SJC-12700

JUDY C. LYNCH & others[1] vs. KEITH D. CRAWFORD & others[2] (and a consolidated case[3]).

Suffolk. September 5, 2019. - December 10, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Cypher, & Kafker, JJ.

Practice, Civil, Interlocutory appeal, Summary judgment. Massachusetts Wage Act. Immunity from Suit. Federal Preemption. Statute, Federal preemption.

Civil action commenced in the Superior Court Department on October 24, 2013.

Civil action commenced in the Superior Court Department on February 10, 2016.

After consolidation, the case was heard by Paul D. Wilson, J., on motions for summary judgment, and a motion for reconsideration was considered by him.

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[1] Johanna Vega, Iris Montijo, Guity Valizadeh, Marie Maxis, Maltina Kelsey, Elizabeth Rhodes, Oswald Hankerson, Denise Ferguson, Reshauna Jackson, Hycienth Jackson, and Gwendolyn Smith.

[2] Lawrence J. Smith, Jr.; and John Doe Nos. 1 through 50.

[3] Kennia Moreno & others vs. Keith D. Crawford & another.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Christopher G. Clark (Christopher E. Novak also present) for Keith D. Crawford.
Andrew E. Goloboy (Richard B. Reiling also present) for the plaintiffs.
Jonathan C. Green, Assistant Attorney General, for the Attorney General, amicus curiae, submitted a brief.
John J. Barter, for Professional Liability Foundation, Ltd., amicus curiae, submitted a brief.

GANTS, C.J. The plaintiffs, former employees of the now-dissolved Roxbury Comprehensive Community Health Center, Inc. (RoxComp), were not paid for the work they performed during the weeks before RoxComp shut its doors. Under the Wage Act, G. L. c. 149, § 148, discharged employees are entitled to be paid all wages due them on the day of their discharge by their "employers." The "president and treasurer of a corporation and any officers or agents having the management of such corporation" are "deemed to be the employers of the employees of the corporation within the meaning of [the statute]." Id. The plaintiffs brought consolidated civil actions against the defendant Keith D. Crawford alleging that, as RoxComp's president, he was among the "employers" who had violated the Wage Act by failing to pay them the wages they were due.[4]

[4] The plaintiffs also alleged that Lawrence J. Smith, as the treasurer of Roxbury Comprehensive Community Health Center, Inc. (RoxComp), and other, as yet unidentified officers or agents of

Crawford moved for summary judgment, claiming that he was not RoxComp's president but solely the chair of its board of directors and that, even if he were its president, he served without compensation and therefore was immune from suit under the Federal Volunteer Protection Act (VPA), 42 U.S.C. § 14503(a) (2012), and the State charitable immunity statute, G. L. c. 231, § 85W (§ 85W).

A Superior Court judge denied Crawford's motion, concluding that there were disputes of material fact as to whether Crawford served as president and whether his conduct placed him outside the scope of the qualified immunity provided to volunteers under the VPA and § 85W. Crawford filed a petition pursuant to G. L. c. 231, § 118, first par., seeking leave from a single justice of the Appeals Court to pursue an interlocutory appeal from the denial of his motion for summary judgment. A single justice denied leave to appeal under § 118 and declared that, if Crawford contended that he had a right to interlocutory appeal under the doctrine of present execution, the way to assert that right was to file a notice of appeal in the Superior Court. Crawford then timely filed such a notice.

In an attempt to harmonize two of our opinions applying the doctrine of present execution -- Maxwell v. AIG Domestic Claims,

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RoxComp were employers who violated the Wage Act by failing to pay their wages.

Inc., 460 Mass. 91 (2011), and Marcus v. Newton, 462 Mass. 148 (2012) -- the Appeals Court concluded that "where a statute designed to encourage private conduct speaks in terms of providing immunity only from liability, and that statute places no affirmative obligations on the protected party to take the actions being immunized, courts are not, without more, to infer an intent to provide immunity from suit." Lynch v. Roxbury Comprehensive Community Health Ctr., Inc., 94 Mass. App. Ct. 528, 535 (2018). Consequently, the Appeals Court held that the doctrine of present execution did not entitle Crawford to an interlocutory appeal from the denial of his motion for summary judgment based on his claimed charitable immunity under Federal or State law because (1) "[t]he language of [§ 85W and the VPA] speaks in terms of immunity only from liability, not from suit"; (2) § 85W "imposes no obligations on people who serve as volunteer board members of nonprofit institutions"; and (3) the VPA does not command "State interlocutory appellate review when such an appeal otherwise would not be available." Id. at 535, 537-538. We granted Crawford's motion for further appellate review.

We hold that, where a statute provides qualified immunity, as do the VPA and § 85W, we attempt to discern whether the Legislature intended immunity from suit, rather than simply immunity from liability. That the statute speaks only of

liability and does not specifically spell out immunity from suit is not dispositive. Rather, we look to the language of the entire statute and, where there is ambiguity, apply our traditional standards of statutory interpretation to determine whether the Legislature intended to grant immunity from suit. Having done so here, we conclude that Congress intended the VPA to provide qualified immunity from suit for officers in nonprofit organizations who receive no compensation and that § 85W may only expand the scope of that immunity, not diminish it. Because our doctrine of present execution recognizes that interlocutory appeal is necessary to vindicate the rights of one who is ordered to proceed to trial despite being immune from suit, we conclude that Crawford, as a volunteer for a nonprofit organization, is entitled to interlocutory review of the denial of his motion for summary judgment.

As to the merits of that summary judgment motion, we affirm the judge's denial of the motion, finding that there are genuine issues of material fact as to whether Crawford was, in fact, the president of RoxComp and as to whether he engaged in "any acts or omissions intentionally designed to harm" that would deprive him of the immunity otherwise provided by § 85W.[5]

[5] We acknowledge the amicus briefs submitted by the Attorney General and the Professional Liability Foundation.

Discussion. 1. Doctrine of present execution. a. Immunity from suit. Generally, a litigant is entitled to appellate review only of a final judgment, not of an interlocutory ruling, such as the denial of a motion for summary judgment. See Pollack v. Kelly, 372 Mass. 469, 470-471 (1977). "However, in narrowly limited circumstances, where 'an interlocutory order will interfere with rights in a way that cannot be remedied on appeal' from a final judgment, and where the order is 'collateral to the underlying dispute in the case' . . . , a party may obtain full appellate review of an interlocutory order under our doctrine of present execution." Patel v. Martin, 481 Mass. 29, 32 (2018), quoting Maddocks v. Ricker, 403 Mass. 592, 596 (1988). "The doctrine is intended to be invoked narrowly to avoid piecemeal appeals from interlocutory decisions that will delay the resolution of the trial court case, increase the over-all cost of the litigation, and burden our appellate courts." Patel, supra.

In civil cases, one of those limited circumstances in which we invoke the doctrine of present execution is "where protection from the burden of litigation and trial is precisely the right to which [a party] asserts an entitlement." Estate of Moulton v. Puopolo, 467 Mass. 478, 485 (2014). Where a party claims immunity from suit but does not prevail on a motion to dismiss or for summary judgment, the party cannot completely vindicate

his or her rights on appeal from a final judgment because the party would already then have defended the case at trial -- exactly what immunity from suit was "designed to prevent." See Patel, 481 Mass. at 33. "[E]ven if the erroneous order were ultimately reversed after trial, the right to immunity from suit would still have been 'lost forever.'" Id., quoting Brum v. Dartmouth, 428 Mass. 684, 688 (1999).

Where absolute or qualified immunity is provided by statute or common law, we discern whether the right to immunity is from suit or from liability, because only immunity from suit entitles a party to an interlocutory appeal under the doctrine of present execution. See Breault v. Chairman of the Bd. of Fire Comm'rs of Springfield, 401 Mass. 26, 31 (1987), cert. denied sub nom. Forastiere v. Breault, 485 U.S. 906 (1988) ("The defendant would not benefit from our rule of 'present execution' . . . if the asserted right to immunity is but a right to freedom from liability . . . , for in that case his right could be vindicated fully on appeal after trial. If, however, the asserted right is one of freedom from suit, the defendant's right will be lost forever unless that right is determined now, and his appeal is proper").

In considering claims of absolute or qualified immunity by governmental entities or employees, we have interpreted the immunity to provide protection from suit, not merely from

liability; therefore, we have applied the doctrine of present execution to allow an interlocutory appeal from an order denying a motion to dismiss or for summary judgment brought by someone asserting such immunity. See Boxford v. Massachusetts Highway Dep't, 458 Mass. 596, 601 (2010) (town entitled to interlocutory appeal from denial of motion to dismiss under doctrine of present execution where it claimed sovereign immunity insulated it from suit brought pursuant to specific statutes); Brum, 428 Mass. at 688, quoting Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 145 (1993) (G. L. c. 258, § 10, of Tort Claims Act "confers immunity from suit, . . . a right that is 'lost as litigation proceeds past motion practice'"); Breault, 401 Mass. at 31 (qualified immunity under Federal Civil Rights Act, 28 U.S.C. § 1983, "is an immunity from suit, not just from liability").

We have done so by focusing on the Legislature's purpose in conferring the immunity rather than on the specific statutory language that grants it. For instance, with respect to qualified immunity under the Tort Claims Act, we have "noted the importance of 'determining immunity issues early if immunity is to serve one of its primary purposes: to protect public officials from harassing litigation.'" Brum, 428 Mass. at 688, quoting Duarte v. Healy, 405 Mass. 43, 44 n.2 (1989). The language of that act does not expressly provide immunity from

suit. Rather, G. L. c. 258, § 2, states that "[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances . . . ." The qualified immunity under the Tort Claims Act derives from the exceptions to § 2 listed in G. L. c. 258, § 10, including but not limited to "any claim arising out of an intentional tort." G. L. c. 258, § 10 (c). If an exception to § 2 is applicable, then public employers are protected from liability by sovereign immunity, which historically has been understood to provide immunity from suit. See Randall v. Haddad, 468 Mass. 347, 354 (2014), quoting Woodbridge v. Worcester State Hosp., 384 Mass. 38, 42 (1981) ("The general rule of sovereign immunity provides that '[t]he Commonwealth cannot be impleaded into its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed . . . [by] statute'").[6]

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[6] Generally, an interlocutory order may be appealed under the doctrine of present execution only where the order is "'collateral to the underlying dispute in the case' and therefore will not be decided at trial." Patel, 481 Mass. at 32, quoting Maddocks, 403 Mass. at 596. Where a party claims qualified immunity from suit, we always deem the order "collateral," even if there might be a genuine issue of fact as

Similarly, in Maxwell, 460 Mass. at 102, we considered whether St. 1996, c. 427, § 13 (i), grants insurers qualified immunity from suit or simply from liability when they are sued because they reported to the insurance fraud bureau that they had reason to believe that a fraudulent insurance transaction was being attempted, as they are required to do by law. In concluding that § 13 (i) confers qualified immunity from suit, we did not rely only on the statutory language, which provides that, "[i]n the absence of malice or bad faith, no insurer . . . shall be subject to civil liability for damages by reason of any statement, report or investigation" that arose from its report to the insurance fraud bureau. Id. Rather, noting the insurers' obligation to report potentially fraudulent conduct and the design of the immunity provision to shield insurers from civil liability in the absence of malice or bad faith, we concluded that § 13 (i) "should be interpreted as providing immunity from suit rather than mere immunity from liability" because "[r]eporting to the [insurance fraud bureau] might be

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to whether the immunity protects the defendant under the circumstances of the case, and that factual issue might be the determinative one at trial. See Kent v. Commonwealth, 437 Mass. 312, 317 (2002). We do so because the merits of the plaintiff's claim that his or her rights have been violated are "conceptually distinct from the merits of the plaintiff's claim" that the defendant may be sued for the violation. See id., quoting Mitchell v. Forsyth, 472 U.S. 511, 527 (1985).

chilled if protection could be secured only after litigating a claim through to conclusion." Id. at 98.

However, in Marcus, 462 Mass. at 153, where we determined that the recreational use statute, G. L. c. 21, § 17C, provides qualified immunity from liability and not from suit, we rested our determination on the language of that statute without exploring the legislative purpose in granting the immunity. Section 17C provides that "[a]ny person having an interest in land . . . who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor . . . shall not be liable for personal injuries or property damage sustained by such members of the public . . . while on said land in the absence of wilful, wanton, or reckless conduct by such person" (emphasis added). We declared that "[w]e need go no further than the plain text of § 17C to conclude" from the underlined language that the statute "merely provides an exemption from liability for ordinary negligence claims; it does not provide immunity from suit." Marcus, supra.

We note that, although we focused solely on the statutory language in Marcus, our determination that the recreational use statute established only qualified immunity from liability was supported by the legislative history of that statute, as set

forth in Ali v. Boston, 441 Mass. 233, 235-237 (2004). There, we observed that, in 1972, when the statute was enacted, our common law placed those who entered upon land into three categories -- invitees, licensees, and trespassers. Id. at 236 n.5. Landowners owed a duty of reasonable care to invitees, but licensees and trespassers "could not recover unless the landowner's conduct was wilful, wanton, or reckless." Id. See McIntyre v. Converse, 238 Mass. 592, 594 (1921). "Corporations in particular were concerned that, if they made their land available for public recreation, courts might conclude that they did so to enhance their own interests and might consequently determine that the recreational users were 'invitees' under the common law, to whom landowners owed the highest duty of care." Ali, supra at 236. In "seeking to strike a balance between encouraging public access to private land and protecting landowners from liability for injuries, the Legislature created by statute a new category of entrants onto land, recreational users," and in essence declared that the duty owed to them was the duty owed to licensees and trespassers rather than invitees. Id. at 236-237.[7] The court in Marcus recognized that, by

[7] As we noted in Ali, 441 Mass. at 237:

> "Subsequently, in 1973, and for reasons wholly unrelated to the recreational use statute, this court modified the common law by, among other things, eliminating 'invitees'

delineating in the statute the duty owed to a recreational user of property, the Legislature did not intend to provide qualified immunity from suit; it simply sought to establish the standard of liability.

b. VPA. In determining whether the VPA and § 85W provide immunity from suit or simply immunity from liability, we look first to the VPA, because it preempts inconsistent State laws, except where State law "provides additional protection from liability relating to volunteers . . . in the performance of services for a nonprofit organization or governmental entity." 42 U.S.C. § 14502(a).[8] Therefore, if the VPA provides qualified immunity from suit, § 85W may not be interpreted to provide less protection to volunteers.

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as a separate category of entrants onto land. Mounsey v. Ellard, 363 Mass. 693, 707 (1973). We determined that, for purposes of landowner liability, entrants onto land would fall into one of two categories: lawful visitors and trespassers. Id. Landowners now owe a reasonable duty of care to all lawful visitors. McDonald v. Consolidated Rail Corp., 399 Mass. 25, 28 (1987). As to trespassers, landowners continue to owe the duty only to refrain from wilful, wanton, or reckless disregard for their safety. Id. at 27."

[8] The Federal Volunteer Protection Act (VPA), 42 U.S.C. § 14502(b) (2012), does not apply to any civil action in a State court in which all parties are citizens of the State if the Legislature of that State has enacted a statute declaring that the VPA does not apply in such cases. The Massachusetts Legislature has enacted no such statute.

The VPA states that, subject to certain exceptions and conditions, "no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if . . . the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." 42 U.S.C. § 14503(a). Because the VPA, like the recreational use statute, declares that a protected class of persons shall not "be liable" for harm unless the conduct is more blameworthy than negligence, the plaintiffs, citing our opinion in Marcus, argue that we need go no further than the plain meaning of these words to conclude that the VPA confers only immunity from liability. We decline to place so much weight on Congress's use of the phrase "be liable"; nor do we infer that the phrase so plainly demonstrates Congress's intent not to provide volunteers with immunity from suit that we need look no further.

In interpreting the meaning of a statute, we "seek to determine the intent of the Legislature in enacting [it], 'ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that

the purpose of its framers may be effectuated.'" Halebian v. Berv, 457 Mass. 620, 628-629 (2010), quoting Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006). We examine all the provisions of a statute, not just isolated phrases, and seek, where possible, to "construe the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction." DiFiore v. American Airlines, Inc., 454 Mass. 486, 491 (2009).

The purpose of the VPA is set forth in 29 U.S.C. § 14501(b), which provides:

> "The purpose of this chapter is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities."

Some of the congressional findings in 29 U.S.C. § 14501(a) help us to understand why and how Congress intended to "provide certain protections from liability abuses." First, Congress found that "the willingness of volunteers to offer their services is deterred by the potential for liability actions against them," and that, "as a result, many nonprofit public and private organizations and governmental entities . . . have been adversely affected by the withdrawal of volunteers from boards

of directors and service in other capacities." 42 U.S.C. § 14501(a)(1)-(2). Second, it found that, "due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance . . . to cover their activities." 42 U.S.C. § 14501(a)(6). Third, it characterized the legislation as "clarifying and limiting the liability risk assumed by volunteers." 42 U.S.C. § 14501(a)(7). The "liability risk" of volunteers is not merely the risk of being found liable and having judgment entered against them; it is also the risk of being dragged into litigation and having to incur the considerable time, expense, and burdens of such litigation. A volunteer does not merely want to prevail in such litigation; the volunteer wants to end it. If, as reflected in the statutory findings, the congressional purpose to protect volunteers from "liability abuses" is to be accomplished; if volunteers are to be less deterred "by the potential for liability actions against them"; and if volunteer organizations are to avoid the need to incur "unwarranted litigation costs" and, by doing so, avoid "higher costs in purchasing insurance," Congress must have intended the VPA to provide qualified

immunity from suit, not merely immunity from liability.[9] Without immunity from suit, a volunteer who fails to obtain a dismissal of an action based on qualified immunity would have no right to an interlocutory appeal to challenge the denial of the motion to dismiss or for summary judgment; such a challenge could be made only after trial, after the costs of litigating such a trial had been incurred. Thus, depriving volunteers of the right to interlocutory appeal would increase the costs of litigation and, as a result, the cost of insurance.

The legislative history of the VPA supports our conclusion that Congress intended to provide immunity from suit. Describing the need for Federal legislation, the House Judiciary Committee report explains that State laws had failed to provide "[t]he very minimum amount of protection -- the freedom from suit because of honest mistakes, or ordinary negligence" (emphasis added). H.R. Rep. No. 105-101, 105th Cong., 1st Sess., pt. 1, at 7 (1997) (Committee on the Judiciary). The report also refers to the need to provide volunteers and nonprofit organizations with "relief from these debilitating lawsuits." Id. at 5.

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[9] Neither the parties nor the amici have pointed us toward, nor have we been able to find, any Federal case law interpreting Congress's intent regarding the nature of the immunity conferred by the VPA. Nor are we aware of any State appellate court opinion that interpreted the VPA with respect to this issue. We appear to be the first to do so.

Because we conclude, based on the statutory language and the legislative history, that Congress intended the VPA to immunize volunteers from suit for harm caused by ordinary negligence, we must also conclude that § 85W provides qualified immunity from suit, because State law may not be less protective of volunteers than the VPA. See 42 U.S.C. § 14502(a). And because both statutes provide qualified immunity from suit, an order denying a motion to dismiss or a motion for summary judgment brought by a volunteer for a nonprofit organization based on the defense of charitable immunity is subject to interlocutory appeal as of right.

Having concluded that Crawford is entitled to an interlocutory appeal from the denial of his motion for summary judgment, we now turn to the merits of that motion.

2. Summary judgment. A party is entitled to summary judgment where the movant (here, Crawford) shows that, viewing the evidence in the light most favorable to the nonmoving party, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). We review an order granting or denying summary judgment de novo because the record before us is the same as the record before the motion judge, and the decision is a matter of law rather than of discretionary judgment. See Merrimack College v. KPMG

LLP, 480 Mass. 614, 619 (2018). "Any doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment." Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 237 (2010). This court may affirm a denial of summary judgment based on reasons that are the same as or different from those of the Superior Court judge, and "we may consider any ground apparent on the record that supports the result reached in the lower court." Clair v. Clair, 464 Mass. 205, 214 (2013).

Viewed in the light most favorable to the nonmoving party (here, the plaintiff employees), RoxComp was a nonprofit community health center that, in 2013, was facing multiple financial and regulatory challenges. At the time, Crawford served as chair of RoxComp's board of directors, a volunteer position for which he received no compensation. On January 24, 2013, RoxComp filed its annual report with the Secretary of the Commonwealth, which identified Crawford as RoxComp's "President." In the subsequent two weeks, RoxComp filed an application for revival of its corporate charter, which had been revoked due to prior mismanagement, and a certificate of change of directors, both of which characterized Crawford as "President." He signed all three documents under penalty of perjury.

On February 25, 2013, RoxComp's interim chief executive officer, Pratt Wiley, informed the board of directors in a memorandum of the challenges that RoxComp would confront if it were to continue to operate. In that memorandum, Wiley declared that RoxComp did not "intend to make payroll" until it received reimbursement from the Health Resources and Services Administration (HRSA), the Federal agency responsible for overseeing RoxComp's Federal grant funding. Wiley wrote that the proper documentation for that reimbursement had been submitted on February 22 and stated, "We will work with HRSA to determine when the payment will post so that we can properly inform the employees when they can expect to be paid." In a March 6 memorandum to the board, Wiley recommended laying off thirty-four current employees and furloughing the remaining employees for between two and four days per month to reduce payroll. On March 8, Wiley told Crawford that the HRSA would not release any further funds to RoxComp until both the budget and contingency reports were approved. He also told Crawford that because the HRSA budget was being revised, RoxComp would likely miss payroll on March 15. Crawford nevertheless held multiple meetings with RoxComp's staff where he personally urged them to continue working and assured them that they would be paid.

When RoxComp ceased operations on March 22, 2013, its employees were not paid on the day of their discharge for their last four weeks of employment, in violation of the Wage Act. On March 27, Crawford wrote in an electronic mail message that he "would like to use the funds available in the bank" to pay two particular vendors, but added that he was "open to suggestions."

Although Crawford claims never to have served as RoxComp's president, the summary judgment record includes abundant evidence to support the finding that he served as its president during the relevant time period; indeed, he signed under the penalty of perjury multiple corporate filings that identified him as RoxComp's president. As president, he was deemed under the Wage Act to be an "employer" of RoxComp's employees, and as an employer, he was required to pay the employees on at least a biweekly basis and to pay discharged employees in full on the day of their termination. G. L. c. 149, § 148. See Segal v. Genitrix, LLC, 478 Mass. 551, 560-561 (2017) ("The Wage Act imposes categorical liability on a company's president and treasurer, and under Massachusetts law, corporations are required to elect a president and treasurer").

The plaintiff employees contend that the charitable immunity in the VPA and § 85W applies only to common-law torts and does not apply to statutory violations, such as Wage Act violations. We disagree. Under the VPA, as earlier noted, "no

volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization" unless the harm is caused by the volunteer's "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." 42 U.S.C. § 14503(a). Under § 85W, no person who serves without compensation as an officer, director, or trustee of any nonprofit charitable organization "shall be liable for any civil damages as a result of any acts or omissions related solely to the performance of his [or her] duties as an officer, director or trustee" unless the acts or omissions were "intentionally designed to harm" or were "grossly negligent acts or omissions which result in harm to the person." G. L. c. 231, § 85W. The VPA, with its focus on "harm," and § 85W, with its focus on "any civil damages," cannot reasonably be interpreted to be limited to harm or civil damages arising from common-law torts rather than statutory violations. Nor would imposing such a limitation be consistent with the legislative purpose of either statute.

Having concluded that the charitable immunity in the VPA and § 85W applies to statutory violations of the Wage Act, we consider whether there is a genuine issue of material fact as to Crawford's entitlement to the protection of either statute. We

conclude that where there is evidence that Crawford, as president of RoxComp, violated the Wage Act by failing to pay the discharged employees, he enjoys no protection under the VPA. A Wage Act violation committed by any employer or any officer deemed under the Wage Act to be an "employer," even "without a willful intent to do so," is a crime under G. L. c. 149, § 27C (2), punishable by imprisonment for not more than six months and a fine of not more than $10,000 for a first offense. See Cook v. Patient Edu, LLC, 465 Mass. 548, 556 (2013) ("The legislative intent of the Wage Act, to hold individual managers liable for violations, is clear . . ."). Because a Wage Act violation for the failure timely to pay wages, regardless of intent, constitutes "criminal misconduct" under § 27C (2), all such violations fall outside the charitable immunity provided by the VPA.

Section 85W, however, does not expressly exclude all "criminal misconduct" from the scope of its charitable immunity, but only "acts or omissions intentionally designed to harm" or "grossly negligent acts or omissions which result in harm to the person." G. L. c. 231, § 85W. The VPA preempts State laws to the extent that they provide less protection to volunteers than the VPA, but it specifically allows States to provide additional protection from liability. 42 U.S.C. § 14502(a). Therefore, because § 85W, at least with respect to Wage Act violations,

provides volunteers with greater protection from liability than the VPA, we consider whether there is a genuine issue of material fact as to whether Crawford's acts or omissions were intentionally designed to harm.[10] We conclude that there is and therefore affirm the judge's denial of Crawford's motion for summary judgment.

Viewing the evidence in the summary judgment record in the light most favorable to the plaintiff employees, Crawford was informed that RoxComp would not timely make payroll and that the eventual payment of the employees' earned wages depended on a Federal reimbursement that had not been and might not be received. Yet he encouraged the employees to continue to work and assured them that payment was forthcoming. His assertion in the March 27 e-mail message that he "would like to use the funds available in the bank" to pay two particular vendors, rather than use those funds to pay the wages of employees, occurred after his alleged Wage Act violation but may be considered as evidence of his state of mind at the time of the alleged violation of the Wage Act. See Commonwealth v. Casale, 381 Mass. 167, 173 (1980) ("intent is a matter of fact, which is often not susceptible of proof by direct evidence, so resort is

[10] The plaintiffs do not allege that Crawford committed "grossly negligent acts or omissions which result in harm to the person." G. L. c. 231, § 85W.

frequently made to proof by inference from all the facts and circumstances developed at the trial"). The totality of this evidence, viewed in the light most favorable to the plaintiff employees, yields a genuine issue of material fact as to whether Crawford, as president of RoxComp, acted with an intentional design to harm employees by failing to pay them the wages they were due.

Conclusion. We affirm the order denying Crawford's motion for summary judgment.

So ordered.