COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11901

KAMEE VERDRAGER,
Plaintiff-Appellant,

v.

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C.,
ROBERT GAULT, DAVID BARMAK, BRET COHEN,
R. ROBERT POPEO, and DONALD SCHROEDER
Defendants-Appellees

On Appeal from a Judgment of
the Suffolk Superior Court

BRIEF FOR *AMICUS CURIAE* MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION

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ISSUES PRESENTED

1. Whether an employee may legitimately engage in productive, efficient informal discovery of relevant employer documents for use in her discrimination case, if she accesses the documents legitimately and does so without breaching confidentiality or privilege.

2. Whether an employee is protected under the broad anti-reprisal provisions of G.L. c. 151B when she obtains documents for her discrimination case through non-disruptive informal discovery of non-confidential or non-sensitive documents.

3. Whether an inappropriately narrow legal standard was applied by the trial court in determining that Verdrager was properly subject to adverse employment action for non-deceptively accessing relevant employer documents that were not confidential, privileged, or injurious to third-party interests.

INTEREST OF AMICUS CURIAE

The Massachusetts Employment Lawyers Association ("MELA") is a voluntary membership organization of more than 175 lawyers who regularly represent employees in labor, employment, and civil rights disputes in Massachusetts. Plaintiff is a member of MELA. MELA is an affiliate of the National Employment

Lawyers Association ("NELA"), a membership organization with 69 circuit, state, and local affiliates and more than 4,000 lawyers who regularly represent employees in such disputes. NELA is the largest organization in the United States whose members litigate and counsel individuals, employees, and applicants with claims arising out of the workplace. As part of its advocacy efforts, MELA has filed numerous Amicus Curiae briefs in employment matters involving state anti-discrimination law, singly or jointly with other Amici. The interest of MELA in this case is to protect the rights of its members' clients by ensuring that employees' ability to vindicate their rights under G.L. c. 151B is not hindered by doctrines that would penalize them for accessing non-confidential employer documents that are important to the pursuit of their claims.

SUMMARY OF ARGUMENT

An employee who engages in informal discovery by accessing employer documents for use in her discrimination case should not be deemed to have ipso facto abused her trust or committed other misconduct. Informal discovery is an important tool to assist in the preliminary investigation of claims and to

streamline litigation by limiting more time-consuming and expensive formal discovery. In so functioning, informal discovery facilitates the search for truth, especially in cases where resources and access to relevant information are asymmetrical, as is typical in discrimination cases (Pages 5-9).

The issue of a discrimination plaintiff's access to employer documents through informal discovery has been considered extensively by courts in Massachusetts and elsewhere. Leading authorities conclude that accessing such documents is permissible where the employee accesses the documents legitimately; where the documents at issue are not genuinely confidential; and where third party interests are not harmed (Pages 9-14).

The standards applicable to lawyers and law firms are no different (Pages 14-16).

The New Jersey state court's Quinlan opinion provides an appropriate analytic framework for considering the propriety of an employee's use of informal access to employer documents as supplemented by the analysis in the single justice's decision in this plaintiff's bar disciplinary proceedings (Pages 16-20).

Documents do not become genuinely confidential merely by virtue of an employer label (especially not after-the-fact). For documents to be deemed confidential, the employer must put employees on notice that they are confidential; the employer must treat these documents as confidential; and the nature of the documents must actually be confidential, a test akin to that employed in the parallel sphere of non-complete litigation (Pages 20-22).

The anti-retaliation provisions of G.L. c. 151B are separate from the statute's core rights to be free of discrimination and exist to protect the ability of discrimination victims to exercise those core rights. Accordingly, such anti-retaliation provisions should be broadly defined and interpreted (Pages 22-26).

Engaging in informal discovery to support an employment discrimination claim represents an exercise of rights under G.L. c. 151B, protected against retaliation by employers and others, unless it is performed in a disruptive manner or one that jeopardizes the confidentiality of sensitive documents (Pages 26-28).

In this case, in accessing the employer's documents, the plaintiff did not engage in any

improper activity. She did not act deceptively; no genuinely confidential documents were accessed; and third-party interests were not affected. Rather, her actions were protected under G.L. c. 151B, since they were neither disruptive nor did they jeopardize the confidentiality of employer documents (Pages 28-33).

ARGUMENT

This case presents an opportunity for this Court to reaffirm and apply two principles: that informal discovery should be encouraged for its benefits to the search for truth in litigation; and that anti-reprisal provisions of the Commonwealth's core anti-discrimination statute should be broadly interpreted to support those who oppose discrimination at work.

I. GIVEN THE BROAD REMEDIAL PURPOSES OF CHAPTER 151B, THE USE OF INFORMAL DISCOVERY TO ACCESS EMPLOYER DOCUMENTS FOR A DISCRIMINATION CASE IS APPROPRIATE IF THE DOCUMENTS ARE LEGITIMATELY ACQUIRED, ARE USED APPROPRIATELY, AND ARE NOT GENUINELY CONFIDENTIAL

A. INFORMAL DISCOVERY AIDS THE SEARCH FOR TRUTH, ESPECIALLY IN CASES WHERE ONE PARTY CONTROLS MOST OF THE RELEVANT INFORMATION AND RESOURCES

In this case, the trial court determined that defendant Mintz Levin ("Mintz" or the "Firm") had a "legitimate reason" to terminate plaintiff's employment, because she had accessed Firm documents to

support her claims. Record Appendix ("App.") 0222-24. In so deciding, the trial court relied upon an earlier ruling by a motion judge, who had deferred consideration of sanctions for plaintiff while characterizing her actions as an abuse of the Firm's trust and as "improper conduct," App. 0185, 0197. See Memorandum of Decision and Order on Defendants' Motion for Sanctions, App. 0165-99.

But there is no reason to conclude that plaintiff's conduct was improper simply because she had accessed employer documents outside of the formal discovery process. Indeed, there are many judicially-recognized benefits to informal methods of discovery[1]: they assist in the preliminary investigation of claims, streamlining the length and cost of litigation. See GTE Prods. Corp. v. Stewart, 414 Mass. 721, 725 (1993) (since employer has no "right to a long and expensive discovery procedure", ex-employee may bypass that process, potentially using documents

[1] This brief utilizes the term "informal" discovery rather than "self-help" discovery, to avoid the implication inherent in the term "self-help" that the information-gatherer is acting outside the bounds of the law (e.g., "self-help eviction"). In fact, as is discussed infra, parties who engage in informal discovery methods within appropriate limits are not acting outside the rules, and the terminology utilized should so reflect.

retained upon departure from employment to help determine witnesses to depose or additional facts about case; employee claiming wrongful discharge permitted to retain documents over company objection). See also Schwartz v. Hood, 2002 U.S. Dist. LEXIS 8342 at *4 (D. Mass. 2002) (informal interviews by plaintiff's counsel of temporary corporate employees would have benefit of streamlining later discovery at very low cost).

This Court has recognized that informal discovery plays a particularly valuable role in avoiding the skewing of cases toward better-resourced parties, or those with greater access to relevant information and documents. In Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347 (2002), this Court authorized litigants to conduct informal witness interviews of certain corporate employees without involvement of corporate counsel or the courts, noting that such interviews provide "more meaningful disclosure of the truth" than would a more restrictive rule. The Court also observed that permitting such informal interviews would better advance "[t]he public policy of promoting efficient discovery" and make it harder "for an organization to

prevent the disclosure of relevant evidence". Id. at 359. A proposed requirement for judicial pre-approval of the informal interviews was rejected because it would generate collateral litigation, which "would clearly favor the better-financed party." Id. at 359.

Such asymmetric access to proof is the norm in discrimination cases. See Vance v. Ball State Univ., 133 S. Ct. 2434, 2464 (2013) (Ginsberg, J., dissenting); Allison v. Hous. Auth., 821 P.2d 34, 43 (Wash. 1991). See also Schwartz v. Hood, 2002 U.S. Dist. LEXIS 8342 at *4 (D. Mass. 2002) (employer has information monopoly in situation where virtually all witnesses are employees); Community Hosp. v. Fail, 969 P. 2d 667, 674 (Colo. 1998) (in general, employee litigants have limited access to employer policy and human resource information in hands of employer).

The particular form of informal discovery at issue in this case shares the advantages described above. Further, it is important and useful to help level the playing field in discrimination cases. In such cases, employers can freely access all documents desired, and even generate employer-controlled relevant documents by conducting their own investigations. In fact, that occurred in this case,

where Mintz apparently conducted at least three internal investigations of Verdrager's complaints. See Brief of Defendants-Appellees at 5-6 (investigations conducted in summer 2004 and early 2005); Brief of Plaintiff-Appellant at 19-21 (investigation conducted in fall 2006). There would be a fundamental imbalance if the employer could have so wide an array of data immediately available to it, while the employee is barred from even the data she has a right to access under firm rules. Accordingly, informal document discovery should be encouraged no less than other forms of informal discovery in discrimination cases, for the same reasons.

B. COURTS HAVE GENERALLY PROTECTED THE RIGHTS OF DISCRIMINATION PLAINTIFFS TO COLLECT EMPLOYER DOCUMENTS INFORMALLY WHERE THE DOCUMENTS ARE LEGITIMATELY ACCESSED AND RELEVANT, AND THE INTERESTS OF THE EMPLOYER AND THIRD PARTIES ARE NOT IMPAIRED

In settings paralleling those in this case, courts have recognized the importance of protecting the ability of discrimination plaintiffs to obtain relevant evidence informally from their employers, while also taking employer interests into account. See, e.g., Bryant v. Merrill Lynch, Pierce, Fenner & Smith, 2013 U.S. Dist. LEXIS 76242, at *20-21

(S.D.N.Y. 2013). In examining this issue, courts have looked at a variety of factors, including how the employee acquired the documents; what the employee did with the documents once obtained; the nature and content of the documents (i.e., their relevance to the employee's claim and the extent to which the documents were confidential); and whether the employee's actions violated a clear company policy on privacy or confidentiality. Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 224 (analyzing cases), 226-28 (N.J. 2010); Niswander v. Cincinnati Ins. Co., 529 F.3d 714, 725-26 (6th Cir. 2008). Significantly, in the leading Quinlan case, in a detailed and thoughtful opinion reviewing the variety of factors that courts have considered, the New Jersey Supreme Court added a final factor: the "broad remedial purposes the Legislature has advanced through our laws against discrimination" and how the decision will affect "the balance of legitimate rights of both employers and employees." Quinlan, 8 A.3d at 228. The Quinlan court identified this last factor as the most important. Id. at 226, 229.

Courts have relied on such factors as these to legitimize employee access to, and use of, employer documents in a variety of discrimination cases.

How the documents were acquired. Courts have protected an employee who accessed and copied memoranda detailing the misbehavior of a comparator co-worker, where the plaintiff had legitimate access to the memoranda as part of her job, Talbott v. Empress River Casino Corp., 1996 U.S. Dist. LEXIS 9866, at *32-33, 62-63 (N.D. Ill. 1996); an employee who obtained from the company president directly, and refused to return, a memorandum memorializing the president's desire to fill the plaintiff's then-position with a "young man," Grant v. Hazelett Strip-Casting, 880 F.2d 1564, 1570 (2d Cir. 1989); an employee who found on his company computer, and refused to return, company documents evidencing a plan to eliminate his job and those of other older employees, Kempcke v. Monsanto Co., 132 F.3d 442, 446-47 (8th Cir. 1998); and an employee who obtained access to numerous business emails in the ordinary course of his work and forwarded them to himself, Bryant, 2013 U.S. Dist. LEXIS 76242, at *21. In each such case, the plaintiff had legitimately accessed the documents in the course of his regular job.

Whether the documents were subject to a clear privacy or confidentiality policy. Courts have also

looked closely at defendants' claims that documents accessed were "private," "proprietary," or "confidential". Compare Vaughn v. Epworth Villa, 537 F.3d 1147, 1153 (10th Cir. 2008) (disclosure of unredacted patient medical records is legitimate grounds for termination); Williams v. Soc. Sec. Admin., 101 M.S.P.R. 587, 589, 592, ¶¶ 3, 13 (2006) (disclosure of co-worker records including names and Social Security numbers not protected); and Harris v. Richland Cmty. Health Care Ass'n, Inc., 2009 U.S. Dist. LEXIS 83832, at *10 (D.S.C. 2009) (removal of employee records, including personnel file information, not protected where records clearly subject to written employer confidentiality policy), with Talbott, 1996 U.S. Dist. LEXIS 9866, at *63 (removal of personnel records reflecting misconduct of comparator protected where documents not clearly subject to company confidentiality policy); Sigmon v. Parker Chaplin Flattau & Klimpl, 901 F. Supp. 667, 683 (S.D.N.Y. 1995) (law firm associate plaintiff removed copies of multiple personnel files, not marked confidential, left by employer in office plaintiff used; no litigation sanctions warranted); Daigle v. Stulc, 794 F. Supp. 2d 194, 217-19, 239, 241-42 (D.

Me. 2011) (summary judgment denied on retaliation claim where employee given warning for removing documents, but removal not prohibited by employer policy); and Ajayi v. Aramark Bus. Servs., Inc., 2004 U.S. Dist. LEXIS 3361, at *11-13 (N.D. Ill. 2004) (disclosure of time cards protected where plaintiff had routine access, cards sought for EEOC investigation, and no explicit company policy).

Nature, and content, of the documents. Some courts have viewed as significant the fact that records accessed or copied were of direct relevance to the plaintiff's case, and were not of an inherently private character. See Bedwell v. Fish & Richardson P.C., 2007 U.S. Dist. LEXIS 88595, at *8 (S.D. Cal. 2007) (plaintiff paralegal permitted to keep removed documents relating to own employee status, and to keep inventory of removed documents about client work to facilitate obtaining them through discovery); Talbott, 1996 U.S. Dist. LEXIS 9866, at *63 (plaintiff Human Resources director permitted to keep removed documents demonstrating sexual harassment history of male comparator).

Broad remedial purposes of civil rights laws and balance of legitimate employer/employee rights. In

applying this final and most important factor, the Quinlan court upheld a jury verdict for the plaintiff predicated on a finding that she had been terminated in retaliation for her attorney's use in a deposition of documents she had removed from the employer. 8 A.3d at 211, 229, 231. The New Jersey Supreme Court determined that such retaliation would be illegal, even though her underlying wholesale removal of documents was not protected. Id. at 229.

In their application of the various criteria and tests as summarized above, courts have carefully safeguarded the policy interests at stake in anti-discrimination cases, an approach MELA proposes be adapted for Massachusetts as described below.

C. THIS COURT AND OTHER COURTS HAVE NOT APPLIED A DIFFERENT STANDARD TO LAW FIRMS

Contrary to the implication in Mintz's various arguments, no separate, higher standard applies to Verdrager as a lawyer or to Mintz as a law firm. Law firms and employers of lawyers are no less subject to anti-discrimination or other employee-protective laws than are other employers, and courts have applied no different standards to them. See, e.g., GTE Prods. Corp. v. Stewart, 414 Mass. at 725 (former in-house

counsel may retain various corporate records upon termination; wrongful termination claim); Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906 (2001)(former in-house counsel may retain even confidential employer documents post-termination to share with attorney; gender and pregnancy discrimination claim); Bedwell v. Fish & Richardson P.C., 2007 U.S. Dist. LEXIS 88595 at *8 (former law firm paralegal may retain documents related to own work status; other documents must be returned only because they contain client-related information, but paralegal may inventory those and seek them in discovery).

Most closely analogous to the present case on its facts-other than as to the level of technology involved-is Sigmon v. Parker Chaplin Flattau & Klimpl, 901 F. Supp. at 683. There, a law firm associate pursuing claims for gender and pregnancy discrimination removed her own and 20 other associates' personnel files left by the employer in an open, unmarked box. She had found the files while she was using an office to which the employer had assigned her. The federal district court rejected defense

demands to limit her potential recovery on her discrimination claims.

In none of these cases did the courts, including this Court, treat the lawyer or law firm status of either party as obviating rights otherwise available to the plaintiff, except to the extent of erecting safeguards where applicable for the use of information specific to the lawyers' former clients.

D. THE *QUINLAN* DECISION PROVIDES A WELL-CONSIDERED TEMPLATE FOR CONSIDERING THE PROPRIETY OF AN EMPLOYEE'S INFORMAL DOCUMENT DISCOVERY, AS SUPPLEMENTED BY THE ANALYTICAL FRAMEWORK ARTICULATED IN JUSTICE SPINA'S OPINION

MELA urges that this Court adopt a modified version of the Quinlan approach, described above, to the question of employee-plaintiff access to employer documents. That approach is carefully considered, and takes into account the interests of both employer and employee. It replaces rigid rules with flexible standards that weigh all surrounding circumstances in document-removal cases, including adding in the important values enshrined in the broad remedial

purposes of state and federal law. See 42 U.S.C. 2000e-3(a); G.L. c. 151B, §4, ¶¶4, 4A.[2]

In applying the most important Quinlan factor, this Court will naturally be conscious that the "broad remedial purposes" of G.L. c. 151B are no less weighty than those of New Jersey's anti-discrimination laws. Chapter 151B has long exemplified the strong public policy of this Commonwealth that discrimination and retaliation are unacceptable in our society. This statute predated the enactment of comparable federal laws like Title VII of the Civil Rights Act of 1964, and in some ways is broader in scope than cognate federal statutes. See generally St. 1946, c. 368; Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521,

[2] The New Jersey Supreme Court opinion in State v. Saavedra, 117 A. 3d 1169 (N.J. 2015), does not diminish the holding of Quinlan. In Saavedra, a criminal defendant appealed the trial court's denial of a motion to dismiss an indictment predicated on defendant's removal of student records from her employer, a school board, for use in her employment discrimination lawsuit against the board. Although the Saavedra court declined to dismiss the indictment, the court focused on whether the prosecution had presented sufficient evidence of the elements of the offenses charged, and made a point of stating that Saavedra was free at trial to raise as a defense the Quinlan holding, and to adduce evidence supporting the propriety of her removal of documents under the Quinlan factors and analysis. Id. at 75-78. The court made clear that its decision in no sense represented any narrowing or modification of the Quinlan ruling. Id. at 78.

536-37 (2001), and cases cited. Its importance and dominant public purpose cannot be overstated.

As this Court has stated:

> Chapter 151B was enacted in 1946 to provide remedies for employment discrimination, a practice viewed as harmful to "our democratic institutions" and a "hideous evil" that needs to be "extirpated." The Legislature recognized that employment discrimination is often subtle and indirect, and that it may manifest itself "by so many devious and various means that no single corrective rule can be applied to prevent the injustices committed." And the Legislature determined that workplace discrimination harmed not only the targeted individuals but the entire social fabric.

Flagg v. AliMed, Inc., 466 Mass. 23, 28-29 (2013) (footnotes omitted); see also Psy-Ed Corp. v. Klein, 459 Mass. 697, 708 (2011); G.L. c. 151B, § 9 (G.L. c. 151B to be "construed liberally for the accomplishment of its purposes"); cf. Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 620 (2013) ("Generally, remedial statutes ... are 'entitled to liberal construction.' Employment statutes in particular are to be liberally construed, 'with some imagination of the purposes which lie behind them.'" (citations omitted)). Those considerations call for a generous interpretation of the rights of discrimination victims, including their rights to obtain

documentation of the bias against which they seek to contend.

The single justice decision in the plaintiff's BBO discipline matter complements the Quinlan analysis. The trial court incorrectly dismissed the relevance of Justice Spina's analysis, writing:

> Whether or not a single justice of the SJC found Ms. Verdrager to be in violation of Mass.R.Prof. C. 8.4 is immaterial to Mr. Popeo's decision to terminate Ms. Verdrager upon learning that she violated the firm's policy . . . it is clear that, under its policies, Mintz Levin does not allow across-the-board access to files so that employees can seek out documents . . . for the purposes of advancing claims against the firm.

App. 0222. The "immaterial" label misses the point. Of course the focus of the single-justice decision was its ruling that plaintiff did not violate the ethical rules. But the decision places that conclusion in its appropriate civil rights context. The decision points out that (as is also elaborated in §I(A) above) (1) "self-help discovery" is not ipso facto wrongful or improper, contrary to the implication in the above quote; (2) employees who "seek out" documents in employer files to "advanc[e] claims" against their employers may well be engaging in activity protected under anti-discrimination laws;

and (by implication, therefore) (3) an employer's internal policy cannot be the beginning and end of the question whether the employer may, without violating anti-retaliation laws, properly terminate an employee. The trial court's approach here should be rejected in favor of the Quinlan analytical framework, integrating the considerations added by Justice Spina's single justice opinion.

E. IN DETERMINING WHETHER EMPLOYER DOCUMENTS SHOULD BE DEEMED CONFIDENTIAL, ANY TEST SHOULD CONSIDER NOT ONLY WHETHER THE EMPLOYER LABELS AND TREATS THEM AS CONFIDENTIAL, BUT ALSO WHETHER THEY ARE GENUINELY CONFIDENTIAL IN CHARACTER

As noted in §I(B) above, many court decisions have turned on whether the documents accessed by plaintiff employees were confidential or private. In a number of cases, plaintiffs' actions have been condemned because the plaintiff knew, or reasonably should have known, that the records were confidential, such as the co-worker records containing Social Security numbers in Williams, 101 M.S.P.R. 587, or were subject to an express company confidentiality policy as in Harris, 2009 U.S. Dist. LEXIS 83832. Other cases (such as Talbott, 1996 U.S. Dist. LEXIS 9866, and Ajayi, 2004 U.S. Dist. LEXIS 3361) have held

that records not subject to a clear company policy can be accessed without penalty.

But it is not enough to decide that records may be accessed absent an employer policy forbidding it. Such a rule would provide a perverse incentive for employers to indiscriminately label company documents as confidential when they are not truly so. Instead, this Court should look to the related area of covenant-not-to-compete case law to determine whether a confidential or secret characterization is proper. In that arena, courts are routinely called upon to assess the nature of information that an entity, normally an ex-employer, calls "confidential." Long-standing case law in the non-compete area relies on well-developed distinctions between self-serving employer labels and legitimate claims to secrecy. In the leading case of Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840 (1972), this Court cited six factors from Restatement of Torts § 757, cmt.b, as determinative of whether an employer's information is truly confidential:

> (1) The extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to

> guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

See also Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 169-70 (1991). Those criteria are appropriate to utilize in weighing employer claims of confidentiality in this setting as well.

F. CONCLUSION

MELA urges that this Court adopt the multi-factor test described above to assess the propriety of an employee's use of informal discovery in a discrimination case. Such a test is far more respectful of the broad remedial purposes of G.L. c. 151B, and of the value of informal discovery to the judicial system, than the inadequate and narrow "abuse of trust" template relied upon by the trial court.

II. AN EMPLOYEE WHO LEGITIMATELY AND NON-DISRUPTIVELY ACCESSES NON-CONFIDENTIAL EMPLOYER DOCUMENTS TO SUPPORT HER DISCRIMINATION CASE IS ENGAGED IN PROTECTED ACTIVITY UNDER G.L. C. 151B

A. THE ANTI-RETALIATION PROTECTIONS OF C. 151B SHOULD BE BROADLY CONSTRUED

At its core, G.L. c. 151B protects the right to be free from invidious discrimination when engaging in

a broad range of public activities. Complementing these protections, the Legislature also prohibited retaliation against those who "oppose[] any practices forbidden under this chapter," G.L. c. 151B § 4, ¶ 4, and made it unlawful to "coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected" by c. 151B. G.L. c. 151B, § 4, ¶ 4A. Such anti-retaliation provisions exist to ensure that the core underlying rights established by the statute are meaningful. See Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960) ("Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances"); Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 569 (3d Cir. 2002) ("The anti-retaliation provisions recognize that enforcement of anti-discrimination laws depends in large part on employees to initiate administrative and judicial proceedings. . . . [A]nti-retaliation provisions. . .are intended to promote the reporting, investigating, and correction of discriminatory conduct in the workplace.") See also Sahli v. Bull HN Info. Sys., Inc., 437 Mass. 696, 701 (2002).

Because the effectiveness of the statute depends in large part upon the willingness of individuals to initiate claims or bring forward supporting information, retaliation protections are critical to the accomplishment of the law's objectives. See Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)(Title VII). That is because the fear of consequences is the chief obstacle to discrimination victims' invocation of the law's benefits. See Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 279 (2009) ("If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." (citations and internal quotation marks omitted)).

Because of their central importance to making the statute meaningful, the anti-retaliation provisions of G.L. c. 151B are broadly worded. Unlike the employment

provisions of the core statute, the scope of the anti-retaliation prohibitions extends beyond employers and their agents to "any person" who commits the specified wrongful acts. Similarly, the anti-retaliation provisions protect not only "employees" (covered by the core provisions only if their statutory "employer" exceeds a certain size, see G.L. c. 151B, § 1(5)) but more generally protect any "person" who asserts rights under the statute or who encourages another to do so. Psy-Ed v. Klein, 459 Mass. at 708-709. And the anti-retaliation provisions protect the exercise of all the statute's core rights— not only its employment rights— against reprisal. G.L. c. 151B, § 4, ¶ 4.

The expansive scope of ¶¶ 4 and 4A is consistent with the broad remedial purpose of those sections of the statute. Because of that broad purpose and scope, the anti-retaliation provisions of c. 151B should be read liberally. Psy-Ed Corp. v. Klein, 459 Mass. at 708; Stonehill College v. MCAD, 441 Mass. 549, 570-71 (2004); Dixon v. Int'l Bhd. of Police Officers, 504 F.3d 73, 81-83 (1st Cir. 2007) (interpreting c. 151B). Given the importance of c. 151B rights, the breadth of the statute's remedial purpose, the scope of its anti-retaliation provisions, and the appropriateness of a

liberal construction of those provisions, this Court should not lightly limit the tools available for discrimination victims to exercise their c. 151B rights.

B. EMPLOYEES SHOULD NOT BE SUBJECTED TO REPRISAL FOR APPROPRIATELY PURSUING AND USING INFORMAL DISCOVERY

One such tool for discrimination plaintiffs and potential plaintiffs is informal discovery. Courts that have considered the question have generally held that informal document discovery should be deemed a protected activity under employment rights statutes, unless it is performed in a disruptive manner or one that jeopardizes the confidentiality of employer documents. Compare Bryant, 2013 U.S. Dist. LEXIS 76242 at *21 (employee's forwarding of proprietary emails to self is protected activity under Title VII; intrusion to business minimal); Quinlan, 8 A. 3d at 229 (use by plaintiff's lawyer in deposition of documents removed by plaintiff is protected activity under New Jersey Law Against Discrimination); Grant, 880 F. 2d at 1570 (plaintiff's possession of, and refusal to return, memo inculpating employer is protected under Age Discrimination in Employment Act); Kempcke, 132 F. 3d at 446-47 (arguably protected activity for plaintiff

to retain documents accidentally found on company computer that supported age discrimination claims); and In Re: In the Matter of the Discipline of an Attorney, No. BD-2012-043, at 5 (Sup. Jud. Ct. for Suffolk County, Sept. 10, 2012) (Spina, J., Single Justice) (App. 0202-0207, at 0207)(actions of respondent, the plaintiff in this case, similar to those at issue in Kempcke), with, e.g., Armstrong v. Whirlpool Corp., 363 F. Appx. at 330 (not protected activity for co-plaintiffs to conceal possession of supervisor's notebook and share contents with one another, but not with own attorney or company). Cf. Internicola v. Local 507, Transport Workers Union, 21 MDLR 61 (1999), aff'd by Full Commission, 24 MDLR 41 (2002) (employee's revelation of innocently acquired confidential information to MCAD is protected activity). See generally EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 70-72 (S.D.N.Y. 1975), aff'd mem., 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977) (employee's informal collection of evidence for her case from employer's customer is protected activity under Title VII).

MELA urges that this Court adopt the principles articulated in these cases, and determine that an

employee who engages in non-disruptive informal discovery of non-sensitive documents for a discrimination claim is engaged in activity protected by G.L. 151B.

III. PLAINTIFF'S CONDUCT WAS NOT IMPROPER IF JUDGED UNDER THE APPROPRIATE STANDARD

If the appropriate standards, as proposed in the preceding sections, are applied, it is clear that Verdrager's actions did not warrant the condemnation they received from the trial court.

How the documents were acquired. Here, similarly to the plaintiffs in Talbott, Grant, Kempcke, and Bryant, the plaintiff acquired documents from the "public" section of Mintz's document storage system, to which she had regular and routine access as part of her job. App. 0204. As Justice Spina wrote, she "took the documents from a place that she was encouraged, and even required, to be." App. 0204.

Whether the documents accessed were subject to a clear privacy or confidentiality policy. The evidence here parallels that in Talbott and Ajayi: no clear Firm policy prohibited the plaintiff from copying or removing the documents she accessed. The Firm's Electronic Information Systems Policy made clear that

"nothing is private" on the storage site, a point underscored in employee training, and the policy expressly permitted personal use of the site. App. 0168-69. The Firm had no unambiguous policy in place precluding plaintiff's free access to documents on the site.

Use of documents and disruption. With a single exception, plaintiff forwarded the documents only to herself and/or to her lawyer, the exception being trial transcripts of an earlier sex discrimination case against the Firm. Plaintiff forwarded those documents to Gallina, the plaintiff in that case, at Gallina's request. App. 0090. There was no evidence of any disruption to the Firm from plaintiff's access to or use of the documents.

Nature, content, and confidentiality of the documents. The documents removed in this case were largely of a non-confidential nature, even aside from their maintenance on the non-confidential sector of the Firm's document management system. They consisted of various time records of Mintz attorneys (in a firm where it was an undisputedly common practice for attorneys to access one another's billing records for competitive and other reasons), App. 0174-75; records

of some portions of a diversity study done for the firm, with some follow-up reports, App. 0173-74; a draft letter between outside counsel and the Firm in plaintiff's own case against the Firm, where plaintiff had already received the final version; a draft document to be filed with the Massachusetts Commission Against Discrimination, where the document was ultimately filed in final form, App. 0172-73, 0191; and documents from the concluded Gallina sex-discrimination litigation, including media documents, witness summaries, trial transcripts, and a partner comment on the underlying facts, App. 0189-91. None of these documents were of a confidential or privileged character, any more than were those at issue in Talbott or Kempcke.

Plaintiff also accessed and provided to her lawyer a transcript of a set of voicemails left for Firm chairman Robert Popeo, which included a voicemail from Mintz's Diversity Committee chair (as well as other unrelated voicemails that plaintiff did not access). App. 0175-76. As in the above-cited cases, the Diversity Committee voicemail (as plaintiff understood it at the time) related directly to her own situation. App. 0177. In fact, plaintiff avoided

viewing, copying or forwarding any documents that were privileged or confidential. App. 0175.

None of these documents were truly confidential. As discussed in §I(D) above, in discrimination litigation, employers often seek to preserve their resource and access to proof advantages, by using nominal "confidential" information policies as a sword against plaintiffs. This can occur even when the documents do not possess a private character and when those policies are more honored in the breach than the observance outside of the litigation context. This case presents an example of that phenomenon. Mintz's invocation of the formal "confidentiality" label does not make it so, and this Court should so recognize.

Nor was Verdrager's sharing of documents with her lawyer improper. See Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th at 308-14 (not improper for in-house counsel alleging gender and pregnancy discrimination to disclose even confidential documents obtained from employer-client to own lawyer; in-house counsel is entitled to prove employer discrimination, disclosure to public is not implicated, and in-house counsel facing complex questions about disclosure and

ethics in discrimination case should have benefit of fully informed legal advice).

Broad remedial purposes of civil right laws and balance of legitimate employer-employee rights. Here, the broad remedial purposes of c. 151B and the balance of employer and employee rights must favor Verdrager. In this case, Mintz maintained an extraordinarily relaxed policy of free access to virtually all Firm documents, placing them on a site where they could be accessed routinely by essentially all white-collar Firm personnel for any purpose, from client work to idle curiosity to peer competition and career advancement. Yet when plaintiff sought to use the site for a civil rights purpose, the investigation and furtherance of her discrimination claim—without deception, concealment, or the invasion of anyone's privacy, App. 0206—Mintz treated her actions as disloyal, termination-worthy "misconduct." The trial court legitimized the Firm's doing so and stripped her of a c. 151B remedy.

But opposing an employer's discrimination is not "disloyal". See, e.g., Heller v. Champion Int'l Corp., 891 F.2d 432, 436-437 (2d Cir. 1989) (collecting cases). In fact, the anti-retaliation provisions of

G.L. c. 151B and other civil rights statutes presume the contrary proposition. Far from creating the proper "balance" of employer and employee rights, see Quinlan, 8 A.3d at 222, the trial court's approach, if sustained, would put a heavy judicial thumb on the wrong side of that balance, undercutting key c. 151B rights. As the single justice decision noted:

> That [plaintiff] viewed the documents and found non-privileged, non-confidential information to support her claims may have been frustrating to her employer, but it does not make her an unethical attorney.

App. 0207.

MELA urges that employer "frustrat[ion]" with employees exercising their civil rights not drive the state of Massachusetts law on document use and retention by Massachusetts employees pursuing discrimination claims. In this case, avoiding that result would require rejecting the test used below. Adopting the Quinlan framework, as modified by integrating Justice Spina's analysis, would be far more consistent with c. 151B's strong anti-retaliation provisions, which are designed to protect whistleblowers who bring civil rights violations to light.

CONCLUSION

For the foregoing reasons, MELA urges this Court to reverse the judgment of the Superior Court, and adopt the principles outlined herein.

Respectfully submitted,

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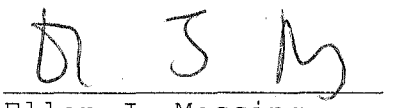
CERTIFICATE OF COMPLIANCE

I, Ellen J. Messing, hereby certify that I have complied with all relevant provisions of Massachusetts Rules of Appellate Procedure 16, 17, 19, and 20 with respect to the contents, format, filing, and service of the within brief.

October 19, 2015



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CERTIFICATE OF SERVICE

I, Ellen J. Messing, hereby certify that I have this date served a copy of the foregoing Brief for Amicus Curiae Massachusetts Employment Lawyers Association, upon Defendants-Appellees and Plaintiff-Appellant, by mailing a true copy via first class U.S. mail, postage prepaid, upon their counsel of record:

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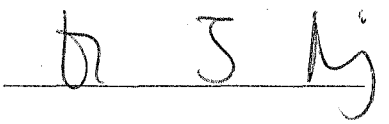

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