

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. PLCV2001-01474

SOPHIA APESSOS,

Plaintiff,

v.

MEMORIAL PRESS GROUP,

Defendant.

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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TABLE OF CONTENTS

INTRODUCTION _____ **1**

FACTUAL SUMMARY _____ **2**

ARGUMENT _____ **4**

I. Ms. Apessos Has Adequately Stated A Claim for Wrongful Termination in Violation of Public Policy _____ **4**

A. Courts Consider A Variety Of Sources To Determine Whether A Public Policy Exists _____ **5**

B. Ms. Apessos Has Identified A Variety Of Sources Articulating The Commonwealth’s Public Policy _____ **5**

C. Ms. Apessos’s Termination Violated The Public Policy Of The Commonwealth **8**

 1. Ms. Apessos Was Doing What The Law Required _____ **10**

 a. Chapter 209A Required Her Appearance in Court _____ **10**

 b. The Supreme Judicial Court's Decision in *Upton v. JWP Businessland* Does Not Bar Ms. Apessos's Claim _____ **11**

 2. Ms. Apessos Was Asserting A Legally Guaranteed Right _____ **12**

 3. Ms. Apessos Was Cooperating With The Criminal Justice Process _____ **14**

 a. Ms. Apessos Assisted the Court by Testifying on July 31st _____ **14**

 b. Ms. Apessos's Mandated Appearance Was Tantamount to a Subpoena _____ **15**

II. Ms. Apessos Has Adequately Stated A Claim For Breach Of Implied Covenant Of Good Faith And Fair Dealing _____ **16**

CONCLUSION _____ **18**

INTRODUCTION

Defendant Memorial Press Group (“MPG”) fired Sophia Apossos (“Ms. Apossos”) because she went to court to obtain a restraining order against her abusive husband. Ms. Apossos notified MPG in advance that she would be absent from work for that purpose. Yet, the next morning she was fired. Ms. Apossos’s Verified Complaint (“Complaint”) against MPG alleges wrongful termination in violation of public policy and breach of the implied covenant of good faith and fair dealing. Because Ms. Apossos has stated a claim for which relief can be granted, and because Ms. Apossos has alleged facts which, if proven, entitle her to relief, MPG’s Motion to Dismiss her Complaint pursuant to Mass. R. Civ. P. 12(b)(6) should be denied. See Nader v. Citron, 372 Mass. 96, 98 (1977) (so long as the plaintiff can prove some set of facts that would entitle her to relief, motion to dismiss should be denied).

Ms. Apossos acknowledges that the courts of the Commonwealth have not yet analyzed a case factually similar to hers in the context of a public policy exception. That, however, does not affect the merits of Ms. Apossos’s Complaint, since a complaint must not be dismissed simply because it alleges a new theory of liability. See New England Insulation Co. v. General Dynamics Corp., 26 Mass. App. Ct. 28, 30 (1988) (“[I]t is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader’s suppositions.”) (internal quotations omitted). Indeed, a “generous reading ... must be accorded to a complaint in passing on a motion to dismiss.” Id. at 29. As set forth below, Ms. Apossos has stated a claim that MPG’s discharge of her was in violation of a clearly defined public policy and breached the implied covenant of good faith and fair dealing.

FACTUAL SUMMARY

Ms. Apessos began working for MPG as a full-time newspaper reporter on June 10, 1999. (Complaint ¶ 8). Ms. Apessos was a victim of domestic abuse during her tenure at MPG. (Id. at ¶ 9). Married since June 24, 1994, Ms. Apessos's then husband (Gilbert C. Hernandez) engaged in a pattern of verbal abuse that ultimately escalated to a series of physical assaults. (Id.). On Saturday night, July 29, 2000, Mr. Hernandez attacked Ms. Apessos. (Id. at ¶ 12). Mr. Hernandez choked Ms. Apessos, but this time he also slapped and punched her, blackening her left eye and causing it to swell. (Id.).

Fearing for her safety, Ms. Apessos fled to the Plymouth Police Department to report the incident and seek protection. (Id. at ¶ 13). Mr. Hernandez was arrested, charged with assault and battery upon Ms. Apessos, pursuant to M.G.L. c. 265, § 13A, and taken into custody. (Id.). That evening, with the assistance of the Plymouth Police Department, Ms. Apessos obtained a temporary emergency abuse prevention order pursuant to the Massachusetts Abuse Prevention Act, M.G.L. c. 209A, § 5. (Id. at ¶ 14). Because it was a Saturday evening and the court was closed for business, Judge Daniel O'Malley issued the order to Police Officer Higgins by telephone, who recorded the order on a court-approved form. (Id.). Despite the issuance of the temporary abuse prevention order, later that night Mr. Hernandez placed a collect call to Ms. Apessos from jail. (Id. at ¶ 15). The call was a violation of the earlier issued court order, and the police charged Mr. Hernandez with a violation of M.G.L. c. 209A, § 7. (Id.).

Because her temporary order was scheduled to expire Monday, July 31, 2000 at 4:00 p.m., Officer Higgins instructed Ms. Apessos to report to the Plymouth District Court on the morning of Monday, July 31, 2000 so that the temporary abuse prevention order could be extended by the

presiding judge. (Id. at ¶ 16). In fact, M.G.L. c. 209A, § 5 *required* Ms. Apessos to appear in court on the next business day to file a formal complaint. (Id.).

Realizing she would need to miss work on Monday in order to appear in court, Ms. Apessos that night telephoned Ms. Archambault, her supervisor at MPG, to notify her that she would be absent from work on Monday. (Id. at ¶ 17). Ms. Apessos left a message on Ms. Archambault's voice mail box at the office. (Id.). Ms. Apessos explained in her message that her presence was required in court on Monday in order to obtain a permanent abuse prevention order against her husband, and that she would not be at work. (Id.).

On July 31, 2000, Mr. Hernandez was arraigned in Plymouth District Court on two counts: (a) assault and battery, and (b) violation of M.G.L. c. 209A, § 7. (Id. at ¶ 18). Mr. Hernandez ultimately admitted to facts sufficient for a finding of guilty on both counts. (Id.). Ms. Apessos appeared at the arraignment, and completed a sworn affidavit detailing the incidents of abuse she had suffered on July 13 and July 29, 2000. (Id. at ¶ 19). Ms. Apessos recounted the events of Saturday, July 29, 2000 for the court, and requested an extension of her temporary abuse prevention order. (Id.). The court granted Ms. Apessos the protection provided under the M.G.L. c. 209A, directing that the abuse prevention order she had obtained on Saturday remain in effect for the following year. (Id. at ¶ 20). The order provided Ms. Apessos with necessary protection by precluding Mr. Hernandez from, *inter alia*, contacting Ms. Apessos both at her workplace and at their marital residence. (Id.).

When Ms. Apessos arrived at MPG the next morning, the area around her left eye remained visibly discolored and swollen. (Id. at ¶ 24). Ms. Archambault immediately escorted Ms. Apessos to the office of Barbara French, Human Resources Director for MPG. (Id. at ¶ 25). Ms. French discharged Ms. Apessos from MPG's employment because of her absence the day before.

(Id. at ¶ 26). But for her absence from work on July 31, 2000, MPG would not have terminated Ms. Apessos. (Id. at ¶ 27).

ARGUMENT

I. MS. APESSOS HAS ADEQUATELY STATED A CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

In order to make out a claim for wrongful termination in violation of public policy, Ms. Apessos need allege only that: (1) MPG terminated her employment, and (2) her termination was in violation of public policy. See, e.g., Hobson v. McLean Hosp. Corp., 402 Mass. 413, 416 (1988). Ms. Apessos has adequately pleaded both elements. MPG concedes that it terminated Ms. Apessos, (Memorandum of Law in Support of Motion to Dismiss [hereinafter “Def.’s Mem.”] at 1). Thus, the crux of the parties’ disagreement is whether Ms. Apessos’s discharge violated public policy.

Although MPG correctly asserts that the existence of a particular public policy is a question of law for the Court to determine, (Def.’s Mem. at 4), such an inquiry is highly fact specific. See Mello v. Stop & Shop Cos., Inc., 402 Mass. 555, 561 n.7 (1988) (“The judge must determine whether, *on the evidence*, there is a basis for finding that a well-defined, important public policy has been violated.”) (emphasis added). Massachusetts courts have “not attempted in general terms to identify those principles of public policy that are sufficiently important and clearly defined to warrant recovery by an at-will employee who is discharged for engaging in, or for refusing to engage in, particular conduct.” Id. at 557. Unsurprisingly, the Supreme Judicial Court has advised that “[t]he task is not an easy one.” Id.

Ms. Apessos has properly alleged that her discharge was in violation of public policy and therefore warrants an exception to the at-will employment doctrine. Indeed, the public policy pronouncements of the Commonwealth upon which Ms. Apessos relies are clearly established

and well-defined proclamations protecting victims of domestic violence. Since she has alleged that she was terminated in contravention of this policy, at this early stage the Court should allow her claims to proceed.

A. Courts Consider A Variety Of Sources To Determine Whether A Public Policy Exists

Courts may consider a variety of sources to determine whether a particular public policy is maintained by the Commonwealth. Although courts look to the state Legislature when seeking articulations of public policy, see, e.g., Mello, 402 Mass. at 557, it is nonetheless within a court's discretion to consider diverse sources when analyzing wrongful termination claims in violation of public policy. See, e.g., Kolodziej v. Smith, 412 Mass. 215, 222 (1992) (recognizing public policy grounded in state constitution allowing freedom of religion); see also Sellig v. Visiting Nurse & Cmty. Health, Inc., No. 98-0037, 1999 WL 515795, at *7 (Mass. Super. Ct. June 10, 1999) (copy attached hereto as Exhibit 1) (considering case law from other jurisdictions in addition to the Commonwealth's own constitution and general "rule of law"); Richard L. Alfred & Ben T. Clements, The Public Policy Exception to the At-Will Employment Rule, 78 MASS. L. REV. 88, 94 (1993) ("[I]n addition to legislative and constitutional enactments, established principles of common law as developed by the courts may, in appropriate circumstances, provide an additional source of public policy.") (citing decisions of the Eighth Circuit and several state courts).

B. Ms. Apessos Has Identified A Variety Of Sources Articulating The Commonwealth's Public Policy

Ms. Apessos's Complaint points to multiple sources from which the Court can discern the Commonwealth's public policy promoting the health, physical safety, and economic self-sufficiency of individuals victimized by domestic violence. The Commonwealth's strong public policy protecting victims of domestic violence is evidenced by the many measures Massachusetts

has implemented to ensure the safety of these victims in their homes and workplaces, and to enhance the ability of these victims to access and retain employment opportunities that will avoid or reduce their financial dependence on their assailants. This public policy is evidenced in statutes enacted by the Massachusetts Legislature, the Massachusetts Constitution, and even an Order issued by the Executive Branch.

Specifically, the Commonwealth maintains a clearly established and well-defined public policy in favor of allowing and encouraging victims of domestic violence to seek the protection of the state. For example, the Massachusetts Legislature has enacted an Abuse Prevention Act (M.G.L. c. 209A) that provides protection for victims of domestic abuse. Massachusetts protects victims, like Ms. Apossos, by granting them access to the courts to prevent their attackers from returning to the home and otherwise abusing or contacting them. See M.G.L. c. 209A, § 3. In addition, since 1994 the Legislature has appropriated significant funding to the Battered Women’s Legal Assistance Project (through the Massachusetts Legal Assistance Corporation)¹ in order to ensure that victims of domestic violence can seek the protection afforded by the courts.² These efforts represent the Commonwealth’s explicit public policy requiring that victims of domestic violence have access to the courts in order to preserve their safety.

¹ The Massachusetts Legal Assistance Corporation (“MLAC”) is body created by M.G.L. c. 221A, § 2 “for the purpose of providing financial support for legal assistance programs that provide representation to persons financially unable to afford such assistance in proceedings or matters other than criminal proceedings or matters, except those proceedings or matters in which the commonwealth is required to provide representation.”

² Over the past five years, the Legislature has appropriated between \$3.1 million and \$4.3 million yearly to MLAC for three projects: the Disability Benefits Project, the Medicare Advocacy Project and the Battered Women’s Legal Assistance project. See Line-item 0321-1600, Commonwealth of Massachusetts Fiscal Year Budgets for 1998 – 2002. MLAC has in turn (and at the direction of the Legislature) allocated between \$1.5 million and \$2.5 million of this funding each year to the Battered Women’s Legal Assistance project.

Moreover, the Legislature provides victims and witnesses protection from discharge when they are called to testify. See M.G.L. c. 258, § 3(1). The statute evidences the Commonwealth’s commitment to ensuring that its victims of crime maintain a voice, and are protected when called upon to participate in the criminal justice system.

The Commonwealth of Massachusetts also maintains a more broadly defined public policy to protect Massachusetts citizens victimized by crime and to encourage cooperation with the criminal justice system. MASS. CONST., pt. I, art. XI (granting to all citizens of the Commonwealth access to the courts in order to obtain justice or gain redress for their grievances and wrongs.)³ When read in conjunction with M.G.L. c. 209A, Article XI further articulates the public policy of the Commonwealth to protect victims of domestic violence.

In addition, the Governor has decreed that “[i]t is the policy of the Commonwealth to have zero tolerance for domestic violence in any form at any place, whether at home, at the workplace, or elsewhere.” Exec. Order 398, Establishing a Policy of Zero Tolerance for Domestic Violence, 824 Mass. Reg. 3 (1997). MPG acknowledges that “[t]here is no question that Executive Order 398 states a policy against domestic violence” (Def.’s Mem. at 9), but protests that no Massachusetts court to date has “recognized an executive order as an appropriate source of public policy for a wrongful discharge claim.” (Id.). In fact, the executive order recognizes and restates the policy to which the Legislature has already given voice. See M.G.L. c. 209A. That courts have not previously considered an executive order as exhibiting the public

³ MPG mistakenly asserts that the Constitution is an inappropriate source from which to derive the public policy of the Commonwealth. In fact, Massachusetts has considered the Constitution before when seeking to ascertain the public policy of the Commonwealth. See discussion supra, p. 12, at n.6.

policy of the Commonwealth is of no moment; the order is certainly an additional policy source this Court may consider.

C. Ms. Apessos's Termination Violated The Public Policy Of The Commonwealth

As MPG concedes, the principle of "at-will employment" is not absolute in the Commonwealth. (Def.'s Mem. at 4). Because "[e]mployees have an interest in knowing they will not be discharged for exercising their legal rights," Massachusetts courts have recognized a public policy exception to the at-will employment doctrine when the employee is terminated for "asserting a legally guaranteed right (e.g., filing a workers' compensation claim), for doing what the law requires (e.g., serving on a jury), or for refusing to do that which the law forbids (e.g., committing perjury)." Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 404 Mass. 145, 149-150 (1989) (citations omitted). The Supreme Judicial Court has also "allowed [public policy] exceptions to [the] general at-will employment rule in cases where employees have been discharged for ... performing important public deeds such as cooperating with law enforcement officials...." Kolodziej v. Smith, 412 Mass. 215, 222 (1992) (citations omitted).

Ms. Apessos has pleaded that she was terminated: (1) for doing what she was legally required to do under M.G.L. c. 209A, § 5 (appearing in court on July 31, 2000); (2) for asserting a legally guaranteed right; and (3) because she was assisting in the criminal justice process. (Complaint ¶¶ 19, 26-27, 29-30, 32). Because her termination falls within recognized exceptions to the at-will employment doctrine, and she has adequately alleged that MPG's discharge of her was in violation of public policy, MPG's motion to dismiss must be denied.

MPG incorrectly asserts that courts have limited claims of wrongful termination in violation of public policy to instances where employers violate public policy related to the employment context. (Def.'s Mem. at 6-7). MPG's contention that the Supreme Judicial Court

recognizes wrongful termination claims only when the public policy “relate[s] to or arise[s] from the employee’s status as an employee,” is based on an inaccurate citation of the King court’s ruling.⁴ (Id.) (citing King v. Driscoll, 418 Mass. 576, 584 (1994)). Indeed, the King court made no such general pronouncement; rather, it simply declined to derive public policy from a shareholder derivative suit statute.⁵

Unlike the putative policy dismissed by the King court for failing to “rise to the level of importance” warranting an exception, id., the public policy relied upon by Ms. Apossos is of immediate consequence to many residents of the Commonwealth. The Commonwealth’s policies promoting the health, physical safety, and economic self-sufficiency of individuals victimized by domestic violence, as evidenced by the Legislature, the Constitution and various other sources have a vast impact on the public. In contrast to King, the “well being of the citizenry” experiences a direct and powerfully positive benefit from allowing the Commonwealth’s victims of domestic abuse to seek the safety afforded them by the Legislature. See id.

⁴ The full citation reads, “For the exercise of a statutory right to be worthy of protection in this area we believe that the statutory right must relate to or arise from the employee’s status as an employee, *not as a shareholder.*” King, 418 Mass. at 584 (emphasis added to phrase omitted by MPG).

⁵ The King court reasoned:

It may be true generally that the financial well being of a corporation affects the economy which in turn affects the well being of the citizenry, and that, therefore, shareholder derivative actions are appropriate and socially desirable conduct. Nevertheless, such a remote effect on the public, arising in the context of a conflict over internal policy matters, does not elevate [the plaintiff’s] participation in the lawsuit to protected activity.

King, 418 Mass. at 584.

1. Ms. Apessos Was Doing What The Law Required

(a) *Chapter 209A Required Her Appearance in Court*

Because her temporary order was scheduled to expire Monday, July 31, 2000 at 4:00 p.m., Officer Higgins instructed Ms. Apessos to report to the Plymouth District Court on the morning of Monday, July 31, 2000 so that the temporary abuse prevention order could be extended by the presiding judge. (Complaint at ¶16). In fact, M.G.L. c. 209A, § 5 *required* Ms. Apessos to appear in court on the next business day to file a formal complaint. (Id.) (emphasis added). The statute governing abuse prevention orders, M.G.L. c. 209A, § 5, specifically provides that if temporary relief has been granted without the filing of a complaint, “then the plaintiff *shall* appear in court on the next available business day to file said complaint.” M.G.L. c. 209A, § 5 (emphasis added). Ms. Apessos followed the instruction of Officer Higgins, complied with the statute, and appeared in court on Monday, July 31.

Even though M.G.L. c. 209A, § 5 does not expressly forbid an employer from firing an employee for complying with its terms, discharge on this basis is directly contrary to the broader principle mandating that citizens do what the law requires. See, e.g., Hobson v. McLean Hosp. Corp., 402 Mass. 413, 416 (1988) (denying motion to dismiss where plaintiff alleged she was terminated for enforcing state and municipal laws she was legally required to enforce). Ms. Apessos was doing what the law required by appearing at the hearing ordered by Judge O’Malley, and thus complying with the statutory requirement that she appear in court on July 31, 2000 to secure a permanent restraining order. MPG’s termination of Ms. Apessos for doing what the law requires violates the public policy of the Commonwealth.

(b) *The Supreme Judicial Court's Decision in Upton v. JWP
Businessland Does Not Bar Ms. Apessos's Claim*

MPG's contention that Ms. Apessos's claim is governed by the Supreme Judicial Court's statement that "an employee's domestic circumstances are insufficient to give rise to a wrongful termination claim," cannot withstand close scrutiny. (Def.'s Mem. at 7-8) (citing Upton v. JWP Businessland, 425 Mass. 756 (1997) (declining to permit a wrongful discharge claim by an employee who could not work long hours because of her child care responsibilities)). The "special domestic circumstances" for which Ms. Upton sought protection (child care responsibilities requiring a change in work schedule) relied upon broad principles of public policy "protecting the family unit and promoting the best interests of children." Id. at 759, 760. These principles are infinitely more general than those precipitating Ms. Apessos's narrow invocation of public policy, and the two plaintiffs' circumstances should not be confused. Unlike Ms. Apessos, Ms. Upton was not discharged for doing what the law required, asserting a legally guaranteed right, or cooperating with the criminal justice system. Id. at 758. Moreover, Ms. Apessos never sought to have her work schedule altered; rather, Ms. Apessos was absent from work for one day, and she did not seek a continuing accommodation.

The public policy of the Commonwealth provides that someone in Ms. Apessos's emergent situation must be afforded access to the legal process and be protected from discharge by her employer. See MASS. CONST. pt. I, art. XI; M.G.L. c. 209A; M.G.L. c. 258B, § 3(1); Exec. Order 398. In contrast with Ms. Upton's request for accommodation, Ms. Apessos's efforts to cooperate with the criminal justice system serve a further "public purpose" to protect the safety of the community by prosecuting a violent offender. Upton, 425 Mass. at 758. Laws that require the performance of a public deed demonstrate "a legislative determination of the importance of the act to the public." Mistishen v. Falcone Piano Co. Inc., 36 Mass. App. Ct. 243, 245 (1994).

To decline Ms. Apessos protection because she did what the law required her to do under M.G.L. c. 209A, § 5 would detrimentally impact victims of violence statewide who would, in effect, be forced to choose between their personal safety and their economic independence – an outcome that plainly does not serve the public purpose and rule of law. Cf. Alfred & Clements, supra, p. 5 at 95 (arguing that “where a right to engage in a particular activity is so fundamental as to warrant broad constitutional or statutory protection, courts may reasonably conclude that, as a matter of public policy, employers should not be permitted to wield their economic power in a manner to force employees to give up those rights as a price of keeping a job.”).

2. Ms. Apessos Was Asserting A Legally Guaranteed Right

MPG’s termination of Ms. Apessos – a battered woman who sought refuge from her abuser in court – runs counter to the public policy embodied in Part 1, Article XI of the Massachusetts Constitution.⁶ Ms. Apessos, like any Massachusetts citizen, has a right to use the courts to gain redress for the harms she suffers. By terminating her for taking a day off to attend a restraining order hearing, MPG exacted a heavy price for the justice Ms. Apessos sought.

The Judiciary has noted that “[w]e are and always have been a law-based society. We deeply and fundamentally believe in the rule of law and in using law to resolve an almost endless variety of social problems.” Sellig, 1999 WL 515795, at *7 (Exhibit 1). The Sellig court’s

⁶ Contrary to MPG’s assertion, Massachusetts has previously recognized a constitutionally-based public policy exception to the general at-will employment rule. See Sellig, 1999 WL 515795, at *6-8 (Exhibit 1). In Sellig, the plaintiff was terminated when, during a dispute with her employer, she threatened to hire a lawyer to advise her in the dispute and then did engage the services of a lawyer. See id., at *2-3. Denying defendant’s motion for summary judgment, the court held that Massachusetts law recognizes the importance of affording an individual the right to consult with counsel. See id., at *5-7. The court reasoned that “allowing employers to discharge employees simply because the latter consult with those whose knowledge is essential to the understanding of their rights and obligations would turn the act of seeking to learn one’s rights into a switch that extinguishes them all.” Id., at *7. The court therefore held that the nexus between the constitutionally-based public policy encouraging consultation with an attorney and the right of the defendant in Sellig to consult a lawyer was sufficient to warrant an exception to the employment at-will doctrine. See id.

emphasis on the importance of the rule of law and the legal process is a directly applicable to the case at bar. The nexus between the conduct for which Ms. Apessos was fired – going to court to obtain a one-year protective order – and the constitutional source used to evidence the public policy at issue is decidedly close. Like Ms. Sellig’s right to consult a lawyer about an employment matter, Ms. Apessos possesses a fundamental right to be free of violence and to seek legal protection from harm. See MASS. CONST. pt. I, art. XI; M.G.L. c. 209A; see also Town of Southbridge v. Massachusetts Coalition of Police, Local 153, AFL-CIO, No. 97-0363C, 1998 WL 142027, at *2 (Mass. Super. Ct. Mar. 23, 1998) (copy attached hereto as Exhibit 2) (noting the Commonwealth’s “concededly compelling policy condemning domestic abuse”), *aff’d*, 51 Mass. App. Ct. 1101 (2001) (unpublished disposition).

The powerful language in the Abuse Prevention statute exhibits the Legislature’s goal of fortifying the safety of victims of domestic violence in the Commonwealth. See, e.g., M.G.L. c. 209A, § 6 (mandating that law enforcement officers “use all reasonable means to prevent further abuse,” including informing the victim of her right to get a restraining order and her right to file a criminal complaint). Furthermore, over the past ten years, the Legislature has continually reinforced the protections afforded victims of domestic abuse.⁷ It is indisputably the clearly established and well-defined public policy of the Commonwealth to assure that its residents who are in danger of harm may avail themselves of the protection of the state.

⁷ For example, the Legislature has expanded the definition of “family or household member” to strengthen its scope in protecting the residents of the Commonwealth. *See* Acts, 1986 – Chap. 310, § 15. In 1992, chapters 208, 209, and 209A of the M.G.L. were amended to decree that although proceedings under the respective chapters are civil, violations of the orders would be prosecuted criminally. *See* Chap. 188, § 1 – 3 (approved Sept. 18, 1992). The Legislature distinctly emphasized the need “for the immediate preservation of public safety” prior to adopting this amendment to the acts. Id.

3. Ms. Apessos Was Cooperating With The Criminal Justice Process

(a) Ms. Apessos Assisted the Court by Testifying on July 31st

Ms. Apessos's former husband violated the temporary restraining order the very night that it had been issued. (Complaint ¶ 15). This violation was a criminal offense pursuant to M.G.L. c. 209A, § 7, and Mr. Hernandez posed an obvious public safety threat. On July 31, 2000 when Ms. Apessos appeared in court, she detailed the incidents of domestic violence she suffered in a sworn affidavit and recounted the events of July 29 in testimony for the court. (Complaint ¶ 19). Her "important public deed" assisted the criminal justice process and she must be entitled to protection from termination for her efforts. See Flesner v. Technical Communications Corp., 410 Mass. 805, 810-11 (1991) (providing protection to employee for cooperation with the United States Customs Service in a criminal investigation even though that cooperation was not required by law); see also Shea v. Emmanuel College, 425 Mass. 761, 763 (1997) ("A policy that protects an at-will employee who, in good faith, reports criminal conduct in her place of employment to public authorities, but does not protect an at-will employee who in good faith reports such conduct to her superiors would be illogical."). Ms. Apessos's actions comported with the public policy of the Commonwealth encouraging citizens to assist the criminal justice system and to protect themselves and the community from harm.

(b) *Ms. Apessos's Mandated Appearance was Tantamount to a Subpoena*

Massachusetts provides that “[a]ny employer or agent of said employer who discharges or disciplines ... a victim or witness because that victim or witness is subpoenaed to attend court for the purpose of giving testimony may be subject to ... sanctions ...” M.G.L. c. 258B, § 3(l).⁸ MPG wrongly asserts that M.G.L. 258, § 3(l) is of no consequence because Ms. Apessos was not subpoenaed. As discussed supra, pp. 2-4, 10, although she did not receive a subpoena, Ms. Apessos nonetheless was compelled to appear in court pursuant to M.G.L. c. 209A, § 5.⁹ The obligation to comply with a statute and court order, both mandating her to appear in court, is tantamount to the compulsion of a subpoena. Judge O’Malley’s order (pursuant to M.G.L. c. 209A, § 5) directing Ms. Apessos to appear in court functioned like a subpoena; it was a court-ordered “command to appear at a certain time and place to give testimony upon a certain matter.” Black’s Law Dictionary 1426 (6th ed. 1990).

Therefore, contrary to MPG’s argument, the instant case is squarely distinguishable from Perkins v. Commonwealth, 52 Mass. App. Ct. 175 (2001), where the court found that a statute

⁸ M.G.L. c. 258, § 3(l) states in its entirety:

for victims or witnesses who have received a subpoena to testify, to be free from discharge or penalty or threat of discharge or penalty by his employer by reason of his attendance as a witness at a criminal proceeding. *A victim or witness who notifies his employer of his subpoena to appear as a witness prior to his attendance, shall not on account of his absence from employment by reason of such witness service be subject to discharge or penalty by his employer.* Any employer or agent of said employer who discharges or disciplines or continues to threaten to discharge or discipline a victim or witness because that victim or witness is subpoenaed to attend court for the purpose of giving testimony may be subject to the sanctions stated in section fourteen A of chapter two hundred and sixty-eight (emphasis added).

⁹ “If relief has been granted without the filing of a complaint pursuant to this section of this chapter, then the plaintiff *shall* appear in court on the next available business day to file said complaint.” (emphasis added).

specifically prohibiting hazing by *student organizations* could not form the basis of a public policy exception to prohibit hazing by *state police academy cadets*. *Id.* at 179-81. M.G.L. c. 258B, § 3(l) by its terms applies to “employer[s],” like MPG, and to “victims of crime,” a category into which Ms. Apessos squarely fits. Accordingly, MPG’s termination of Ms. Apessos the day after she went to court to obtain a permanent abuse prevention order impermissibly sanctioned her for participating in the criminal justice system and asserting the legal rights guaranteed to her by the Massachusetts Constitution and statutory law.

II. MS. APESSOS HAS ADEQUATELY STATED A CLAIM FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Termination of an at-will employee for reasons contrary to public policy violates the covenant of good faith and fair dealing implied in the employment relationship. *See, e.g., Federici v. Mansfield Credit Union*, 399 Mass. 592, 595 (1987); *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 669 n.6 (1981). MPG mistakenly asserts that an employee can make out a claim for breach of the implied covenant of good faith and fair dealing only if an employer wrongfully deprives her of previously earned compensation. (Def.’s Mem. at 14).¹⁰ In fact, Massachusetts courts have repeatedly recognized that a claim for breach of the implied covenant of good faith and fair dealing – distinct from the *Fortune* line of cases – exists when an employer terminates an employee in violation of public policy. *See Federici*, 399 Mass. at 595; *Siles v. Travenol Labs.*

¹⁰ MPG claims that “the existence of a public policy claim will not implicate the *Fortune* doctrine [recognizing that employment relationships contain a covenant of good faith and fair dealing] unless a deprivation of previously earned compensation is also involved.” (Def.’s Mem. at 14) (citing *Mello v. Stop & Shop Cos.*, 402 Mass. 555, 556 n.1 (1988); *Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch.*, 404 Mass. 145, 150, n.4 (1988)). MPG’s assertion that the implied covenant of good faith in the employment relationship is limited to terminations in order to avoid payment of compensation for past services rendered is simply incorrect. Although the *Fortune* court recognized the implied covenant of good faith and fair dealing in the context of a claim for previously unearned compensation, courts have extended the implied covenant in employment relationships to the public policy context. *See* cases cited above. The *Mello* and *Smith Pfeffer* courts simply observed this distinction.

Inc., 13 Mass. App. Ct. 354, 358 (1982); Gram, 384 Mass. at 669 n.6; see also Grubba v. Bay State Abrasives, 803 F.2d 746, 747 (1st Cir. 1986) (“Massachusetts does recognize a claim for breach of the implied covenant of good faith and fair dealing when a claimant shows that an employer’s reason for discharge was contrary to public policy.”); Hunt v. Wyle Labs., Inc., 997 F. Supp. 84, 91 (D. Mass. 1997) (describing a “cause of action distinct from the Fortune and Gram lines....”).

To make out a claim for breach of implied covenant of good faith and fair dealing, Ms. Apessos need allege only that: (1) she and MPG were parties to an employment agreement, and (2) MPG’s termination of her breached the implied covenant of good faith and fair dealing because it was contrary to public policy. See Siles, 13 Mass. App. Ct. at 358; Gram, 384 Mass. at 669 n.6; Grubba, 803 F.2d at 747; Hunt, 997 F. Supp. at 91. As discussed supra at pp. 4-16, Ms. Apessos has adequately pleaded that MPG’s termination of her was contrary to the clearly established and well-defined public policy of the Commonwealth of Massachusetts. She has further pleaded that MPG “breached its contractual obligation of good faith and fair dealing by terminating Ms. Apessos’s employment on August 1, 2000 without cause and in violation of public policy.” (Complaint ¶ 38). Accordingly, Ms. Apessos’s claim for breach of implied covenant of good faith and fair dealing should stand.

CONCLUSION

For the reasons set forth above, the Defendant's motion to dismiss the Complaint should be denied.

Respectfully submitted,
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Dated: February 12, 2002

CERTIFICATE OF SERVICE

I, Colleen E. Dunham, hereby certify that on this 12th day of February, 2002, I caused a copy of the foregoing to be served by hand on Brian H. Lamkin, Edwards & Angell, LLP, 101 Federal Street, Boston, Massachusetts 02110.

Colleen E. Dunham