a claim. *See, e.g.,* ¶¶ 7, 9, 88, 89, 92, 96, 101, 105.
- The decisions regarding the consequences that would be meted out to Lt. Pender in 2010 following the slur, or not meted out to other Town officials about conduct alleged in the Complaint, does not state a claim for adverse job action or constitutional misconduct against Plaintiff. *See, e.g.,* ¶¶ 6, 48, 58, 86, 88, 89, 91, 134.
- The Selectmen did not engage in adverse job action or constitutional misconduct against Plaintiff by omitting to reach out to him or to make public statements. *See, e.g.,* ¶¶ 89, 116, 126.
- Maintaining confidentiality regarding the circumstances of Lt. Pender's discipline was not adverse job action against Plaintiff or constitutional misconduct against him. *See, e.g.,* ¶¶ 6, 104.
- Not having completed a racial climate review for which Attorney Ames had first advocated as a member of the human relations commission (*see* Ex. 11 at 4), and not having undertaken to discuss the racial climate review with Plaintiff, does not state a colorable claim of adverse job action or constitutional misconduct against Plaintiff. *See, e.g.,* ¶¶ 14, 129, 140, 143.
- Delays in scheduling or failures to schedule meetings or hearings with Plaintiff is not adverse job action or constitutional misconduct against him. *See, e.g.,* ¶¶ 129, 133, 140.
- Hiring Black job applicants, appointing Black commission members, and recruiting Black citizens to run for elective office is not adverse job action or constitutional misconduct against Plaintiff. *See, e.g.,* ¶¶ 145-47.
- Creating commissions over the past 60 years, writing reports, and retaining the expertise of outside experts to address issues of concern in the community is not adverse job action or unconstitutional misconduct against Plaintiff. *See, e.g.,* ¶¶ 41, 48, 62, 65, 69, 144.
- Retaining the State's leading civil rights enforcement agency (the MCAD) to train the Town's workforce about legal prohibitions against discrimination and retaliation, ¶¶ 8, 129 (fourth bullet point), did not violate Plaintiff's rights as a matter of law. Adopting a "zero tolerance" anti-discrimination policy is decidedly not constitutional misconduct. *See* ¶ 90.

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[38] The evidence will show that Plaintiff did not cooperate with the Town's attempt to investigate this complaint.

D. The Court Should Dismiss Plaintiff's Allegations To the Extent They Are Time-Barred and Precluded as Previously Litigated

The statute of limitations for § 1981 actions is four (4) years. *See Jones v. R.R. Donnelley & Sons, Co.,* 541 U.S. 369, 382, 124 S. Ct. 1836, 1845 (2004). The statute of limitations for § 1983 actions brought in Massachusetts (based on the State limitations period applicable to tort actions) is three (3) years. *Mangano v. Bellotti,* 187 Fed. Appx. 8 [2006 WL 1828005] (1st Cir. 2006); *Griggs v. Lexington Police Dept.,* 672 F. Supp. 36, 38 (D. Mass. 1987). Federal law governs the accrual date, which is when Plaintiff knew or should have known of the injury on which his action is based. *Ruiz-Sulsona v. University of Puerto Rico,* 334 F.3d 157, 159 (1st Cir. 2003) (citing *AMTRAK v. Morgan,* 536 U.S. 101, 114, 122 S. Ct. 2061 (2002)); *Muniz-Cabrero v. Ruiz,* 23 F.3d 607, 610 (1994).

Plaintiff filed this action on December 1, 2015. Plaintiff cannot maintain a cause of action for discrimination prior to December 1, 2011, or for First Amendment retaliation prior to December 1, 2012. This eliminates Plaintiff's allegations regarding the 2010 slur and its aftermath contained in Paragraphs 76-94 of the Complaint.[39] This is particularly so given that Plaintiff's prior knowledge of his alleged constitutional injuries allegedly incurred during this time-barred period is evidenced in his past filings with the MCAD and Superior Court, which raise many of the same matters he raises here. *Compare, e.g.,* Complaint, ¶ 8, 83 (retaliation for reporting the slur, ostracizing, including by Pender), ¶¶ 5, 79-80 (slur), ¶¶ 6-9, 88, 92, 96, 101, 105 (Pender promotions/Medal of Valor, Town inaction to Plaintiff's unhappiness with promotions), ¶ 8 (MCAD training that was mocked) *with* original May 2012 MCAD charge, Ex. 5 & n.4 (slur, Pender promotion to acting captain) *and* November 2012 Amended MCAD charge (Ex. 6 & n.4, slur, promotion, retaliatory ostracizing, including by Pender) and June 2013 Superior Court complaint, Ex. 7 & n.4 (same).

[39] The last of these paragraphs, ¶ 94, regards a social media posting by a union official in 2010. *See* Ex. 13.

The Town maintains that Plaintiff's claims are precluded as previously litigated through final judgment for the reasons explained by defendants DeWitt, Goldstein, Daly, Mermell, Wishinsky, DeBow and Murphy in the brief accompanying their motion to dismiss, which arguments the Town incorporates by reference herein.

Conclusion

As the foregoing makes clear, this is an unusual case that is being pursued by a former Town official who is now serving as Plaintiff's counsel on these matters. The Complaint largely seeks to revive long-standing policy debates within the Town through the vehicle of 42 U.S.C. §§ 1981 and 1983, fee-shifting statutes, relating to conduct that is simply not actionable under those statutes. The bulk of Plaintiff's Complaint extends well beyond the presentation of colorable claims for redress by this Court, and appears to be filed in tandem with a long-standing media campaign that has been waged against the Town and its officials, including a stream of accusations against them, for example, on Facebook and "Twitter" accounts, despite the Town's good faith efforts to return the Plaintiff to work.[40]

For the foregoing legal reasons, the Town asks the Court not to countenance this misuse of this forum and to excise those portions of the Complaint that do not state a claim against the Town of Brookline.

At the case proceeds, the evidence will show that the Town's efforts to return Plaintiff to work have been repeatedly impeded by his attorney's refusal to engage with

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[40] *See, e.g.* *https://twitter.com/BrooksAmes1?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor*, his twitter account. This has included Attorney Ames's re-"Tweeting" a cartoon mocking former Chair Goldstein, who, at the time, was the Town's highest official, depicting him fleeing his January 2015 meeting with Plaintiff assertedly because he is Black, *see* ¶¶ 136-38, a version the Town vigorously disputes and regarding which Attorney Ames is a central witness. *See* Ex. 14.

the appropriate Town staff to effect Plaintiff's return to work.[41] The Town is hopeful that the parties to this lawsuit can begin to work constructively to address the colorable portion of this Complaint regarding Plaintiff's work status in light of the psychiatrists' return-to-work conditions, address any outstanding concerns, and get Plaintiff back to work as a firefighter. This is particularly desirable given the amount of time (almost one year) that Plaintiff has been absent and on paid leave. *See Id.,* ¶ 14 (resumption of paid leave as of February 2015).

The Town is confident that its board-certified psychiatrists' conditions for Plaintiff's return-to-work at issue in that portion of the Complaint stating colorable claims are legally justified under all of the above-described circumstances, particularly given that Plaintiff has never supplied the Town with any information contradicting those recommendations. Still, and again, the Town invites Plaintiff to work with the Town regarding his return to work.

DEFENDANT THE TOWN OF BROOKLINE
By its attorneys:

/s/ Douglas I. Louison
Douglas I. Louison, BBO # 545191
Louison, Costello, Condon & Pfaff, LLP
101 Summer St.
Boston, MA 02110
(617) 439-0305
dlouison@lccplaw.com

/s/ Patricia Correa
Patricia Correa, BBO # 560437
Office of Town Counsel
Town of Brookline
333 Washington Street
Brookline, MA 02445
(617) 730-2190
pcorrea@brooklinema.gov

CERTIFICATE OF SERVICE

I, Patricia Correa, hereby certify that on 1/12/16, I served the foregoing document on all parties by: filing it electronically with the ECF system for electronic receipt by all registered participants, and by email and mail to all non-registered participants.

/s/ Patricia Correa
Patricia Correa

[41] These circumstances too may mean that Attorney Ames is a witness in this action. *See* n.22 and DR 3.7.