COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT
CIVIL ACTION NUMBER: 2007-00583

EDWARD B. NIZWANTOWSKI,
Plaintiff,

v.

PEABODY SCHOOL DISTRICT,
Defendant.

PLAINTIFF'S CROSS MOTION FOR
PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

Now comes plaintiff Edward B. Nizwantowski ("Nizwantowski") and moves for partial summary judgment pursuant to Mass.R.Civ.P. 56 establishing that the defendant is liable to Nizwantowski on Nizwantowski's complaint because there are no genuine issues of material fact as to liability and he is entitled to judgment as a matter of law because defendant Peabody School District ("Peabody") can set forth no facts sufficient to rebut the presumption that Peabody discriminated against Nizwantowski on the basis of his age by failing to re-hire Nizwantowski for the positions of head football and head baseball coach at Peabody Veterans' Memorial High School for the 2005 seasons.

In support of this Motion Nizwantowski incorporates by reference (1) Plaintiff's Statement of Undisputed Material Fact and Legal Elements in Support of His Cross Motion for Partial Summary Judgment as to Liability and (2) Plaintiff's Memorandum of Law in Support of his Cross Motion for Partial Summary Judgment as to liability.

Respectfully submitted,
Edward M. Nizwantowski
By his Attorneys,

William H. Sheehan III, BBO #457060
Robin Stein, BBO #654829
MacLean Holloway Doherty
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8 Essex Center Drive
Peabody, MA 01960
(978) 774-7123

October 16, 2008

COMMONWEALTH OF MASSACHUSETTS

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EDWARD M. NIZWANTOWSKI,
Plaintiff,

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PEABODY SCHOOL DISTRICT,
Defendant.

PLAINTIFF'S CONCISE STATEMENT OF UNDISPUTED MATERIAL FACTS AND LEGAL ELEMENTS IN SUPPORT OF HIS CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

Plaintiff Edward M. Nizwantowski hereby sets forth the undisputed material facts and legal elements entitling him to judgment as a matter of law that defendant Peabody School District ("Peabody") discriminated against him on the basis of his age by failing to re-hire him for the positions of head football coach and head baseball coach at Peabody Veterans' Memorial High School for the 2005 seasons.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Nizwantowski served as the head baseball coach at Peabody Veteran's Memorial High School ("Peabody High School") from 1987 through the 2004 season. **Exhibit 1- Deposition of Edward Nizwantowski,** pp. 25, 28.

2. In July of 2004, Patrick Larkin ("Larkin") became the new principal of Peabody High School. **Exhibit 2- Deposition of Patrick M. Larkin,** p. 8.

3. Larkin purported to initiate a new hiring process for head athletic coaches for the winter and spring sports in 2004-2005 and sought applications, for among others, the 2005 baseball coach position. **Exhibit 2**, pp. 8, 24-26.

4. Nizwantowski applied, but was not hired, for the position of head baseball coach at Peabody High School for the 2005 season. **Exhibit 1,** pp. 190, 197.

5. The committee purportedly responsible for screening candidates for the position of head baseball coach at Peabody High School for the 2005 season recommended Nizwantowski as one of two finalists for said position. **Exhibit 3-Deposition of Philip Sheridan**, p. 24.

6. Nizwantowski was qualified for the position of head baseball coach having: (1) a 74% winning percentage; (2) Greater Boston League Championships in eight of his last nine seasons; (3) state tournament appearances in each of his last eleven years; (4) Division I North Championships in four of his last nine years; (5) nationally ranked teams in three of his last eight years and (6) been named the 2003 Boston Globe Coach of the Year. **Exhibit 4-Affidavit of Edward Nizwantowski filed with the MCAD**, ¶ 2.

7. Nizwantowski received satisfactory evaluations of his performance as head baseball coach. **Exhibit 3,** pp. 111-114, 144-145.

8. Mark Bettencourt was hired as head baseball coach for the 2005 season. He was thirty-two years of age at the time of his hire and had no prior high school coaching experience. **Exhibit 1,** p. 197; **Exhibit 10-Complaint,** ¶¶ 8, 11; **Exhibit 8-Answer to Complaint,** ¶¶ 1, 4.

9. Nizwantowski was fifty-eight years of age at the time of his non-hire. **Exhibit** 1, pp. 15-16; **Exhibit 5-MCAD Complaint.**

10. Larkin determined unilaterally not to re-hire Nizwantowski as head baseball coach or head football coach for the 2005 seasons. **Exhibit 2,** pp. 8-9, 109 ; **Exhibit 3-Deposititon of Philip Sheridan**, p. 5, 23; **Exhibit 11-Deposition of Nadine Binkley,** pp. 5, 8-14, 104-107.

11. Larkin told Nizwantowski that he did not re-hire Nizwantowski as head baseball coach because Larkin wanted to go in a different direction. **Exhibit 1**, p. 195.

12. On or about February 15, 2005, Nizwantowski filed a charge with the Massachusetts Commission Against Discrimination ("MCAD") alleging that Peabody impermissibly discriminated against him on the basis of his age in violation of Mass.Gen.Laws c.151B § 4 and the Age Discrimination in Employment Act of 167, as amended, 29 U.S.C 621 et seq. by not re-hiring him as the head baseball coach. **Exhibit 5.**

13. Larkin submitted an affidavit to the MCAD as part of Peabody's position statement filed in response to the claim filed by Nizwantowski in which affidavit Larkin claimed that Bettencourt was hired over Nizwantowski because Bettencourt gave better answers to questions and exhibited a better demeanor during the interviews conducted by Larkin for the baseball position. **Exhibit 2,** p. 13-14 (including deposition Exhibit 1-Affidavit of Patrick M. Larkin).

14. Larkin's affidavit purported to contain the complete and accurate reasons for Nizwantowski not being re-hired. **Exhibit 2,** p. 14.

15. Larkin's reasons for not rehiring Nizwantowski as set forth in Larkin's Affidavit submitted to the MCAD were false, all as admitted by Larkin. **Exhibit 2,** pp. 21-23.

16. Larkin has now admitted that the purported opening of all coaching positions, the creation of screening committees, and all of the other trappings surrounding the selection of coaching for the winter and spring seasons of the 2004-2005 school year and the fall season of the 2005-2006 school year were a sham and would not have occurred but for Larkin's determination not to re-hire Nizwantowski as baseball and football coach. **Exhibit 2**, pp. 83-89.

17. Based on Larkin's Affidavit, the MCAD originally determined that

Nizwantowski's pro se complaint lacked probable cause. **Exhibit 6-MCAD Dismissal and Notification of Rights.**

18. Nizwantowski, after engaging counsel, successfully appealed the original decision of the MCAD that his complaint lacked probable cause. **Exhibit 7-MCAD Order Finding Probable Cause.**

19. Nizwantowski served as the head football coach at Peabody High School from 1982 through the 2004 season. **Exhibit 1,** p. 24.

20. Nizwantowski was qualified for the position of head football coach having: (1) won nine Greater Boston League championships: (2) made five Super Bowl appearances and (3) won two state championships as Peabody's head football coach. **Exhibit 4,** ¶ 2.

21. Nizwantowski received satisfactory evaluations of his performance as football coach. **Exhibit 3,** pp. 110-114, 145.

22. After filing his MCAD claim, Nizwantowski applied, but was not hired, for the position of head football coach at Peabody High School in 2005. **Exhibit 1,** pp. 15-16; **Exhibit 2, pp.** 109-110.

23. There was no circumstance or circumstances under which Larkin would have hired Nizwantowski for the head football coach position. **Exhibit 2,** p. 109-110.

24. The screening committee purportedly charged with interviewing candidates for the position of head football coach at Peabody High School for the 2005 season knew that Larkin would not hire Nizwantowski for said position. The following is an excerpt from Larkin's deposition testimony:

"Q- You weren't going to recommend Mr. Nizwantowski?

A- That's correct.

Q- No matter what the process was, agreed?

A- Yes, and the group agreed with me, the screening committee agreed."

Exhibit 2, pp. 109-110.

25. Paul Uva, who was younger than Nizwantowski by more than five years and less qualified than Nizwantowski, was hired as head football coach for the 2005 season. **Exhibit 8, ¶ 6; Exhibit 9-Resume of Paul Uva.**

26. Nizwantowski filed this Action on March 26, 2007, alleging that Peabody impermissibly discriminated against him on the basis of his age by not hiring him for the positions of head baseball coach and head football coach for the 2005 seasons. **Exhibit 10.**

STATEMENT OF LEGAL ELEMENTS

1. Summary judgment shall be granted where there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983); Comty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976).

2. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).

3. The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 716 (1991).

4. The first stage of the established three-stage analysis under the Massachusetts

anti-discrimination statute, G. L. c. 151B, puts the burden on the plaintiff to establish a prima facie case of discrimination. In an age discrimination case, this requires the plaintiff to establish that he (i) was over forty; (ii) was doing his job acceptably; (iii) suffered an adverse job action; and (iv) was replaced by a younger person. *See* Mitchell v. Tac Tech. Servs., 50 Mass. App. Ct. 90, 93 (2000).

5. An age disparity of greater than five years is sufficient to establish a prima facie case of age discrimination. *See* Knight v. Avon Products, Inc., 438 Mass. 413, 425 (2003).

6. Once the plaintiff "establishes a prima facie case, [he] is entitled to a 'legally mandatory, rebuttable presumption' that [the employer] unlawfully terminated [him], and [he] will prevail on [his] claims if [the employer] fails to satisfy its burden at the second stage of the framework." Romero v. UHS of Westwood Pembroke, Inc., 72 Mass. App. Ct. 539, 543 n.7 (2008).

7. "In the second stage, the employer can rebut the presumption by articulating a 'lawful reason or reasons for its employment decision [and] produce credible evidence to show that the reason or reasons advanced were the real reasons.'" Abramian v. President & Fellow of Harvard College, 432 Mass. 107, 116 (2000); *see* Romero at 543 n. 7. "The information provided at this stage also serves to 'narrow the field of possible lawful reasons' for the decision." Abramian at 117 (citations omitted).

8. A plaintiff will "prevail on [his] claims if [the employer] fails to satisfy its burden at the second state of the framework." Sullivan v. Liberty Mut. Ins. Co., 444 Mass 34, 40-41 (2005).

9. "Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it has previously asserted in another

proceeding." Otis v. Arbella Mutual Ins. Co., 443 Mass. 634, 639-640 (2005), *quoting* Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998).

10. "The purpose of the doctrine is to prevent the manipulation of the judicial process by litigants." Otis, supra at 640, *quoting* Canavan's Case, 423 Mass. 304, 308 (2000).

11. "[T]he doctrine is properly invoked whenever a 'party is seeking to use the judicial process in an inconsistent way that courts should not tolerate.'" Otis, supra, at 640, *quoting* East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623-624 (1996).

12. "[J]udicial estoppel will normally be appropriate whenever 'a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of a legal advantage.'" Otis supra at 641, *quoting* InterGen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003).

13. Judicial estoppel is used to prevent a "distasteful role reversal which would demean and reduce the public's confidence in the legal process." Otis supra at 647 *quoting* New Hampshire Ins. Co. v. McCann, 429 Mass. 202, 211 (1999).

Respectfully submitted,
Edward M. Nizwantowski
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Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

Plaintiff Edward M. Nizwantowski hereby submits this memorandum in support of his cross motion for partial summary judgment as to liability.

I. Standard of Review

Summary judgment shall be granted where there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983); Comty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).

The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 716 (1991).

II. Facts

Nizwantowski served as the head baseball coach at Peabody Veteran's Memorial High School ("Peabody High School") from 1987 through the 2004 season. (Nizwantowski's Statement of Undisputed Material Facts (hereinafter cited as "Plaintiff"), ¶ 1).

In July of 2004, Patrick Larkin ("Larkin") became the new Principal of Peabody High School. (Plaintiff, ¶ 2). Larkin purported to initiate a new hiring process for head athletic coaches for the winter and spring sports in 2004-2005 and sought applications, for among others, the 2005 baseball coach position. Plaintiff, ¶ 3).

Nizwantowski applied, but was not hired, for the position of head baseball coach at Peabody High School for the 2005 season. (Plaintiff, ¶ 4). Nizwantowski was qualified for the position of head baseball coach having: (1) a 74% winning percentage; (2) Greater Boston League Championships in eight of his last nine seasons; (3) state tournament appearances in each of his last eleven years; (4) Division I North Championships in four of his last nine years; (5) nationally ranked teams in three of his last eight years and (6) been named the 2003 Boston Globe Coach of the Year. (Plaintiff, ¶ 6).

Nizwantowski received satisfactory evaluations of his performance as head baseball coach. (Plaintiff, ¶ 7). The committee purportedly responsible for screening candidates for the position of head baseball coach at Peabody High School for the 2005 season recommended Nizwantowski as one of two finalists for said position. (Plaintiff, ¶ 5).

Mark Bettencourt was hired as head baseball coach for the 2005 season. He was thirty-two years of age at the time of his hire. (Plaintiff, ¶ 8). Nizwantowski was fifty-eight years of age at the time of his non-hire (Plaintiff, ¶ 9). Larkin told Nizwantowski that he did not re-hire Nizwantowski as head baseball coach because Larkin wanted to go in a different direction.

(Plaintiff, ¶ 11). Larkin determined unilaterally not to re-hire Nizwantowski as head baseball coach for the 2005 season. (Plaintiff, ¶ 10).

On or about February 15, 2005, Nizwantowski filed a charge with the Massachusetts Commission Against Discrimination ("MCAD") alleging that Peabody impermissibly discriminated against him on the basis of his age in violation of Mass.Gen.Laws c.151B § 4 and the Age Discrimination in Employment Act of 167, as amended, 29 U.S.C 621 et seq. by not re-hiring him as the head baseball coach. (Plaintiff, ¶ 12).

Larkin submitted an Affidavit to the MCAD as part of Peabody's position statement in response to the claim filed by Nizwantowski in which Affidavit Larkin claimed that Bettencourt was hired over Nizwantowski because Bettencourt gave better answers to questions and exhibited a better demeanor during the interviews Larkin conducted for the baseball position. (Plaintiff, ¶ 13). Larkin's affidavit purported to contain the complete and accurate reasons for Nizwantowski not being re-hired. (Plaintiff, ¶ 14). Larkin's reasons for not rehiring Nizwantowski as set forth in Larkin's Affidavit submitted to the MCAD were false, all as admitted by Larkin at his deposition in this Action. (Plaintiff, ¶ 15).

Based on Larkin's Affidavit, the MCAD originally determined that Nizwantowski's pro se complaint lacked probable cause. (Plaintiff, ¶ 17). Larkin has now admitted that the purported opening of all coaching positions, the creation of screening committees, and all of the other trappings surrounding the selection of coaching for the winter and spring seasons of the 2004-2005 school year and the fall season of the 2005-2006 school year were a sham and would not have occurred but for Larkin's determination not to re-hire Nizwantowski as baseball and football coach. (Plaintiff, ¶ 16). Nizwantowski, after engaging counsel, successfully appealed the original decision of the MCAD that his complaint lacked probable cause. (Plaintiff, ¶ 18).

Nizwantowski served as the head football coach at Peabody High School from 1982 through the 2004 season. (Plaintiff, ¶ 19). Nizwantowski was qualified for the position of head football coach having: (1) won nine Greater Boston League championships: (2) made five Super Bowl appearances and (3) won two state championships as Peabody's head football coach. (Plaintiff, ¶ 20). Nizwantowski received satisfactory evaluations of his performance as football coach. (Plaintiff, ¶ 21).

After filing his MCAD claim, Nizwantowski applied, but was not hired, for the position of head football coach at Peabody High School for the 2005 season. (Plaintiff, ¶ 22). Larkin determined unilaterally not to re-hire Nizwantowski as football coach. (Plaintiff, ¶ 10). There was no circumstance or circumstances under which Larkin would have hired Nizwantowski for the head football coach position. (Plaintiff, ¶ 23). The screening committee purportedly charged with interviewing candidates for the position of head football coach at Peabody High School for the 2005 season was aware that Larkin would not hire Nizwantowski for said position. (Plaintiff, ¶ 24). The following is an excerpt from Larkin's deposition testimony:

"Q- You weren't going to recommend Mr. Nizwantowski?

A- That's correct.

Q- No matter what the process was, agreed?

A- Yes, and the group agreed with me, the screening committee agreed." (Plaintiff, ¶ 24).

Paul Uva, who was younger than Nizwantowski by more than five years and less qualified than Nizwantowski, was hired as head football coach for the 2005 season. (Plaintiff 25).

Nizwantowski filed this Action on March 26, 2007, alleging that Peabody impermissibly

discriminated against him on the basis of his age by not hiring him for the positions of head baseball coach and head football coach for the 2005 seasons. (Plaintiff, ¶ 26).

III. Argument

The first stage of the established three-stage analysis under the Massachusetts anti-discrimination statute, G. L. c. 151B, puts the burden on the plaintiff to establish a prima facie case of discrimination. In an age discrimination case, this requires the plaintiff to establish that he (i) was over forty; (ii) was doing his job acceptably; (iii) suffered an adverse job action; and (iv) was replaced by a younger person. Mitchell v. Tac Tech. Servs., 50 Mass. App. Ct. 90, 93 (2000). Once the plaintiff "establishes a prima facie case, [he] is entitled to a 'legally mandatory, rebuttable presumption' that [the employer] unlawfully terminated [him], and [he] will prevail on [his] claims if [the employer] fails to satisfy its burden at the second stage of the framework." Romero v. UHS of Westwood Pembroke, Inc., 72 Mass. App. Ct. 539, 543 n.7 (2008).

Nizwantowski was (1) over the age of forty when he applied for the baseball and football coaching positions, (2) qualified for each position and (3) not re-hired for each position. In both instances a younger[1], less qualified person was hired for each position. It is not disputed that Nizwantowski has met his burden of establishing a prima facie case that Peabody discriminated against him on the basis of his age.

"In the second stage, the employer can rebut the presumption by articulating a 'lawful reason or reasons for its employment decision [and] produce credible evidence to show that the reason or reasons advanced were the real reasons.'" Abramian v. President & Fellow of Harvard

[1] As to the baseball job, Nizwantowski was in the age-protected class and Bettencourt was not. As to the football job, both Nizwantowski and Uva were over forty years of age, but Uva was more than five years younger than Nizwantowski. *See* Knight v. Avon Products, Inc., 438 Mass. 413, 425 (2003)(age disparity of greater than five years sufficient to establish a prima facie case of age discrimination).

College, 432 Mass. 107, 116 (2000); *see* Romero at 543 n. 7. "The information provided at this stage also serves to 'narrow the field of possible lawful reasons' for the decision." Abramian at 117 (citations omitted). A plaintiff will "prevail on [his] claims if [the employer] fails to satisfy its burden at the second state of the framework." Sullivan v. Liberty Mut. Ins. Co., 444 Mass 34, 40-41 (2005).

The facts on which Nizwantowski relies for summary judgment as to liability are most unusual, if not unique. Peabody's Principal, admittedly the sole decision maker as to the baseball job and football job, has admitted under oath in this Action that his previously enunciated non-discriminatory reason for not hiring Nizwantowski, which reason was given to the MCAD under oath, was false. Indeed the Principal has now admitted that the entire framework surrounding the false reason given to the MCAD for Nizwantowski not being hired, to wit: the opening of all coaching positions, the creation of screening committees for all major coaching positions, the narrowing of candidates to two from which the Principal was to select one based upon the answers to a series of questions and the "score" awarded to the two finalists by the Principal, was all an elaborate sham designed to provide the Principal with cover for the realization of his single goal: to eliminate Nizwantowski as a coach in the Peabody School system.

Sullivan holds for the proposition that where the employer fails to satisfy its burden of articulating a lawful reason for its employment decision or fails to produce credible evidence that its articulated reason is the real reason, the plaintiff shall prevail. Here, Peabody, by its decision maker Principal, has admitted under oath, that its reason articulated to the MCAD was false. Nizwantowski suggests that such an admission is tantamount to the defendant's providing no reason at all for its employment decision. Therefore, Nizwantowski should prevail as to liability.

Peabody is likely to be heard to say words to the effect: while it is true that we lied to the MCAD in an attempt to defeat Nizwantowski's claim at the administrative stage, and, at least for a while, we were successful by reason of advancing said lie, we should be permitted to proffer a new reason in place of our earlier admittedly false testimony now that we are in court. The mere recitation of the contention proves the answer: Peabody should not, and cannot, be allowed to do so based on the principle of judicial estoppel.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it has previously asserted in another proceeding." Otis v. Arbella Mutual Ins. Co., 443 Mass. 634, 639-640 (2005), *quoting* Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998). Judicial estoppel is used to prevent a "distasteful role reversal which would demean and reduce the public's confidence in the legal process." Otis supra at 647 *quoting* New Hampshire Ins. Co. v. McCann, 429 Mass. 202, 211 (1999).

"The purpose of the doctrine is to prevent the manipulation of the judicial process by litigants." Otis, supra at 640, *quoting* Canavan's Case, 423 Mass. 304, 308 (2000). "[T]he doctrine is properly invoked whenever a 'party is seeking to use the judicial process in an inconsistent way that courts should not tolerate.'" Otis, supra, at 640, *quoting* East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623-624 (1996). "[J]udicial estoppel will normally be appropriate whenever 'a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of a legal advantage.'" Otis supra at 641, *quoting* InterGen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003).

The statutory requirement that an employee file his complaint of discrimination with the MCAD before the filing of a Superior Court action and the purposes sought to be accomplished

by that requirement are all discussed in the Plaintiff's memorandum in opposition to the Defendant's motion for partial summary judgment and are incorporated herein by reference. The accomplishment of those purposes is dependent upon the employer's telling the truth to the MCAD, at least as the employer sees the truth, in its response, under oath, to an employee's charge of discrimination.

In the instant case, the Defendant employer has now admitted under oath, when presented with how unsupportable its MCAD position statement was, that it intentionally lied to the MCAD about the reason for the Plaintiff's non-hire. The Defendant's "distasteful" conduct is all the more unpalatable because it is a public employer. How can there be conduct more likely to "reduce the public's confidence in the legal process" than what the Defendant Peabody now seeks to do: change its position previously given under oath to the MCAD because the Defendant has been caught in its lie? That false testimony was initially successful: the MCAD originally found no probable cause on the Plaintiff's pro se complaint and dismissed same based upon the Defendant's false testimony. Only after the Plaintiff engaged counsel and sought a reversal of that dismissal, and the MCAD found probable cause, was the Plaintiff able to pursue his claim. Peabody should be prohibited from manipulating the judicial process by being limited in its defense of this Action to the statements it made under oath, by way of affidavit to the MCAD.

The result of the application of judicial estoppel against Peabody in the instant case is, in effect, to eliminate any defense available to Peabody on the issue of liability. Peabody, having acknowledged that the statements contained in its MCAD affidavit were perjurious, cannot advance that perjurious testimony at trial. Therefore, Peabody cannot meet its stage two burden and Nizwantowski is entitled to judgment as a matter of law that Peabody discriminated against him. *See* Sullivan, supra.

Nizwantowski suggests that the result of the application of judicial estoppel in the instant case, although harsh to Peabody, is reasonable, necessary and consistent with public policy considerations. A public employer like Peabody should have known and understood the risk of providing false testimony to a state tribunal and should now suffer the consequences of its conduct. The judgment sought now by Nizwantowski, if entered, will help ensure that future public employers will refrain from engaging in the wrongful conduct committed by Peabody and also help ensure the integrity of the MCAD process.

IV. Conclusion

For the reasons set forth herein, this Court should allow the Cross Motion for Partial Summary Judgment on Liability of Plaintiff Edward M. Nizwantowski.

Respectfully submitted,
Edward M. Nizwantowski
By his Attorneys,

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October 16, 2008

Memo from Health, PE & Athletics

Ph. 978-535-3385 • Fax 978-535-9578

To: Ed Nizwantowski

From: Phil Sheridan

Date: June 17, 2003

Re: Baseball Season Evaluation

The 2003 baseball season was a special season for the players, staff, school and community. The players played an unselfish brand of ball and displayed spirit; class and togetherness.

As the leader of the baseball team you have always displayed sportsmanship and discipline and as a result your players behaved like true sportsmen. It is unfortunate for everyone involved that the season ended with the controversy that erupted prior to the Division I State Championship game because it paints a picture of you and your team that is unfair and undeserved.

I did not agree with your decision not to accept the trophy at the completion of the game and was very glad to hear you say that you regretted the decision as well. It was a teachable moment that escaped us and unfortunately was during a very visible moment. We have all missed moments like this, have learned from them and become all the better for it. Your teachable moment was very visible and as a result many people are willing to pass judgment. I know that you regret the decision and not just because of other people's reactions. I know you will take the time to discuss your decision with your team and use it as a life lesson.

The issues that are being brought forth by Lowell Spinner Management are distressing and hurtful. When I arrived Principal Patuleia had intervened and calmer heads had prevailed. It is critical that you also discuss this situation with your team. They were tired and quickly became angry when warm-ups were shortened and one or two behaved like most teens would.

The baseball team displayed great class and sportsmanship all year and now we can use this incident to teach the importance of poise in the face of adversity. This is said knowing that for the most part our team did behave as they had all year, with class and dignity. One or two may have behaved in a way that colored their year unfairly and they too can learn from it.

I am unhappy to be writing about anything but the magical season that did occur. It is unfortunate that people who do not have all the facts are judging the baseball team and the athletic department in an unfair manner. It is up to us not to allow the negativity to ruin such a season. Seize the moment coach, and make lemonade from the lemons we have been given. Good teacher and coaches, of which you are one, rise up and lead when the going gets tough.