

## PUBLIC POLICIES THAT PROTECT AT-WILL EMPLOYEES

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This article will discuss the Massachusetts doctrine prohibiting the termination of an at-will employee in violation of public policy. As a general rule, employment at-will is legally terminated by either employee or the employer for almost any reason, or for no reason at all. Jackson v. Action for Boston Community Dev., Inc., 403 Mass. 8, 9 (1988). One exception to this rule is that an employee may not be terminated for reasons contrary to public policy. DeRose v. Putnam Management Co., 398 Mass. 205, 210 (1986).<sup>1</sup>

Where the Commonwealth articulates a policy to encourage individuals to act in a specific, beneficial way, the Commonwealth may refuse to tolerate the termination of an employee for complying with that policy. See Flesner v. Technical Communications Corp., 410 Mass. 805, 810 (1991).

In order to succeed in proving a wrongful termination claim, the employee must rely on a “well-defined” public policy. Wright v. Shriners Hosp. for Crippled Children, 412 Mass. 469, 474 (1992). The public policy exception to the at-will rule is “not static and . . . may be held to apply in new circumstances.” Tramontozzi v. Mass. DOT, 89 Mass. App. 1136; 2016 Mass. App. Unpub. Lexis 781, at 3. It is a question of law for the

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<sup>1</sup> This paper will not address the “implied covenant of good faith and fair dealing” cases, where an employee is terminated in a manner that deprives the employee of earned or almost earned compensation. See Fortune v. National Cash Register Co., 373 Mass. 96 (1977).

Court to decide whether the true reason for a discharge violates public policy. Mello v. Stop & Shop Cos., 402 Mass. 555, 561 n.7 (1988).

Establishing a valid public policy is not an easy task. Complaints about internal matters within a company, and acting in conformity with or reliance on the company's policies, which do not turn upon violations of law or threats to safety, may not be protected under this cause of action. Wright, 412 Mass. at 474; Sassine v. Fidelity Management & Research Co., 2013 Mass. Super. Lexis 201, at 9-10 (refusal to volunteer to work as editor on Superior's private book is not protected, even though it was improper to ask the employee to do so under company's own guidelines). Indeed, where an employee reports to the employer that its employees were "stealing time" from the employer, which is assisted by management, this was considered a non-actionable internal matter. Chacon v. Brigham and Women's Hospital, 2015 U.S. Dist. Lexis 50174 (D. Mass.), at 23-24; see also Murray v. Warren Pumps, LLC, 2016 U.S. App. 7471 (1<sup>st</sup> Cir. 2016), at 22-23 & n.4 (internal complaints that coworkers were welding in an unsafe manner were not protected, where company claimed to be auditing the safety of the products, and there is no imminent threat to the public's health or safety).

On the other hand, someone objecting to an illegal practice internally may be protected, even if he or she continues to engage in the illegal practice. E.g., Mercado v. Manny's T.V. and Appliance, Inc., 77 Mass. App. 135, 137, 140-141 (2010). Moreover, a statute may establish a public policy, even where it makes no provision for criminal penalties. Nardone v. Raytheon Co., 2014 Mass. Super. Lexis 53, at 8-9.

The whistleblower's motive for making her disclosure is irrelevant. Flesner, 410 Mass. at 812 n.5; see Carter v. Electrical Dist. No. 2, Case No. 1992-TSC-00011, slip op.

at 11 (Sec'y July 26, 1995); Oliver v. Hydro-Vac Services, Inc., Case No. 1991-SWD-00001, slip op. at 8 (Sec'y Nov. 1, 1995).

Even when an issue of public health or safety is at issue, the whistleblowing conduct is not protected if the threat is too remote or speculative, or the complaint too general. Nelson v. Anika Therapeutics, Inc., 28 Mass. L. Rptr. No. 29, 613 (October 10, 2011) (complaint that inadequate staffing increases the likelihood of compromising the quality of medical products is not protected), aff'd 2013 Mass. App. Unpub. Lexis 459, at 5.

Moreover, there may be no redress for a public policy violation when other remedies are available and adequate to punish the offending termination. Mello, 402 Mass. at 557 & n.2 (1988). For example, the claim will provide no remedy where it could be addressed by chapter 151B. Ryan v. Holie Donut, Inc., 2012 Mass. App. Lexis 267 (where customer assaulted and sexually harassed an employee, and the employee was fired for threatening to report this behavior, this was potentially covered by c. 151B, requiring dismissal of the claim); **Nardone v. Raytheon Co., 2014 Mass. Super. Lexis 53, at 5, 7-8 (SOX preempts public policy as it provides sufficient relief for retaliation)**. However, there is an exception to this preemption principle where the overlapping statute provides for what is seen as an inadequate remedy. **Nardone v. Raytheon Co., 2014 Mass. Super. Lexis 53, at 7-8**. This paper will review the cases involving public policy terminations, and attempt to assemble, in useful form, a list of the public policies recognized by Massachusetts courts. Hopefully, this list will be useful to practitioners who are trying to determine whether public policy is implicated in a particular set of circumstances.

## **PUBLIC POLICIES IDENTIFIED**

The Courts have recognized rough, sometimes overlapping categories of public policies that protect employees. Public policy provides redress for employees who are terminated [1] for asserting a legally guaranteed right; [2] for doing what that law requires; [3] for refusing to do what the law forbids; and [4] for performing important public deeds, even though the law does not absolutely require the performance of such a deed. Flesner v. Technical Communications Corp., 410 Mass. 805, 810-811 (1991). The law protects those who have a reasonable, good faith belief that their conduct is compelled or protected by public policy, even if it is later determined that no law was violated. Chernov v. Home Depot, Inc., 2010 Mass. App. Unpub. Lexis 1153, 4. Moreover, an employee is protected even if she is not aware of a specific legal provision supporting the public policy, where the employee had a “gut feeling” that a public policy was at issue. Id., at 2, 4. Below, this article will flesh out the four categories noted in Flesner, and further identify the various public policies that fall within each.

### **I. ASSERTING A LEGALLY GUARANTEED RIGHT**

Right to Privacy: Cort v. Bristol-Myers Co., 385 Mass. 300, 306, 307 (1982) (termination for failing to answer unlawfully intrusive questionnaire could violate public policy); O'Donnell v. Miller, 1999 Mass. Super. Lexis 554, 9-10 (constructive discharge caused by employer's conduct in secretly monitoring and videotaping an employee in the bathroom); Restuccia v. Burk Technology, Inc., 5 Mass. L. Rptr. No. 31, 712, 714 (November 4, 1996) (termination of employee based on information employer obtained through employer's improper review of employee's private e-mails); Coffin v. Acton Lincoln-Mercury, Inc., Memorandum and Order, C.A. No. 89-7012, Middlesex, ss, November 13, 1991, 6-7 (there may be a public policy breach where a private employer requires an employee to submit to a drug test, as a condition of employment); Spartaro v. Commonwealth, 21 Mass. L. Rep. 733, 735 (2007) (refusal of employee to answer questions about whether she had a romantic relationship with former DSS client may be protected).

Right to File a Claim: See Apessos v. Mem'l Press Group, 15 Mass. L. Rep. 322 (2002) (taking a day off of work to pursue a c. 209A restraining order in Court is protected); Brewer v. Fortunato, 1993 WL 818649 (Mass super 1993) (public policy prohibits a termination based on an employee's lawsuit against an employer); James v. Obele, Memorandum of Decision on Defendant Christy's Motion to Dismiss, C.A. No. 91-7673B, Suffolk, ss., Botsford, J., December 23, 1993, at 11-12 (where employee was subjected to an indecent assault by her supervisor, public policy protects the employee's right to press criminal charges, and to cooperate with a criminal investigation); Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 404 Mass. 145, 149-50 (1989) (retaliation for filing workers' compensation claim could violate public policy); Federici v. Mansfield Credit Union, 399 Mass. 592, 594 n.2 (1987) (retaliation for filing workers' compensation could violate public policy); Executive Order 378 (policy against Domestic Violence).<sup>2</sup> But see Santarpia v. Senior Residential Care/Kingston, Inc., 2014 Mass. App. Unpub. Lexis 917 (pursing a third party slip and fall claim against the employer's landlord, relating to a workers comp. claim, is not protected).

Right to Testify as a Witness: Trowbridge v. Engelhard Corp., Memorandum of Decision on Defendants' Motion for Summary Judgment, C.A. No. 90-00852, Norfolk, ss., Stearns, J., April 1, 1992, at 5-6 (it violates public policy for an employer to terminate an employee for serving as a witness in favor of a co-worker pursuing a wrongful termination case); see Page v. Columbia Natural Resources, 13 IER 944 (W. Va 1996) (right to testify and assert fifth amendment).

Right to Counsel: Sellig v. Visiting Nurse & Community Health, Inc., 10 Mass. L. Rptr. No. 10, 231, 234 (August 16, 1999) (public policy accords employees with the right to consult with an attorney); but see LeClair v. Eastern Bank, 2009 Mass. App. Unpub. Lexis 333 (suggesting that Sellig is incorrectly decided); D'Alessandro v. NIPMUC, Inc., 22 Mass. L. Rep. 1 (2007) (employee fired for hiring separate counsel to represent her in a customer lawsuit may have public policy claim).

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<sup>2</sup> The public policy protecting the filing of workers' compensation claims, along with various other public policies mentioned in this article, is limited by a defense which holds that a public policy claim will not be recognized if an adequate statutory remedy is otherwise available. However, the article continues to list these recognized public policies, as they may be useful in developing analogies to other, valid claims.

Right to Union Activity: Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922, 932 (1<sup>st</sup> Cir. 1983).

Right to Proper Payment of Wages: Rodden v. Savin Hill Enters., 2016 Mass. Super. Lexis 37, at 15-17 (independent contractor demanding to be placed on payroll, so that proper State and Federal taxes are paid).

## II. DOING WHAT THE LAW REQUIRES

Fairney v. Savogran Co., 422 Mass. 469, 472 (1996) (assuming that it is unlawful to retaliate against an employee for carrying out a fiduciary duty in connection with an ERISA plan, although such a claim would be preempted).

Hobson v. McLean Hospital Corp., 402 Mass. 413, 416 (1986) (termination for complying with duty to enforce state and municipal safety law and ordinances in a hospital may be grounds for public policy exception).

## III. REFUSING TO DO WHAT THE LAW FORBIDS

Protection may apply even where the employee continues to engage in illegal conduct, where the employee has objected to illegal conduct, and indicates that he will stop engaging in such conduct in the future. Mercado v. Manny's T.V. and Appliance, Inc., 77 Mass. App. 135, 137, 140-141 (2010).

Alcohol Service: Mataele v. The 57 Restaurant, Inc., Memorandum of Decision, Small Claim No. 9009SC731, (Norfolk Dist. Ct.) (Shubow, J.), October 29, 1990, at 2 (retaliation against employee for refusing to serve alcohol intoxicated patron of bar violates public policy).

False Reports to Government: Rocci v. Micro-Dynamics, Inc., Order on Defendants' Motion to Dismiss, C.A. No. 9110 RM-0057, (Middlesex Trial Ct.) (Coven, J.), October 9, 1991 (retaliation against employee for refusing to submit false documents to federal government regarding testing of equipment violates public policy); Brayman v. MBTA, Memorandum of Decision and Order on Defendants' Motion for Summary Judgment, Pursuant to Mas. R. Civ. P. 56, as to Plaintiff Glenn Brayman, C.A. No. 2012-1268,

Suffolk, ss., Lauriat., J., March 2, 2015, at 11-12 (refusing to falsify bus mileage records for the purpose of delaying bus maintenance requirements under Federal regulations, which has safety ramifications).

Electrician and Plumbers Codes: Mercado v. Manny's T.V. and Appliance, Inc., 77 Mass. App. 135, 137, 140-141 (2010) (appliance installer objecting to performing tasks which could only be lawfully performed by a licensed electrician and/or plumber).

Fire Codes: Falcon v. Leger, 62 Mass. App. 352 (2004) (wrongful to terminate employee for refusing to interfere with a product inspection process of UL, a private, independent testing laboratory—refusal to cover up unsafe wiring).

Fraud: Alford v. Elan Pharma, Inc., 9 Mass. L. Rptr. No. 25, 553, 556 (April 19, 1999) (refusal to overbill customer by submitting a false invoice).

Perjury: DeRose v. Putnam Management Co., 398 Mass. 205, 208-210 (1986) (public policy protects employee that refuses to give false testimony against another employee); Kattar v. Demoulas, 433 Mass. 1, 14 (2000) (public policy prohibits a retributive foreclosure based on the plaintiff's refusal to testify in reckless disregard for the truth); Phaneuf v. UPS, 2000 U.S. Dist. Lexis 2777 (D. Mass.) (refusing to sign false statements implicating co-workers charging various offenses is protected). **In Latimer v. Alternatives Unlimited, Inc., 2012 Mass. Super. Lexis 174, at 21-22, the Court held that an employee's refusal to falsely admit to wrongdoing in an internal company meeting was protected by public policy.**

#### IV. PERFORMANCE OF AN IMPORANT PUBLIC DEEDS

At least one court has rejected a bright line rule requiring that the statute underlying the whistleblower's concern must contain criminal penalties. Murray v. Warren Pumps, LLC, 2013 U.S. Dist. Lexis 130574 (D. Mass.), at 45-46.

##### A. Participation in Governmental Investigations

Flesner v. Technical Communications Corp., 410 Mass. 805 (1991) (employee may not be terminated for responding to questioning of Federal Customs officials).

Cronin v. City of Brockton, Memorandum and Order on Defendants' Motion for Summary Judgment, C.A. No. 94-11109, Saris, D.J. (D. Mass. 1996), at 15-16 (contacting FBI because of concern of police force's use of funds is protected).

B. Safety Issues:

“An at-will employee may not be fired for reporting circumstances that the employee reasonably and in good faith believes violate our public safety laws and present a threat to the public safety.” Chernov v. Home Depot, Inc., 2010 Mass. App. Unpub. Lexis 1153, 4. On the other hand, at least one court has held that the risk must be specific, and protection does not apply where there is concern about “an unsafe process that may lead to unsafe products,” especially where the statute involved fails to provide for criminal penalties. Murray v. Warren Pumps, LLC, 2013 U.S. Dist. Lexis 130574 (D. Mass.), at 45-46.

“[E]mployees are generally protected when they report, resist, or refuse to participate in activity that presents a threat to public health or safety.” Archer v. Fujitsu Network Communications, Inc., 354 F. Supp. 2d 26, 30 (D. Mass. 2005).

Flesner, 410 Mass. at 801 (enforcing safety regulations for which the employee was responsible).

Mercado v. Manny's T.V. and Appliance, Inc., 77 Mass. App. 135, 137, 140-141 (2010) (unlicensed appliance installer objecting to performing work that should only be performed by a licensed plumber or electrician).

Chernov v. Home Depot, Inc., 2010 Mass. App. Unpub. Lexis 1153 (internal, good faith reports of blocked exits and water valves, could violate public policy).

Moriarty v. Boys and Girls Club of Marshfield, 2015 Mass. App. Unpub. Lexis 349 (internal complaint that Boys and Girls Club was operating contrary to licensing requirement in G.L. c. 15D, § 1, et seq.).

Brayman v. MBTA, Memorandum of Decision and Order on Defendants' Motion for Summary Judgment, Pursuant to Mas. R. Civ. P. 56, as to Plaintiff Glenn Brayman, C.A. No. 2012-1268, Suffolk, ss., Lauriat, J., March 2, 2015, at 11-12 (refusing to falsify bus

mileage records for the purpose of delaying bus maintenance requirements under Federal regulations, which has safety ramifications).

Briones v. Ashland, Inc., 164 F. Supp. 2d 228 (D. Mass. 2001) (Surface Transportation and Assistance Act (STAA) protects employee who was fired for threatening to report employer who refused to use hazard warnings on trucks transporting toxic materials).

Riley v. Green, 15 Mass. L. Rep. 367 (2002) (employee complained internally, or planned to complain, about the fact that the employer falsified and concealed reports pertaining to drugs and when such drugs are being tested on humans).

Frost v. TGI Friday's, Inc., 201 Mass. Super. Lexis 647 (reporting that dishes were not washed in compliance with sanitary code).

Apessos v. Mem'l Press Group, 15 Mass. L. Rep. 322 (2002) (participating in a police investigation of domestic abuse, and going to court to enforce a c. 209A restraining order is protected).

Mogilevsky v. Keating, 11 Mass. L. Rptr. No. 15, 332 (May 15, 2000) (complaining to landlord/employer that the employee's apartment violates the State Sanitary Code is protected).

Antlitz v. CMJ Management Co., 6 Mass. L. Rptr. No. 17, 371 (March 24, 1997) (fired for reporting workplace safety violations to OSHA).

Acciavatti v. Professional Services Group, Inc., 982 F. Supp. 69, 74 n.3 (D. Mass. 1997) (reporting unsafe drinking water).

Norris v. Lumbermen's Mut. Cas. Co., 881 F.2d 1144, 1152-1153 (1<sup>st</sup> Cir. 1989) (internal reporting on issues impacting on the construction and operation of nuclear power plants, including safety hazards and improper inspections).

#### C. Crime or Fraud

“It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws.” Worthington v. Scribner, 109

Mass. 487, 488 (1872). “The reporting of any violation of the criminal laws is conduct which ordinarily should be encouraged.” Sure-Tan v. NLRB, 104 S. Ct. 2803, 2810 (1984). “Reporting, resisting or refusing to participate in criminal activity is clearly protected.” Archer v. Fujitsu Network Communications, Inc., 354 F. Supp. 2d 26, 30 (D. Mass. 2005).

Rodden v. Savin Hill Enters., 2016 Mass. Super. Lexis 37, at 15-17 (independent contractor demanding to be placed on payroll, so that proper State and Federal taxes are paid).

Shea v. Emmanuel College, 425 Mass. 761 (1997) (internally reporting to employer/college an apparent theft of funds from the office is protected).

Cappucci v. Boston University, Memorandum and Order Pursuant to Rule 1:28, (Mass. App. 2007) (internal report that a computer has been stolen from the employer by a co-worker is protected).

Murray v. Warren Pumps, LLC, 2013 U.S. Dist. Lexis 130574 (D. Mass.), at 45-46 (reporting a safety violation involving a statute providing for criminal penalties would be protected)

Callahan v. Center for Technology Commercialization, Inc., 20 Mass. L. Rptr. No. 18, 407 (knowledge of, or reporting of practice of fraudulently billing the government is protected).

Lebreton v. Stone, 14 Mass. L. Rep. 350 (2002) (termination for reporting to town building inspectors that the employer was misusing a construction supervisor license).

Chilson v. Polo Ralph Lauren Retail Corp., 11 F. Supp. 2d 153, 157 (D. Mass. 1998) (internal complaint about supervisor’s serving alcohol to minors, and nudity).

Bala v. AOtec, Inc., 8 Mass. L. Rptr. No. 27, 613 (September 7, 1998) (threatening to tell the Marine Corps that it overpaid the employer \$400,000 on a contract for eyewear was protected conduct, as failure to do so could result in liability for the employee and the employer).

Tighe v. Career Systems Dev. Corp., 915 F. Supp. 476, 484-485 (D. Mass. 1996) (employee of a Job Corps center was improperly terminated for speaking openly at an interview with the Dept. of Labor, and asserting that the employer was manipulating student enrollment statistics to receive higher payments under the contract).

Clark v. South Middlesex Opportunity Council, Inc., 11 Mass. L. Rptr. No. 23, 542 (July 10, 2000) (employee was fired for submitting correct numbers to state funding agencies, for refusing to submit incorrect numbers, and for informing the agency that other numbers submitted by the employer may not be accurate).

Smith v. Mitre Corp., 949 F. Supp. 943, 951 (D. Mass. 1997) (internal report of fraud and false claims of a governmental contractor is protected)

Finlay v. Fischbach & Moore, 9 Mass. L. Rep. 139 (1998) (public policy protects an employee who is terminated based on a fear that he will report falsified timesheets, and based on the employee's investigation of the problem).

Holden v. Worcester Housing Authority, 4 Mass. L. Rptr. No. 4, 61 (September 4, 1995) (employee of public authority reported illegal conduct to the Executive Office of Communities and Development).

Slavin v. Xenon Corp., 3 Mass. L. Rptr. No. 11, 227 (March 13, 1995) (internal complaints that the employee had been improperly designated as an independent contractor, as opposed to an employee); Miller v. Trinity Oil Co., 10 Mass. L. Rep. 60, 62 (1999) (employee's objection to misclassification as an independent contractor is protected).

Daigle v. Gregorio, 3 Mass. L. Rptr. No. 26, 571 (June 26, 1995) (signing a complaint demonstrating that the employee was not paid the prevailing wage).

Supermarkets General Holdings Corp. v. Wenberg, Fed. Sec. L. Rep. (CCH) 96,611 (D. Mass. 1992) (whistleblowing on violations of Securities and Exchange Act is assumed protected); Stanley v. Somerset Savings Bank, Memorandum of Decision and Order on Defendants' Motion to Dismiss, C.A. No. 92-4362, Middlesex, ss., Doerfer, J., November 1992 (reporting to SEC).

Riley v. Cameron and Colby, Inc., 1987 WL 17537 (D. Mass. 1987) (opposition to improper insurance practices is protected).

D. National Defense

DeSouza v. DRS-Power Technology, Inc., 23 Mass. L. Rep. 469 (2008) (internal report on design flaws in the construction of Navy ship is protected).

Hutson v. Analytic Sciences Corp., 860 F. Supp. 6 (D. Mass. 1994) (reporting flaws in technology made by defense contractor, and reporting improper copying and circulation of a classified document, is protected).

E. Respecting Patient/Customer Demands

O’Leary v. Cape Cod Healthcare, Inc., 2012 Mass. Lexis 192 (Superior Court) (transferring ill patient to a different hospital, pursuant to that patient’s request, is protected by public policy).

## **SOURCES OF PUBLIC POLICY**

Public policy can derive from various types of authority. Below, public policies will be indexed by their source.

I. **MASSACHUSETTS CONSTITUTION**

Refusal to give up a constitutionally protected right may receive public policy protection. Bala v. AOTec, Inc., 8 Mass. L. Rptr. No. 27, 613 (September 7, 1998).

Right to Counsel: Mass. Const., Pt. 1, Art. XI: Sellig v. Visiting Nurse & Community Health, Inc., 10 Mass. L. Rptr. No. 10, 231, 234 (August 16, 1999) (finding a public policy according employees with the right to consult with an attorney); but see LeClair v. Eastern Bank, 2009 Mass. App. Unpub. Lexis 333 (suggesting that Sellig is incorrectly decided).

Access to Court to Obtain Redress: Mass. Const. Pt. 1, Art. XI: Apessos v. Mem’l Press Group, 15 Mass. L. Rep. 322 (2002) (missing a day of work to enforce a c. 209A

restraining order is protected, to assist in the presentation of evidence, to obtain her own security, and to remedy domestic abuse); Brewer v. Fortunato, 1993 WL 818649 (Mass super 1993) (public policy prohibits a termination based on an employee's lawsuit against an employer).

Free Exercise of Religion: See Kolodziej v. Smith, 412 Mass. 215, 222 (1992).

## II. MASSACHUSETTS STATUTES

Legislation is the primary, but not the exclusive, source of public policy. Apeossos v. Mem'l Press Group, 15 Mass. L. Rep. 322 (2002).

Alcohol to Minors: G.L. c. 138, § 34: Chilson v. Polo Ralph Lauren Retail Corp., 11 F. Supp. 2d 153, 157 (D. Mass. 1998) (internal complaint about supervisor's serving alcohol to minors, and nudity is protected).

Building Code: G.L. c. 142A, § 17: Lebreton v. Stone, 14 Mass. L. Rep. 350 (2002) (termination for opposing improper use of construction supervisor's license).

Civil Rights Act: G.L. c. 12, §§ 11H and 11I (Mass. Civ. Rights Act): Coffin v. Acton Lincoln-Mercury, Inc., Memorandum and Order, C.A. No. 89-7012, Middlesex, ss, November 13, 1991, 6-7 (there may be a public policy breach where a private employer requires an employee to submit to a drug test, as a condition of employment).

Consumer Protection Act: G.L. c. 93A: Mistishen v. Falcone Piano Co., 36 Mass. App. 243, 245 (1994) (Consumer Protection Act may form basis of a public policy, where the particular situation at issue is important enough); see Riley v. Cameron and Colby, Inc., 1987 WL 17537 (D. Mass. 1987) (opposition to improper insurance practices is protected).

Domestic Abuse: G.L. c. 209A: Apeossos v. Mem'l Press Group, 15 Mass. L. Rep. 322 (2002) (missing a day of work in order to go to court and eliminate domestic abuse is protected); Executive Order 378 (policy against Domestic Violence)

False Claims: G.L. c. 268, § 6: Clark v. South Middlesex Opportunity Council, Inc., 11 Mass. L. Rptr. No. 23, 542 (July 10, 2000) (the law prohibits the submission of false information to state agencies for the purpose of obtaining funding).

Fire Codes: G.L. c. 148, § 10B; 143, §§ 94(a), (96): Falcon v. Leger, 62 Mass. App. 352 (2004) (wrongful to terminate employee for refusing to interfere with a product inspection process of UL, a private, independent testing laboratory); G.L. c. 148, § 27A: Chernov v. Home Depot, Inc., 2010 Mass. App. Unpub. Lexis 1153, 2 n.3, 4 (prohibiting obstruction of sprinkler system).

Insurance Practices: G.L. c. 176D, s. 3(9): Riley v. Cameron and Colby, Inc., 1987 WL 17537 (D. Mass. 1987) (opposition to improper insurance practices is protected).

Larceny: G.L. c. 266, § 30: Cappucci v. Boston University, Memorandum and Order Pursuant to Rule 1:28, (Mass. App. 2007) (internal report that a computer has been stolen from the employer by a co-worker is protected); see Alford v. Elan Pharma, Inc., 9 Mass. L. Rptr. No. 25, 553, 556 (April 19, 1999).

Nursing Safety: See Boston Med. Ctr. v. SEIU, 260 F.3d 16, 24 (1<sup>st</sup> Cir. (G.L. c. 112, §§ 80B, 74A, 80; 244 C.M.R. 2.3(14), requiring safe nursing and criminalizing unsafe nursing).

Privacy: G.L. c. 214, § 1B: Spartaro v. Commonwealth, 21 Mass. L. Rep. 733, 735 (2007) (refusal of employee to answer questions about whether she had a romantic relationship with former DSS client may be protected); Cort v. Bristol-Myers Co., 385 Mass. 300, 306, 307 (1982) (termination for failing to answer unlawfully intrusive questionnaire could violate public policy); O'Donnell v. Miller, 1999 Mass. Super. Lexis 554, 9-10 (constructive discharge caused by employer's conduct in secretly monitoring and videotaping an employee in the bathroom); Restuccia v. Burk Technology, Inc., 5 Mass. L. Rptr. No. 31, 712, 714 (November 4, 1996) (termination of employee based on employer's improper review of private e-mails, violates public policy found in c. 214, § 1C and the Wiretapping Statute, 272, § 99).

Wages: G.L. c. 149, § 148A: Daigle v. Gregorio, 3 Mass. L. Rptr. No. 26, 571 (June 26, 1995) (signing a complaint demonstrating that the employee was not paid the prevailing wage); Miller v. Trinity Oil Co., 10 Mass. L. Rep. 60, 62 (1999) (employee's objection to

misclassification as an independent contractor is protected); Rodden v. Savin Hill Enters., 2016 Mass. Super. Lexis 37, at 15-17 (independent contractor demanding to be placed on payroll, so that proper State and Federal taxes are paid).

Workplace Safety: G.L. c. 149, §§ 3, 5, 6: Antlitz v. CMJ Management Co., 6 Mass. L. Rptr. No. 17, 371 (March 24, 1997) (fired for reporting safety violations to OSHA).

Witness Encouragement: G.L. c. 262, s. 29; G.L. c. 233, s. 20D: Flesner v. Technical Communications Corp., 410 Mass. 805, 810 (1991) (cooperation with Federal investigation is protected based on statutory policies to reimburse witnesses and to provide witnesses immunity).

### III. FEDERAL STATUTES

In Murray v. Warren Pumps, LLC, 2016 U.S. App. 7471 (1<sup>st</sup> Cir. 2016), at 27, the court questions whether federal authority may be the sole source of a Massachusetts public policy. However, for a contrary view, see Hutson v. Analytic Sciences Corp., 860 F. Supp. 6 (D. Mass. 1994).

Credit Union Regulation: Simas v. First Citizens' Fed. Credit Union, 63 F. Supp. 2d 110 (D. Mass. 1999) (12 U.S.C. § 1790(a)(1), which protects employees of credit unions that report violations of law to the NCUA Board, forms the basis of Massachusetts public policy).

Truth in Negotiations Act: **Nardone v. Raytheon Co., 2014 Mass. Super. Lexis 53, 8-11.**

Defense: Hutson v. Analytic Sciences Corp., 860 F. Supp. 6 (D. Mass. 1994) (relying on 10 U.S.C. § 2301(a)(1) and (b)(1) [full and open competition with respect to defense procurement] and 48 C.F.R. 601 regarding the same, and 18 U.S.C. § 2156(a) [prohibiting defective construction of national defense material]); DeSouza v. DRS-Power Technology, Inc., 23 Mass. L. Rep. 469 (2008) (internal report on design flaws in the construction of Navy ship is protected, based on 18 U.S.C. § 2156(a) (prohibiting defective construction of national defense material) and 10 U.S.C. § 2409(a) & (b) (relating to defense contracts)).

Drug Manufacturing: Riley v. Green, 15 Mass. L. Rep. 367 (2002) (employee complained internally, or planned to complain, about the fact that the employer falsified and concealed reports pertaining to drugs and when such drugs are being tested on humans, in violation of 18 U.S.C. § 1001 (prohibiting falsification of reports), and 21 U.S.C. § 333(b) (prohibiting violation of reporting requirements of a manufacturer or distributor of prescription drugs)).

False Claims Act: Smith v. Mitre Corp., 949 F. Supp. 943, 951 (D. Mass. 1997) (internal report of fraud and false claims of a governmental contractor is protected, in light of False Claims Act, 31 U.S.C. § 3730(h)).

False Report: Clark v. South Middlesex Opportunity Council, Inc., 11 Mass. L. Rptr. No. 23, 542 (July 10, 2000) (18 U.S.C. 1001; 18 U.S.C. 666 prohibits the submission of false information to agencies for the purpose of obtaining funding); see Riley v. Green, 15 Mass. L. Rep. 367 (2002).

Job Corps Centers: Tighe v. Career Systems Dev. Corp., 915 F. Supp. 476, 484-485 (D. Mass. 1996) (employee of a Job Corps center was improperly terminated for speaking openly at an interview with the Dept. of Labor, where 29 U.S.C. §§ 1501, et seq. establishes job corps centers, and 19 U.S.C. §§ 1573 & 1574(g) authorizes the DOL to investigate such centers, and prohibits retaliation against whistleblowers).

Nuclear Energy Safety: Norris v. Lumbermen's Mut. Cas. Co., 881 F.2d 1144, 1152-1153 (1<sup>st</sup> Cir. 1989) (citing 42 U.S.C. 5851, which prohibits retaliation against those making complaints regarding the safety of a nuclear facility).

Securities Law: Supermarkets General Holdings Corp. v. Wenberg, Fed. Sec. L. Rep. (CCH) 96,611 (D. Mass. 1992) (whistleblowing on violations of Securities and Exchange Act is assumed protected); Sullivan v. Mass. Mutual Life Ins. Co., 7 IER 1414 (D. Conn. 1992); Stanley v. Somerset Savings Bank, Memorandum of Decision and Order on Defendants' Motion to Dismiss, C.A. No. 92-4362, Middlesex, ss., Doerfer, J., November 1992 (reporting to SEC).

Truck Regulation: Briones v. Ashland, Inc., 164 F. Supp. 2d 228 (D. Mass. 2001) (Surface Transportation and Assistance Act (STAA) protects employee who was fired for threatening to report employer who refused to use hazard warnings on trucks transporting

toxic materials); but see Carter v. Tropicana Prods. Sales, Inc., 2008 U.S. Dist. Lexis 4104 (STAA precludes public policy claim).

Water Safety: Acciavatti v. Professional Services Group, Inc., 982 F. Supp. 69, 74 n.3 (D. Mass. 1997) (whistleblowing protection is supported by 42 U.S.C. § 300(j-9i) [Federal Safe Water Act]).

Witness Encouragement: See Baker v. Summit Unlimited, 855 F. Supp. 375, 376 (N.D. Ga. 1994) (citing 18 U.S.C. §§ 1501-1514 [obstruction of justice provisions] and 5 U.S.C. § 1214 [whistleblower protections for federal employees]); Witness Encouragement: G.L. c. 262, s. 29; G.L. c. 233, s. 20D: Flesner v. Technical Communications Corp., 410 Mass. 805, 810 (1991) (cooperation with Federal investigation is protected based on 18 U.S.C. § 6002 [witness immunity]).

#### IV. CASE LAW

Public policy may be found in court decisions. See Miller v. Cotter, 448 Mass. 671, 683 (2007); see Painter v. Graley, 70 Ohio St. 3d 377, 384, 639 N.E.2d 51 (1994) (common law may form basis for public policy exception to at-will rule).

Flesner v. Technical Communications Corp., 410 Mass. 805, 810 (1991) (citing Correllas v. Viveiros, 410 Mass. 314 (1991), regarding common law witness immunity, to support protection for governmental informant).

Alford v. Elan Pharma, Inc., 9 Mass. L. Rptr. No. 25, 553, 556 n.3 (April 19, 1999) (common law prohibition against larceny forms public policy prohibiting termination for employee refusing to defraud a customer).

Sellig v. Visiting Nurse & Community Health, Inc., 10 Mass. L. Rptr. No. 10, 231, 234 (August 16, 1999) (finding a public policy according employees with the right to consult with an attorney); but see LeClair v. Eastern Bank, 2009 Mass. App. Unpub. Lexis 333 (suggesting that Sellig is incorrectly decided).

Mataele v. The 57 Restaurant, Inc., Memorandum of Decision, Small Claim No. 9009SC731, (Norfolk Dist. Ct.) (Shubow, J.), October 29, 1990, at 2 (retaliation against

employee for failing to serve intoxicated patron of bar violates public policy, as established by common law liability rules).

## V. REGULATIONS

Competitive Bidding: Hutson v. Analytic Sciences Corp., 860 F. Supp. 6 (D. Mass. 1994) (relying on 10 U.S.C. § 2301(a)(1) and (b)(1) – full and open competition with respect to defense procurement -- and 48 C.F.R. 601 regarding the same).

Electrical and Plumbing Codes: Mercado v. Manny's T.V. and Appliance, Inc., 77 Mass. App. 135, 137, 140-141 (2010) (requiring that only licensed electricians and plumbers perform certain types of appliance installation).

Federal Acquisition Rules and Regulations: Bala v. AOtec, Inc., 8 Mass. L. Rptr. No. 27, 613 (September 7, 1998) (threatening to tell the Marine Corps that it overpaid the employer \$400,000 was protected conduct, as failure to do so could result in liability for the employee and the employer).

Federal Transit Authority Regulations: Brayman v. MBTA, Memorandum of Decision and Order on Defendants' Motion for Summary Judgment, Pursuant to Mas. R. Civ. P. 56, as to Plaintiff Glenn Brayman, C.A. No. 2012-1268, Suffolk, ss., Lauriat., J., March 2, 2015, at 11-12 (refusing to falsify bus mileage records for the purpose of delaying bus maintenance requirements under Federal regulations, which has safety ramifications).

Fire Safety Regulations: Falcon v. Leger, 62 Mass. App. 352 (2004) (wrongful to terminate employee for refusing to interfere with a product inspection process of UL, a private, independent testing laboratory).

Job Corps: Tighe v. Career Systems Dev. Corp., 915 F. Supp. 476, 484-485 (D. Mass. 1996) (federal regulation, 20 C.F.R. § 636 encourages employee of a Job Corps center to cooperate with DOL investigations).

Nursing Safety: See Boston Med. Ctr. v. SEIU, 260 F.3d 16, 24 (1<sup>st</sup> Cir. (G.L. c. 112, §§ 80B, 74A, 80; 244 C.M.R. 2.3(14), requiring safe nursing and criminalizing unsafe nursing).

Tenant Protections: Mogilevsky v. Keating, 11 Mass. L. Rptr. No. 15, 332 (May 15, 2000).

## VI. ORDINANCES

Hobson v. McLean Hospital Corp., 402 Mass. 413 (1988), held that an employer may have violated public policy in violation of state and municipal law and fire ordinances.

## VII. CODES

GTE Prods. Corp. v. Stewart, 421 Mass. 22, 29-30 (1995) (lawyers' ethical norms may form basis for public policy).

Frost v. TGI Friday's, Inc., 201 Mass. Super. Lexis 647 (reporting that dishes were not washed in compliance with sanitary code).

## VIII. EXECUTIVE ORDER

Amato v. Div. of Information Technology, 2010 Mass. App. Unpub. Lexis 568 (Executive Order 442, which bars retaliation for reporting workplace violence, does not support a public policy claim). Hutson v. Analytic Sciences Corp., 860 F. Supp. 6 (D. Mass. 1994) (Federal Executive Order No. 10865, 25 F.R. 1583, helps establish public policy relating to the protection of classified information relating to defense).

## IX. PROFESSIONAL STANDARDS

Professional standards do not form the basis for public policy, according to the First Circuit. Murray v. Warren Pumps, LLC, 2016 U.S. App. 7471 (1<sup>st</sup> Cir. 2016), at 27.

## IX. GENERAL SENSE OF WHAT IS RIGHT(?!)

O'Leary v. Cape Cod Healthcare, Inc., 2012 Mass. Lexis 192 (Superior Court) (transferring ill patient to a different hospital, pursuant to that patient's request, is protected by public policy, because there may be a public policy protecting the patient's "right to quality medical care and specifically, his right to be taken to a hospital on his own request").

However, in Tramontozzi v. Mass. DOT, 89 Mass. App. 1136; 2016 Mass. App. Unpub. Lexis 781, at 3-5, the court held that the firing of a public employee for purposes of scapegoating that employee, and deflecting blame from the Secretary of Transportation, was not illegal. In that case, the employee was forced to resign in the wake of the fatal accident in the Big Dig, when a light fixture fell in the Central Artery Tunnel.