COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1567

JAMES H. COVIELLO, JR.

vs.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, James H. Coviello, Jr., was seriously injured when he fell off the outbound platform at Ruggles station on the Orange Line of the Massachusetts Bay Transportation Authority (MBTA) transit system and was struck by a subway train. He brought this action against the MBTA alleging, among other things, that the MBTA was negligent in failing to adequately staff Ruggles station with a safety inspector or a customer service agent (CSA) on the date of the accident.[1] The MBTA filed a motion for summary judgment. Among

[1] Neither party has provided us with a copy of the plaintiff's complaint, as required by Mass. R. A. P. 18 (a), as amended, 425 Mass. 1602 (1997) (in effect at the relevant time). According to the MBTA's brief, the complaint alleges three theories of liability: (1) the MBTA operator was inattentive in his operation of the Orange Line train as it entered Ruggles station; (2) the MBTA transit police dispatchers failed to respond adequately to a notification that the plaintiff was on the tracks at the station; and (3) the MBTA failed to

other arguments, the MBTA asserted that to the extent Coviello's claim is based on the theory that the MBTA failed to staff Ruggles station adequately, the MBTA is immune from liability pursuant to the discretionary function exception of G. L. c. 258, § 10 (b). A judge in the Superior Court denied the MBTA's motion without addressing the issue whether the MBTA is entitled to immunity under § 10 (b). The MBTA has appealed under the doctrine of present execution. See Brum v. Dartmouth, 428 Mass. 684, 688 (1999). For the reasons that follow, we conclude that the MBTA is immune from liability on the theory that it failed to staff Ruggles station with sufficient personnel.

Background. We summarize the pertinent facts, which are undisputed. Around 5:20 P.M. on Saturday, April 5, 2014, Coviello got off an MBTA Orange Line train at Ruggles station, staggered along the platform for about one minute, and then fell onto the subway tracks.[2] He remained on the tracks for over four and one-half minutes, while a bystander called 911 and attempted to locate an MBTA employee.

There was no safety inspector on the platform at the time of the accident, and no CSA in the booth near the upstairs

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sufficiently allocate staff to the stations, the MBTA's central operations hub, and various monitoring hubs throughout the MBTA system.

[2] There is no allegation that Coviello was impaired by alcohol or controlled substances.

ticketing area. The safety inspector assigned to Ruggles station on that day, Gregory Lowe, was responsible for four other stations during his shift, and was at another station when Coviello fell onto the tracks. Lowe was not usually assigned to Ruggles station during his Saturday shift, but had been asked to cover it on the day of the accident. Meanwhile, the bystander's 911 call was transferred to the city of Boston's emergency medical services (EMS) department, which dispatched an ambulance to the station. After ending the call with the bystander, the EMS dispatcher telephoned the MBTA's transit police department (TPD). In the meantime, Coviello was stuck by a train entering the station -- less than thirty seconds after the TPD received the call. He suffered a closed head injury and bilateral leg amputations.

The sole issue on appeal is whether the MTBA was entitled to summary judgment on the theory that it is immune under G. L. c. 258, § 10 (b), from suit based on Coviello's theory that his injuries were caused by the negligence of the MBTA in failing to allocate sufficient staff to Ruggles station on the date of the accident.

Discussion. Our review of a motion judge's decision on summary judgment is de novo. See Williams v. Steward Health Care Sys., LLC, 480 Mass. 286, 290 (2018). General Laws c. 258, § 10 (b), provides that, notwithstanding the other provisions of

the Massachusetts Tort Claims Act, a "public employer" shall remain immune from "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . ." G. L. c. 258, § 10 (b). It is undisputed that the MBTA is a "public employer" within the meaning of G. L. c. 258, § 1, and has the benefit of protection from liability provided by the discretionary function exception of G. L. c. 285, § 10 (b), if the conduct at issue qualifies as a discretionary function.

The first step in determining whether § 10 (b) applies is to determine whether the MBTA had any discretion as to what course of conduct to follow. See Harry Stoller & Co. v. Lowell, 412 Mass. 139, 141 (1992). If so, we next decide whether that discretion is of the kind for which § 10 (b) provides immunity from liability. Id. If a statute, regulation, or established agency practice prescribes a course of action, the defendant's conduct is not protected by the discretionary function exception. Id.

Coviello claims that § 10 (b) is inapplicable because the MBTA failed to follow previously established policies and plans regarding the scheduling of personnel at Ruggles station on the date of the accident. In support of this argument, Coviello relies on sections of an MBTA personnel manual that describe the responsibility of CSAs on duty to remain in and monitor the fare

area. However, as Todd Johnson, chief operating officer of the MBTA and a former MBTA inspector, testified in his deposition, the manual upon which Coviello relies defines the duties of CSAs when they are on duty at a station. The manual says nothing about MBTA policy regarding when to allocate CSAs to its stations, nor does it state that a CSA must be on duty at all times. Similarly, Johnson's deposition testimony does not support Coviello's claim that, normally, safety inspectors would be on duty at all times. In fact, Johnson testified that a single inspector typically is assigned to several stations in a shift, so that no station has an inspector present for the entire length of a shift.

Furthermore, while Coviello refers to a "plan" to staff a CSA and an inspector at Ruggles station on the day of the accident, he does not point to any evidence in the record that shows that the decision whether to staff those positions was anything other than discretionary on the part of the MBTA. Likewise, there is no evidentiary support in the record for Coviello's claim that asking Lowe to cover an additional station on his shift as opposed to assigning another inspector to Ruggles station was in any way improper or against MBTA policy. Thus, we conclude that no statute, regulation, or established agency practice required the MBTA to staff a CSA or a safety inspector at Ruggles station on the date of the accident, and

that the decision whether to do so was a matter of the MBTA's discretion.

The second step of our § 10 (b) analysis, determining whether the discretion of a public employer is the type that is afforded immunity, involves the following considerations:

> "(1) whether the injury-producing conduct was an integral part of governmental policy making or planning; (2) whether the imposition of tort liability would jeopardize the quality and efficiency of the governmental process; (3) whether a judge or jury could review the conduct in question without usurping the power and responsibility of the legislative or executive branches; and (4) whether there is an alternate remedy available to the injured individual other than an action for damages."

Wheeler v. Boston Hous. Auth., 34 Mass. App. Ct. 36, 39-40 (1993).

Based on these factors, we conclude that the determination of how to allocate safety personnel to MBTA stations is "an integral part of the [MBTA]'s policy making and planning," and the MBTA is entitled to immunity for the claim based on this function. See id. at 40 (public employer's discretion regarding what security measures to take to protect persons on its premises is entitled to immunity). As the MBTA notes in its brief, its railway system is extensive, with the Orange Line alone spanning nineteen stations. Given the limited resources of the MBTA and the variation in ridership on different days of the week, decisions regarding staffing are an integral part of the MBTA's decision-making, and it would impact the quality and

efficiency of the MBTA's services to impose liability for decisions regarding how to allocate staff across its stations. See id. ("There is also no question that the imposition of liability on the defendant for inadequate security . . . would undoubtedly affect the ability of the defendant to provide the quantity and quality of [services] by requiring diversion of significant resources . . ."). In addition, doing so would greatly usurp the decision-making power of the MBTA. See id. ("subjecting to judicial review the defendant's decision with respect to security measures might usurp the decision-making power granted the defendant by the Legislature").

Coviello further argues that the MBTA's decisions regarding staffing at Ruggles station on the date of the accident were not an exercise of this type of discretion because the MBTA has not demonstrated sufficient budgetary constraints rendering additional staffing impossible. This argument misses the mark. The test by which we determine the applicability of the discretionary function exception depends on the nature of the discretion vested in a public employer to decide to take or refrain from the course of action at issue, not on its reasons for doing so. See Stoller, 412 Mass. at 143 ("Because each case depends on its facts, the design of a comprehensive, all-purpose guide to the limits of the exception is not likely"). These may, but do not have to, include the inability or unwillingness

to expend public funds. See Wheeler, 34 Mass. App. Ct. at 40 (allocation of security staff could be based on budgetary considerations). See also Barnett v. Lynn, 433 Mass. 662, 664-665 (2001) (city was financially incapable of conducting snow removal and decision not to build fence was based on cost incurrence). It would hardly serve the purpose of the discretionary function exception -- to avoid "jeopardiz[ing] the quality and efficiency of government itself, and endanger[ing] the creative exercise of political discretion and judgment" -- to require public employers to show that their decisions were based on economic considerations in every case in order to qualify for immunity. Barnett, supra at 665, quoting Whitney v. Worcester, 373 Mass. 208, 218 (1977). At any rate, as the MBTA argues, making decisions regarding the allocation of staff on particular days is a fundamental part of the MBTA's discretion over how to allocate its limited resources.

For these reasons, we conclude as a matter of law that the MBTA has discretion over whether and how to allocate CSAs and safety inspectors to its stations and that this is the type of discretion which to which § 10 (b) immunity applies.

Accordingly, so much of the order as denies the MBTA's motion for summary judgment on the plaintiff's theory that the MBTA failed to staff Ruggles station with sufficient personnel

is reversed, and partial summary judgment shall enter in favor of the MBTA consistent with this memorandum and order.

So ordered.

By the Court (Vuono, Meade & Sullivan, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: November 6, 2019.

[3] The panelists are listed in order of seniority.