SJC-12991

KEHLE OSBORNE-TRUSSELL vs. THE CHILDREN'S HOSPITAL CORPORATION.[1]

Suffolk. January 4, 2021. - August 25, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Domestic Violence and Abuse Leave. Employment, Termination, Retaliation. Harassment Prevention. Notice. Unlawful Interference. Public Policy. Practice, Civil, Complaint, Motion to dismiss. Words, "Employee."

Civil action commenced in the Superior Court Department on May 8, 2019.

A motion to dismiss was heard by Douglas H. Wilkins, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Michael L. Mason for the plaintiff.

Richard J. Riley (Peter C. Kober also present) for the defendant.

Naomi R. Shatz, Rebecca Pontikes, & Naitasia Hensey, for Massachusetts Employment Lawyers Association, amicus curiae, submitted a brief.

[1] Doing business as Boston Children's Hospital.

Alyssa Z. Bloom, Nicole R.G. Paquin, & Andrea C. Kramer, for Women's Bar Association of Massachusetts, amicus curiae, submitted a brief.

WENDLANDT, J. This case presents our first opportunity to consider the elements needed to state a claim for relief pursuant to the nonretaliation and noninterference provisions of the Domestic Violence and Abuse Leave Act, G. L. c. 149, § 52E (DVLA). Enacted in 2014, see St. 2014, c. 260, § 10, the DVLA is designed to support victims of abuse and harassment by easing the additional burdens that often are visited upon them when they undertake to stop the abuse, pursue legal action against their abusers, and rebuild their lives. Thus, the DVLA prohibits an employer from taking adverse action against, or otherwise discriminating against, an employee who exercises rights under the DVLA, such as taking leave from work to attend doctors' appointments or to go to court hearings involving the harassment or abuse. The DVLA also prohibits employers from interfering in an employee's exercise, or attempted exercise, of these statutorily protected rights. Employees, in turn, are required to provide employers with "appropriate advance notice" of the leave they may need. See G. L. c. 149, § 52E (d).

The plaintiff filed a complaint in the Superior Court against the Children's Hospital Corporation (CHC), alleging that, in contravention of the DVLA, it terminated her employment

after she disclosed to CHC that her abuser, who had been stalking, harassing, and threatening her, had violated the terms of a harassment prevention order (HPO), and that the plaintiff had reported the violation to the police. The complaint also alleged that CHC's termination of her employment contravened the Commonwealth's public policy to protect victims of abusive behavior and to encourage enforcement of protective orders. CHC's motion to dismiss was allowed. Because we conclude that the plaintiff's complaint stated a claim for which relief may be granted, the order dismissing the complaint must be reversed with respect to all counts in the complaint with the exception of the public policy claim, and the matter remanded to the Superior Court for further proceedings.[2]

Background. We summarize the factual allegations set forth in the complaint and in the undisputed documents incorporated by reference in the complaint. See Sudbury v. Massachusetts Bay Transp. Auth., 485 Mass. 774, 776 n.4 (2020); Calixto v. Coughlin, 481 Mass. 157, 158 (2018) (in reviewing allowance of motion to dismiss, we accept as true all well-pleaded facts alleged in complaint).

[2] We acknowledge the amicus briefs submitted by the Massachusetts Employment Lawyers Association and the Women's Bar Association of Massachusetts.

The plaintiff is a registered nurse and the victim of "repeated stalking, threats, harassment, abuse, and overt threats." In December 2018, the plaintiff obtained an HPO against the abuser, pursuant to G. L. c. 258E.[3] The HPO barred the abuser from "directly or indirectly contacting [the plaintiff], ordered [the abuser] to remain away from [the plaintiff's] home or place of work, and prohibited [the abuser] from making any social media postings that reference [the plaintiff]."[4]

In February 2019, the plaintiff applied for employment with CHC. CHC "aggressively" recruited her; it invited her to "a number of interviews," contacted her references, and ordered a background check. CHC tendered the plaintiff a formal job offer, which she accepted. On February 14, 2019, CHC sent the plaintiff a letter memorializing her acceptance of CHC's offer

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[3] In order to obtain an HPO under G. L. c. 258E, § 3, an individual must demonstrate by a preponderance of the evidence that, inter alia, the perpetrator committed "harassment," which is defined in relevant part as "[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property that does in fact cause fear, intimidation, abuse or damage to property." Van Liew v. Stansfield, 474 Mass. 31, 37 (2016), quoting G. L. c. 258E, § 1. See F.K. v. S.C., 481 Mass. 325, 332 (2019).

[4] For ease of reference, and in view of our obligation at this stage in the litigation to accept as true the factual allegations in the complaint, we refer to the subject of the HPO as the "abuser." See Calixto v. Coughlin, 481 Mass. 157, 158 (2018). The subject of the HPO is not a party to the case.

of employment. This letter began, "We are delighted that you have accepted our offer for the Staff Nurse I position in the Orthopedic/General Surgery Unit . . . in Patient Services-Nursing." The letter stated that the plaintiff's position was full time, with salary and benefits, and that her "start date" was to be March 18, 2019.[5] The letter also explained that the plaintiff's employment was "at will" and subject to termination at any time, and was contingent on the successful completion of reference, background, and licensure checks, a "pre-employment fitness for duty assessment," and a number of administrative tasks, as well as receiving a score of at least eighty-six percent on a "medication assessment test given as part of [her] new hire clinical orientation." CHC subsequently issued the plaintiff a photograph identification card identifying her as a CHC "staff nurse," provided her with a CHC employee identification number, and assigned her a training schedule.

On February 28, 2019, the plaintiff's abuser posted threats and false statements about the plaintiff on social media, in

[5] The plaintiff did not append the letter to her complaint. The complaint, however, refers to the substance of the letter, and neither party disputes its existence or substance. Therefore, "this court may properly consider it in connection with the complaint." Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 614 n.5 (2019).

violation of the HPO. The post also "tagged"[6] the social media profile "Children's Hospital," in an apparent attempt to bring the falsehoods to CHC's attention. The plaintiff reported the violation of the HPO to the Merrimac police department. Additionally, she informed CHC's human resources department about the HPO and her abuser's past abusive behavior. The plaintiff provided CHC with copies of the HPO and told CHC that "she was pursuing enforcement of the [HPO]." CHC requested additional information about the abuser, and CHC's human resources representative told the plaintiff that he "intended to speak with [the abuser] to hear her side of the story."

Less than two weeks later, and approximately one week before she was scheduled to begin orientation, CHC sent the plaintiff a termination letter stating that her "employment offer for the Staff Nurse position at Boston Children's Hospital has been rescinded effective March 12, 2019."[7] The termination letter continued, "the work clearance process is not able to be

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[6] "To 'tag' another user on a social media platform means to mention that user and create a link to his [or her] profile. The user tagged will generally receive a notification of the tag and the tag will be associated with his [or her] profile" (citation omitted). Goldman v. Reddington, 417 F. Supp. 3d 163, 169 n.2 (E.D.N.Y. 2019).

[7] As with the February 14 welcome letter, the termination letter was not appended to the complaint. For essentially the same reasons as with the welcome letter, see note 5, supra, we consider the substance of the termination letter in connection with the plaintiff's complaint.

initiated, so we are unable to complete the onboarding process at this time." In her complaint, the plaintiff alleged that CHC took this action "in order to avoid having to offer [the plaintiff] protections" of the DVLA.

The plaintiff filed a three-count complaint against CHC in the Superior Court, asserting that her termination violated the DVLA and public policy. The complaint alleged that CHC terminated and discriminated against the plaintiff in violation of the nonretaliation provision of the DVLA, which states:

> "No employer shall discharge or in any other manner discriminate against an employee for exercising the employee's rights under this section."

G. L. c. 149, § 52E (i). The complaint also asserted that CHC violated G. L. c. 149, § 52E (h), the noninterference provision of the DVLA. Under that provision,

> "[n]o employer shall coerce, interfere with, restrain or deny the exercise of, or any attempt to exercise, any rights provided under this section or to make leave requested or taken hereunder contingent upon whether or not the victim maintains contact with the alleged abuser."

Lastly, the complaint alleged that CHC's termination of the plaintiff's employment violated public policy.

In its motion to dismiss the complaint, pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), CHC argued that because the plaintiff had never commenced her employment with CHC, the plaintiff was not an "employee" within the meaning of the DVLA and was not entitled to its protections. CHC also

asserted that, even if the plaintiff had been an employee, her complaint failed to allege that she had provided CHC with notice that she was requesting leave under the DVLA; that such request was for any of the purposes set forth in G. L. c. 149, § 52E (b) (ii); or that she intended to undertake any of the statutorily protected actions. In addition, CHC argued that the complaint did not state a valid claim for a violation of public policy.

Following a hearing at which the plaintiff was given the opportunity to amend her complaint, something she ultimately did not do, the judge allowed CHC's motion to dismiss. While the judge determined that the plaintiff was an "employee" within the meaning of the DVLA, he dismissed the claims for discrimination and for noninterference because the plaintiff had not alleged that she had sought leave from work "for any of the purposes set forth in [G. L. c. 149, § 52E (b) (ii)], or that she actually did, or had had plans to do, any of the enumerated actions in that subsection." The judge also concluded that, given the broad coverage and the detailed provisions of the DVLA, there was "no need and no reason to recognize" the plaintiff's public policy claim under common law. The plaintiff appealed, and we transferred the case from the Appeals Court on our own motion.

Discussion. 1. Standard of review. "We review the allowance of a motion to dismiss de novo, accepting as true all

well-pleaded facts alleged in the complaint." Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 614 (2019). We "draw all reasonable inferences in the plaintiff's favor, and determine whether the allegations 'plausibly suggest' that the plaintiff is entitled to relief on that legal claim" (citation omitted). Buffalo-Water 1, LLC v. Fidelity Real Estate Co., 481 Mass. 13, 17 (2018). To survive a motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Sudbury, 485 Mass. at 779, quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). The facts alleged must "plausibly suggest[] (not merely [be] consistent with) an entitlement to relief" (quotation and citation omitted). Iannacchino, supra. See Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 609 (2017) (complaint survives motion to dismiss "if it includes enough factual heft" to raise basis for relief above level of speculation).

2. Statutory interpretation. The DVLA affords victims of harassment and abuse the right to take up to fifteen days of leave per year, see G. L. c. 149, § 52E (b), for the purpose of addressing, among other things, "issues directly related to the abusive behavior against the employee or family member of the employee," G. L. c. 149, § 52E (b) (ii). Where, as in the

present case, statutory interpretation is necessary, "[o]ur goal is 'to determine the intent of the Legislature in enacting the statute, "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."'" Commonwealth v. Hanson H., 464 Mass. 807, 810 (2013), quoting Halebian v. Berv, 457 Mass. 620, 628–629 (2010).

We begin with the familiar canon of statutory construction that, "[o]rdinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." Malloch v. Hanover, 472 Mass. 783, 788 (2015), quoting Thurdin v. SEI Boston, LLC, 452 Mass. 436, 444 (2008). If the statutory language is clear, "courts must give effect to its plain and ordinary meaning and . . . need not look beyond the words of the statute itself." Doherty v. Civil Serv. Comm'n, 486 Mass. 487, 491 (2020), quoting Milford v. Boyd, 434 Mass. 754, 756 (2001).

"To the extent there is any ambiguity in the statutory language, we turn to the legislative history" as a guide to legislative intent. Ajemian v. Yahoo!, Inc., 478 Mass. 169, 182 (2017), cert. denied sub nom. Oath Holdings, Inc. v. Ajemian, 138 S. Ct. 1327 (2018). "In addition, our respect for the Legislature's considered judgment dictates that we interpret the

statute to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation." Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 620 (2013), quoting DiFiore v. American Airlines, Inc., 454 Mass. 486, 490-491 (2009).

a. Employment status. General Laws c. 149, § 52E (a), defines "employees" as "individuals who perform services for and under the control and direction of an employer for wages or other remuneration." CHC maintains that the plaintiff was not an "employee" within the meaning of the DVLA because her "offer of employment" was "'contingent' upon the fulfillment of specifically identified conditions"[8] that the plaintiff was still in the process of completing. As such, she was an individual who had "yet to perform services" for CHC, and who was not under its "current 'control or direction.'"

CHC's argument rests, in part, on a challenge to the factual allegations in the complaint. The complaint alleges that the plaintiff "successfully [had] gone through the entire application, interview and onboarding process" when CHC terminated her employment. In reviewing a decision on a motion to dismiss, we accept as true the factual allegations in the

[8] According to CHC, the remaining contingencies included a background investigation, a review of the plaintiff's references and licensing credentials, a "fitness for duty" evaluation, a proficiency examination, and a number of administrative tasks.

complaint. See Calixto, 481 Mass. at 158. Here, the complaint alleges that the contingencies of the "onboarding process" had been resolved, that CHC had issued the plaintiff an identification badge showing her to be its staff nurse, that she had been given an employee identification number, and that she had been assigned a training schedule.

Assuming, as we must, that these factual allegations are true, we consider what remains of CHC's argument -- namely, that the term "employees" within the meaning of the DVLA includes only "current" employees who are performing services for the employer, and excludes individuals, like the plaintiff, who have yet to perform such services (including those who are terminated in advance of their start date). Because the language of the statute alone does not resolve the question, we turn to the legislative history for guidance.

In enacting the DVLA, the Legislature sought "to create innovative programs and help victims in combatting domestic violence." State House News Service (Senate Sess.), July 31, 2014 (statement of Sen. Karen E. Spilka). When the Senate voted to adopt the bill, its president noted that "[v]ictims of domestic violence continue to face barriers in their recovery and protecting themselves from future attacks, and we have an obligation to change that . . . . This bill will increase the rights and protections of victims." Senate Passes Domestic

Violence, Parental Leave Bills, State House News Service, Oct. 24, 2013 (quoting Sen. Therese Murray). One of the Legislature's specific goals in adopting the DVLA was to protect employees who were experiencing the effects of domestic violence from adverse consequences at work. The bill's sponsor, Senator Cynthia Stone Creem, said that "[employees] should not need to choose between health and employment. This not only increases victim safety and financial security, but helps with increased productivity, lower health care costs and employee turnover." State House News Services (Senate Sess.), Oct. 24, 2013.

The DVLA thus is a remedial statute, centered on protecting victims of abuse and harassment in many contexts.[9] "Generally, remedial statutes such as the [DVLA] are 'entitled to liberal construction.'" Depianti, 465 Mass. at 620, quoting Batchelder v. Allied Stores Corp., 393 Mass. 819, 822 (1985). "Employment statutes in particular are to be liberally construed, 'with some imagination of the purposes which lie behind them.'" Depianti, supra, quoting Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir. 1914), cert. denied, 235 U.S. 705 (1915).

[9] A statute is remedial where it is "intended to address misdeeds suffered by individuals," rather than to punish public wrongs." Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 620 (2013), quoting Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 420 (2007).

Limiting the term "employees" as CHC proposes would foil these broad, remedial purposes. It would allow employers to discriminate against an individual who, prior to his or her start date, notified an employer of a situation, such as a violation of an HPO, that might require leave to address the collateral consequences of harassment or abuse. Such an individual would have no recourse when, perhaps on the verge of achieving a measure of financial security, he or she were stripped of it by an employer who determined it would be inconvenient to accommodate the individual's protected rights to leave. A construction that excludes from the definition of "employees" those who have accepted employment but have not yet begun work would be directly contrary to the clear intent of the DVLA to allow employees to attend to the consequences of the abuse without risking loss of their jobs, and to prevent future harassment and abuse when victims step forward to confront their abusers.

The narrow view of the term "employees" suggested by CHC also would be inconsistent with other provisions in the DVLA in which the Legislature has defined terms using the temporal restrictions CHC asks us to read into the term "employees." See Selectmen of Topsfield v. State Racing Comm'n, 324 Mass. 309, 312-313 (1949) ("All the words of a statute are to be given their ordinary and usual meaning, and each clause or phrase is

to be construed with reference to every other clause or phrase without giving undue emphasis to any one group of words, so that, if reasonably possible, all parts shall be construed as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose").

For instance, the phrase "domestic violence," as used in the DVLA with respect to potential perpetrators, refers to a possible perpetrator as being, inter alia, "a current or former" spouse, a person who "is cohabitating with or has cohabitated with" the victim of the abuse, or a person with whom the individual or the individual's family member "has or had" a dating relationship or had been engaged. G. L. c. 149, § 52E (a). The absence of similar temporal qualifications in the definition of "employees" suggests that the Legislature did not intend to restrict the protections of the DVLA to current employees. "In light of the statute's broad remedial purpose, 'it would be an error to imply . . . a limitation where the statutory language does not require it.'" Depianti, 465 Mass. at 621, quoting Psy-Ed Corp. v. Klein, 459 Mass. 697, 708 (2011). See Depianti, supra at 620-625 (noting that statutes are to be interpreted "sensibl[y]" and in light of their remedial purposes, and concluding that employee status under misclassification statutes applied even where putative employee and employer did not have contract); Canton v. Commissioner of

the Mass. Highway Dep't, 455 Mass. 783, 794 (2010) ("We do not read into [a] statute a provision which the Legislature did not see fit to put there, nor add words that the Legislature had an option to, but chose not to include" [citation omitted]).

It is instructive that, in related contexts involving employee leave to exercise rights afforded under specific statutory provisions, courts in other jurisdictions have concluded that the term "employee" encompasses individuals who have yet to perform services for the employer, where the statute lacked any explicit language to the contrary. See Robinson v. Shell Oil Co., 519 U.S. 337, 341-342, 345 (1997) (holding that term "employee" in context of Title VII of Civil Rights Act includes former employees where statutory language did not temporally limit employee status to "current" employees and in light of remedial purpose of statute); National Labor Relations Bd. v. Town & Country Elec., Inc., 516 U.S. 85, 87, 98 (1995) (agency construction of term "employee" in National Labor Relations Act was lawful, where construction included prospective employees and did not exclude paid union organizers); Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 9-11 (1st Cir. 1998) (upholding agency construction of right of action under Family Medical Leave Act [FMLA] to include employees who have not yet performed services, where "[t]he statute does not plainly limit the term to current employees").

Contrast 29 U.S.C. § 2611(2)(A) (one year of work is required before employee is eligible to take FMLA leave); G. L. c. 149, § 105D (requiring completion of probationary period or three months of work performed for employee to gain right to parental leave); G. L. c. 149, § 148C (d) (1) (granting sick leave to employees based on number of hours they have worked).

In support of its argument that the term "employees" in the DVLA is limited to individuals who currently are performing services for an employer, CHC points to a different provision of the DVLA, G. L. c. 149, § 52E (g), which requires that "[a]n employee seeking leave under this section shall exhaust all annual or vacation leave, personal leave and sick leave available to the employee, prior to requesting or taking leave under this section, unless the employer waives this requirement" (emphasis added). CHC maintains that the plaintiff had not yet accrued any leave hours at the time of her dismissal, and thus could not have exhausted all other types of accrued leave, as required under G. L. c. 149, § 52E (g), before being entitled to use the leave afforded under this section. Therefore, CHC urges, it follows that she was not entitled to leave under the DVLA when she informed CHC of the HPO.

General Laws c. 149, § 52E (g), however, states that an employee must exhaust all other leave "available to the employee." The statutory provision thus does not make the

availability of other, non-DVLA-afforded leave a precondition of being an "employee" within the meaning of the DVLA. Compare G. L. c. 149, § 105D (statutory right to parental leave accrues only after employees have completed their probationary period or worked for employer for three months); G. L. c. 149, § 148C (d) (1) (statutory sick leave is dependent on number of hours employee has worked). To interpret the leave provision of the DVLA as imposing a precondition that, in order to make use of the leave it affords, an employee first must accrue and have available some period of another form of leave not only would contravene the plain statutory language, but also would frustrate the protective purpose of providing leave to employees who are victims of abusive behavior for the enumerated purposes tied to the harassment or abusive behavior.

Accordingly, we reject a construction of the term "employees" that would exclude individuals who have been hired but have yet to perform services for their employers. Under the broader view we adopt, the plaintiff's complaint alleges sufficient facts to plausibly suggest that she was CHC's employee. The complaint asserts that CHC had extended an offer of employment to the plaintiff, which she had accepted. This relationship was memorialized in a written letter welcoming the plaintiff to CHC and setting forth CHC's mission. The letter described the position for which the plaintiff was hired ("Staff

Nurse I"), the particular "surgery unit" into which she was hired, the supervisor to whom she would be reporting, the start date, and the applicable compensation and benefits. The complaint alleges that the plaintiff had "successfully gone through the . . . onboarding process" and that CHC had issued her an identification badge, identifying her as a "staff nurse," and provided her with a CHC employee identification number. CHC also had placed the plaintiff on a training schedule for new employees. Taken together, these allegations are sufficient plausibly to suggest that, although she had not yet commenced her orientation, the plaintiff was in an employment relationship with CHC, whereby she was to perform services for CHC under its control and direction. Accordingly, she was an "employee" for purposes of the DVLA.

b. Retaliation claim. In her complaint, the plaintiff also asserted a claim for unlawful retaliation, in violation of G. L. c. 149, § 52E (i). That provision states, in pertinent part, "No employer shall discharge or in any other manner discriminate against an employee for exercising the employee's rights under this section."[10] CHC contends that the complaint

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[10] General Laws c. 149, § 52E (i), provides in full:

> "No employer shall discharge or in any other manner discriminate against an employee for exercising the employee's rights under this section. The taking of leave under this section shall not result in the loss of any

fails to set forth sufficient facts plausibly suggesting a claim under this provision of the DVLA.

We have not previously addressed the requirements of a prima facie case of retaliation under the DVLA. To assess the merits of CHC's argument, we turn to the prima facie case for claims of retaliation under roughly analogous provisions of the Federal FMLA, 29 U.S.C. §§ 2601 et seq.,[11] as well as other contexts involving claims of retaliation in employment. See Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 407-409 (2016) (analyzing prima facie elements in retaliation claim in case of unlawful demotion and termination based on claimed gender discrimination); Mole v. University of

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> employment benefit accrued prior to the date on which the leave taken under this section commenced. Upon the employee's return from such leave, the employee shall be entitled to restoration to the employee's original job or to an equivalent position."

[11] The FMLA prohibits employers from retaliating against employees for exercising their rights to leave under the FMLA to care for ill family members or newly arrived children. See 29 U.S.C. § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter"). To establish a prima facie case of retaliation under the FMLA, an employee must show that "(1) he [or she] availed [him- or herself] of a protected right under the FMLA; (2) he [or she] was adversely affected by an employment decision; (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action." Chase v. United States Postal Serv., 843 F.3d 553, 558 (1st Cir. 2016), quoting Hodgens v. General Dynamics Corp., 144 F.3d 151, 161 (1st Cir. 1998).

Mass., 442 Mass. 582, 591–592 (2004) ("To make out his prima facie case [for retaliation under G. L. c. 151B, § 4, the plaintiff] had to show that he engaged in protected conduct, that he suffered some adverse action, and that a causal connection existed between the protected conduct and the adverse action" [quotation, citation, and footnotes omitted]). Drawing on this related jurisprudence, we conclude that, to state a claim under G. L. c. 149, § 52E (i), an employee must allege that (1) the employee availed him- or herself of a protected right under the DVLA; (2) the employee was adversely affected by an employment decision; and (3) there is a causal connection between the employee's protected activity and the employer's adverse action.

While "[t]he prima facie standard is an evidentiary standard, not a pleading standard," reference to the elements of the prima facie case nonetheless "help[s] a court determine whether the 'cumulative effect of the complaint's factual allegations' [constitutes] a plausible claim for relief." Carrero-Ojeda v. Autoridad de Energía Eléctrica, 755 F.3d 711, 718 (1st Cir. 2014), quoting Rodríguez-Reyes v. Molina-Rodríguez, 711 F.3d 49, 54-55 (1st Cir. 2013). See Lopez v. Commonwealth, 463 Mass. 696, 701, 713-714 (2012) (analyzing whether facts pleaded demonstrated plausible claim for relief by looking to elements of G. L. c. 151B, § 4 [5]). In its motion

to dismiss, CHC contended that the plaintiff failed to allege facts plausibly suggesting the first and third prongs of the prima facie case for retaliation.[12] We address each in turn.

i. Rights protected under the DVLA. CHC contends that dismissal of the retaliation claim was proper because the complaint did not allege that the plaintiff had availed herself of the leave provisions of the DVLA, as she neither notified CHC that she required leave nor requested time off for any particular date. General Laws. c. 149, § 52E (d), the notice provision of the DVLA, states that, "[e]xcept in cases of imminent danger to the health or safety of an employee, an employee seeking leave from work under this section shall provide appropriate advance notice of the leave to the employer as required by the employer's leave policy." The plaintiff maintains that, by communicating a qualifying reason for leave to be afforded under the DVLA -- namely, that her abuser had violated the HPO and that she was engaging with law enforcement

[12] CHC does not contest that the plaintiff adequately pleaded the second prong of the retaliation claim, i.e., that CHC's termination of the plaintiff's employment constituted an "adverse action." See Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 407 (2016); McInerney v. United Air Lines, Inc., 463 Fed. Appx. 709, 716 (10th Cir. 2011) ("Termination of employment is 'clearly an adverse employment action'" [citation omitted]); Phelan v. Cook County, 463 F.3d 773, 780 (7th Cir. 2006). Instead, CHC maintains that because the plaintiff was never its employee, it could not have engaged in retaliation against her.

to enforce the provisions of the HPO -- she provided CHC with the requisite notice. In essence, CHC's position is that the plaintiff is not protected by the DVLA because she did not state in haec verba, "I request leave," and instead notified CHC of a condition that might trigger the need for leave in the future.

While the DVLA requires "appropriate advance notice," it does not define the phrase. See G. L. c. 149, § 52E (d). Accordingly, we look to the plain and ordinary meaning of each of the individual words it contains. See Commonwealth v. Keefner, 461 Mass. 507, 511 (2012) (if words used in statute are not otherwise defined within it, we afford words their plain and ordinary meaning). In common usage, "appropriate" means "suitable or fitting for a particular purpose, person, occasion, etc." Webster's New Universal Unabridged Dictionary 103 (2003). In ordinary understanding, "advance" means "given ahead of time." Id. at 28. A "notice" ordinarily means "an announcement or intimation of something impending." Id. at 1326. Therefore, "appropriate advance notice" of the requested leave requires that a "suitable announcement or intimation given ahead of the impending leave" is needed. The plain and ordinary meaning of the phrase thus suggests that the content of the notice, as well as its timing, will depend on the circumstances of each case.[13]

[13] The DVLA contains no requirement for a specific form of words to satisfy the notice requirement. Compare, e.g., Boston

Consistent with this understanding, we conclude that the facts, as alleged in the complaint, show that the plaintiff provided the requisite "appropriate" and "advance" notice when she informed CHC that her abuser had violated the HPO and that she was cooperating with law enforcement in connection with enforcing it. Based on the notice provided, CHC was aware that the plaintiff might need the leave afforded under the DVLA, and also was able to exercise its own rights under the statute when it asked the plaintiff for additional details concerning the HPO.[14] Rather than forestalling notice until she had been provided a date certain when she might need leave to address the violation, the plaintiff did not delay in providing CHC with the information regarding the violation and her enforcement efforts.

Hous. Auth. v. Bridgewaters, 452 Mass. 833, 845–848 (2009) (tenant's actions combined with his assertions at trial "amounted to a request for an accommodation"; "no 'magic' words [were] required" to invoke rights to statutorily mandated review of whether disability could be accommodated before ordering eviction). Cf. Psychemedics Corp. v. Boston, 486 Mass. 724, 732, 736 (2021) (in indemnity contract, requiring, but not defining, "notice"; "a simple statement of the existence of allegations of conduct covered by the indemnification provision would suffice to provide notice;" no "formal [or] explicit demand" was required beyond alerting indemnitor to existence of claim [citation omitted]).

[14] Pursuant to G. L. c. 149, § 52E (e), "[a]n employer may require an employee to provide documentation evidencing that the employee . . . has been a victim of abusive behavior and that the leave taken is consistent with the conditions [set forth in the statute]." Here, CHC requested, and the plaintiff provided, documentation of the HPO.

It was sufficient, as alleged in the complaint, that the plaintiff notified CHC, two weeks before her start date, that her abuser had violated the HPO and that she was working with law enforcement authorities. This disclosure was enough to put CHC on notice that, while the plaintiff did not then know of any specific date on which she would require leave, she might need to exercise the leave provisions of the DVLA and was invoking her rights to leave under it.[15]

A contrary conclusion would be at odds with the remedial purposes of the DVLA to encourage appropriate advance notice and to "create a situation in which abuse is not something to remain silent about." State House News Service, Senate Sess., July 31, 2014 (statement of Sen. Karen E. Spilka). Under CHC's narrow view of the notice provision, an employer could preclude an employee from exercising the rights provided under the DVLA by preemptively terminating an employee who discloses her abuser's violation of a protective order before a date certain for leave is known. Compare Duckworth, 152 F.3d at 10 (interpretation of FMLA's notice provision to permit employer to terminate employee who provides notice of FMLA leave before she was eligible to use

[15] The request for leave afforded by the statute itself constitutes the exercise of a right under the statute. Compare Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788, 793 (1st Cir. 2011) (making request for FMLA leave constitutes exercise of protected right under statute).

it "would conflict with the [FMLA's] basic purpose of enhancing job security by protecting the right of eligible employees to take leave"). Rather than encouraging a dialogue about abuse prevention, such a narrow construction would forestall employees from advising their employers of the known circumstances that might require leave, and perhaps discourage them from pursuing enforcement actions against their abusers. Compare id. (noting that if employees who provide notice before they became eligible to take leave were not protected by FMLA, statute would "provide less protection for new employees or applicants who notify their employers of a need for future leave than those who conceal a need for leave"). At the same time, CHC's narrow construction would work to the detriment of employers' legitimate interest in early notice, which may assist employers in planning to accommodate an employee's leave or, as here, notify the employer that the violation of the HPO included a public reference to the employer. See id. (recognizing employers' "legitimate interests" in early notice, which is satisfied by notice of qualifying condition under FMLA [citation omitted]).

Like an employee who tells her employer that she is pregnant but does not make a specific request for leave under

the FMLA,[16] the plaintiff did enough to provide appropriate advance notice that she was invoking the protections of G. L. c. 149, § 52E, by informing CHC of the existence of the HPO, the violation by the social media posting, and the enforcement efforts she had undertaken. These were the conditions precedent to her need for the leave afforded by the DVLA.

ii. Causal connection. CHC also maintains that, assuming the plaintiff were an employee at the times alleged, dismissal of her nonretaliation claim was appropriate because the plaintiff's complaint did not assert a causal connection between her invocation of her rights to leave under the DVLA and CHC's adverse employment action. CHC argues that such a causal connection cannot reasonably be inferred from the temporal proximity between the plaintiff's notice to CHC and her termination.

While proximity alone in general is not enough,[17] in some circumstances, where adverse employment actions follow "very

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[16] Under the FMLA, an employee provides adequate notice to an employer by providing notice of a covered condition, such as pregnancy. See 29 U.S.C. § 2612(e)(1); 29 C.F.R. § 825.302(c).

[17] See, e.g., Carrero-Ojeda v. Autoridad de Energía Eléctrica, 755 F.3d 711, 720 (1st Cir. 2014) (while "temporal proximity is one factor from which an employer's bad motive can be inferred, by itself, it is not enough"); Huskey v. San Jose, 204 F.3d 893, 899 (9th Cir. 2000) (retaliation cannot be inferred from temporal proximity alone because to do so "would be to engage in the logical fallacy of post hoc, ergo propter hoc, literally, 'after this, therefore because of this'").

close[ly]" on the heels of protected activity, a causal relationship may be inferred. Mole, 442 Mass. at 595, quoting Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001). See generally Mickey v. Ziedler Tool & Die Co., 516 F.3d 516, 523-525 (6th Cir. 2008).

The complaint alleges that the plaintiff had been aggressively recruited by CHC. She had undergone further vetting, had accepted CHC's offer of employment, and had been issued an identification badge and employee identification number. She was scheduled to begin training. She then provided notice to CHC. Within two weeks and, as alleged in the complaint, in an otherwise inexplicable about face, CHC terminated her employment. In these circumstances, the adverse employment action "very close" to the protected activity was sufficient, for purposes of pleading, to suggest the requisite "but for" causation. Compare, e.g., Ramirez v. Oklahoma Dep't of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994).

c. Interference claim. The complaint also alleges that CHC's termination of the plaintiff's employment unlawfully interfered with the exercise of her statutory rights to leave. General Laws c. 149, § 52E (h), provides that "[n]o employer shall coerce, interfere with, restrain or deny the exercise of,

or any attempt to exercise, any rights provided under this section."[18]

CHC's contention that the interference claim failed to state a claim upon which relief may be granted is based on the same arguments discussed supra: that the plaintiff was not an employee and that she did not provide "appropriate advance notice of the leave." The argument that the interference claim properly was dismissed thus is unavailing, for the reasons discussed supra.

3. Public policy. The plaintiff also claims that her termination was against public policy. In light of the specific protections of the DVLA, that claim properly was dismissed. The well-established principle that "an at-will employee has a cause of action for wrongful discharge if the discharge is contrary to public policy," DeRose v. Putnam Mgt. Co., 398 Mass. 205, 210 (1986), is narrow, see Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456, 471 (2017), and does not apply where "the Legislature has also prescribed a statutory remedy," Mello v. Stop & Shop Cos., 402 Mass. 555, 557 (1988). See Melley v.

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[18] General Laws c. 149, § 52 (h), provides in full:

> "No employer shall coerce, interfere with, restrain or deny the exercise of, or any attempt to exercise, any rights provided under this section or to make leave requested or taken hereunder contingent upon whether or not the victim maintains contact with the alleged abuser."

Gillette Corp., 19 Mass. App. Ct. 511, 513 (1985), S.C., 397 Mass. 1004 (1986) ("We think that where, as here, there is a comprehensive remedial statute, the creation of a new common law action based on the public policy expressed in that statute would interfere with that remedial scheme").

The DVLA represents the Legislature's measured judgment with respect to the necessary relief for victims of abusive behavior regarding leave from their employment in order to address the effects of that abuse, and the mechanisms of enforcement against employers who interfere with or retaliate against an employee's use of its statutory protections. Accordingly, a separate public policy ground for relief is unavailable.

Conclusion. So much of the Superior Court judge's order that allowed the motion to dismiss count three of the plaintiff's complaint is affirmed. With respect to the other counts, the allowance of the motion to dismiss is vacated and set aside, and the matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

CYPHER, J. (concurring). I agree that the employee's claim should be permitted to proceed, although on public policy grounds rather than pursuant to the statute. I agree with my dissenting colleague, Justice Georges, that the employee did not plead sufficient facts to satisfy the statute. It appears to me that on the facts before us the plaintiff would not have a common-law claim that would mirror her statutory claim. See G. L. c. 149, § 52E.

When considering whether public policy prohibits a termination, "[t]he question is whether a well-established public policy is served by denying the employer the right freely to discharge an employee for engaging in particular conduct." Shea v. Emmanuel College, 425 Mass. 761, 762 (1997). A termination violates public policy where it is based on an employee's decision to (1) assert a legal right, (2) do what the law requires, (3) refuse to do that which the law forbids, or (4) perform important public deeds. Flesner v. Technical Communications Corp., 410 Mass. 805, 810-811 (1991) (cooperating with governmental investigation). See Shea, supra at 763 (reporting criminal activity); Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 404 Mass. 145, 149-150 (1989) (filing worker's compensation claim).

The Commonwealth has a well-established public policy against domestic abuse. This policy has been recognized in case

law. Champagne v. Champagne, 429 Mass. 324, 327 (1999). The Legislature has expressed this public policy through the many statutes punishing domestic abuse and protecting victims of such abuse. See, e.g., G. L. c. 276A, § 4 (defendant charged with assault or assault and battery on household member, G. L. c. 265, § 13M, not eligible for pretrial diversion); G. L. c. 209A (abuse prevention order); G. L. c. 258E (harassment prevention order). And the executive branch has issued numerous orders concerning domestic violence.[1]

If an employee has a statutory remedy, then there is no cause of action based on public policy. Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456, 471 (2017). Here, however, it does not appear that there is a statutory remedy for a termination made after an employee advises an employer that she will be asserting her legal rights in enforcing a harassment prevention order but does not yet need leave or does not request future leave. Merely because there is a statutory remedy for one aspect of a public policy does not mean that an employee

[1] See Executive Order No. 586 (Apr. 10, 2019); Executive Order No. 563 (Apr. 27, 2015); Executive Order No. 486 (May 25, 2007); Executive Order No. 450 (May 7, 2003); Executive Order No. 357 (July 8, 1993); Executive Order No. 334 (Apr. 10, 1992). Various of these executive orders have declared a state of emergency "resulting from the unacceptable frequency and severity of domestic violence." Executive Order No. 334 (revoked and superseded by Executive Order No. 357). Executive Order No. 450 (revoking and superseding Executive Order No. 357).

cannot seek the protection of the public policy exception for violations of the public policy that the statute does not cover. Rather, "the common law public policy exception is not called into play" when there is an express statutory remedy for termination. King v. Driscoll, 418 Mass. 576, 584 n.7 (1994), S.C., 424 Mass. 1 (1996). In this case, the employee was availing herself of her legal rights and was attempting to protect herself from harassment. I think that her pleading was sufficient to invoke the public policy exception.

GEORGES, J. (dissenting, with whom Gaziano, J., joins). I agree with the court that the plaintiff's complaint alleged sufficient facts to establish that she was an "employee" under the Domestic Violence and Abuse Leave Act (act), G. L. c. 149, § 52E (§ 52E). See ante at . For purposes of the defendant Children's Hospital Corporation's (CHC's) motion to dismiss, we must accept these factual allegations as true. See Ryan v. Mary Anne Morse Healthcare Corp., 483 Mass. 612, 614 (2019). In addition, I agree that because the act already provides employees with a statutory cause of action to vindicate their leave rights, a separate public policy ground for relief thus is unavailable here.

However, I believe a plain reading of the act requires us to conclude that the plaintiff did not provide CHC with "appropriate advance notice" of any request for leave, see G. L. c. 149, § 52E (d), which is a prerequisite for any claim of retaliation or unlawful interference under the statute. Accordingly, because I would hold that the plaintiff's complaint did not state a claim under the act for which relief may be granted, I respectfully dissent.

Statutory interpretation. When interpreting a statute, as here, this court adheres to the familiar principle that "[t]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain,

. . . the sole function of the courts is to enforce it according to its terms." Commonwealth v. Beverly, 485 Mass. 1, 11 (2020), quoting Commonwealth v. Soto, 476 Mass. 436, 438 (2017). In doing so, we often look "to the language of the entire statute, not just a single sentence, and attempt to interpret all of its terms 'harmoniously to effectuate the intent of the Legislature.'" Commonwealth v. Hanson H., 464 Mass. 807, 810 (2013), quoting Commonwealth v. Raposo, 453 Mass. 739, 745 (2009). Importantly, "[w]e do not 'read into [a] statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.'" Doe v. Board of Registration in Med., 485 Mass. 554, 562 (2020), quoting Fernandes v. Attleboro Hous. Auth., 470 Mass. 117, 129 (2014). See Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 712-713 (2018) (declining to broaden scope of term "wages" under Wage Act to encompass "sick pay" because "ordinarily we will not add language to a statute where the Legislature itself has not done so").

The act provides victims of harassment and abuse with the right to take leave from work for reasons related to harassment or abusive behavior. Specifically, the statute affords up to fifteen days of leave per year to employees who are victims of harassment or abuse, G. L. c. 149, § 52E (b) (i), for the purpose of addressing, among other things, "issues directly

related to the abusive behavior against the employee or family member of the employee," G. L. c. 149, § 52E (b) (ii). The statute also provides for various causes of action against employers who violate this employment leave entitlement, including for retaliation[1] and unlawful interference.[2]

By its plain language, the act affords employees leave protections only when an employee specifically gives "appropriate advance notice of the leave to the employer." G. L. c. 149, § 52E (d).[3] Generally, such notice is to be given

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[1] General Laws c. 149, § 52E (i), states, in pertinent part: "No employer shall discharge or in any other manner discriminate against an employee for exercising the employee's rights under this section."

[2] General Laws c. 149, § 52E (h), provides: "No employer shall coerce, interfere with, restrain or deny the exercise of, or any attempt to exercise, any rights provided under this section or to make leave requested or taken hereunder contingent upon whether or not the victim maintains contact with the alleged abuser."

[3] General Laws c. 149, § 52E (d), provides, in relevant part:

> "Except in cases of imminent danger to the health or safety of an employee, an employee seeking leave from work under this section shall provide appropriate advance notice of the leave to the employer as required by the employer's leave policy.
>
> "If there is a threat of imminent danger to the health or safety of an employee or the employee's family member, the employee shall not be required to provide advanced notice of leave; provided, however, that the employee shall notify the employer within [three] workdays that the leave was taken or is being taken under this section."

prior to taking the leave, although if "there is a threat of imminent danger to the health or safety of an employee or the employee's family member," the notice may be provided within three work days after the leave was taken. Id. Although the act does not expressly define the phrase "appropriate advance notice," we adhere to the familiar principle that "[w]ords are to be accorded their ordinary meaning and approved usage." Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3, 458 Mass. 155, 162 (2010). As the court notes, the plain and ordinary meaning of the words "appropriate," "advance," and "notice," together in this context, are understood to mean a "suitable announcement or intimation given ahead of the impending leave is needed" (quotation omitted). Ante at .

The plaintiff's complaint did not allege, however, that she ever requested any leave to enforce her harassment prevention order (HPO), that she told CHC that she would need leave to do so, or that she intended to request leave for any other protected purpose under subsection (b) (ii) of the act.[4] Rather,

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[4] Specifically, G. L. c. 149, § 52E (b) (ii), provides, in relevant part:

> "(b) An employer shall permit an employee to take up to [fifteen] days of leave from work in any [twelve] month period if:
>
> ". . .

the complaint alleged only that the plaintiff reported the abuser's violation of the HPO to police "so they could begin enforcement proceedings" and that the plaintiff "informed [CHC] that she was pursuing enforcement of the [HPO]." Based on these allegations, CHC had notice that the plaintiff intended to enforce the HPO against her abuser, but it did not have notice that she requested (or intended to request) any leave in order to do so. Indeed, the court all but concedes that the plaintiff had not requested any leave before she was terminated. See ante at (plaintiff's "disclosure was enough to put CHC on notice that, while the plaintiff did not then know of any specific date on which she would require leave, she might need to exercise the leave provisions of the [act]"). In my view, where an employee announces simply that he or she is taking action generally to enforce an HPO, it does not follow that the employee intends to take, or necessarily would need to take, a leave from work to do so.

> "(ii) the employee is using the leave from work to: seek or obtain medical attention, counseling, victim services or legal assistance; secure housing; obtain a protective order from a court; appear in court or before a grand jury; meet with a district attorney or other law enforcement official; or attend child custody proceedings or address other issues directly related to the abusive behavior against the employee or family member of the employee . . . ."

The plaintiff argues that she provided CHC with "appropriate advance notice" of her request for leave when she informed its human resources officer that she was "engaged in efforts with the police to enforce the HPO." For support, the plaintiff analogizes the act's notice requirement in § 52E (d) to the regulations implementing the Family Medical Leave Act (FMLA), under which employees need only state an "FMLA-qualifying reason" for leave in order properly to invoke its leave protections. 29 C.F.R. § 825.302(c). The plaintiff contends, and the court agrees, that an employee's provision to her employer of the existence of an HPO, or merely the existence of an abusive relationship for which an employee is seeking assistance, affords an employer notice of a "condition precedent" that is sufficient to invoke the act's leave protections, even in the absence of any discernable request for any amount of leave. See ante at .

The problem is that the act and the FMLA are written, and indeed are structured, quite differently. The act expressly requires that, in order for an employee to invoke properly his or her leave rights under the statute -- such as taking leave to enforce an HPO by appearing in court -- the employee first must give his or her employer notice of a request for leave. That the focus of the notice is on the leave itself, and not simply a reason that could support an eventual request for leave, is

confirmed by other provisions of the statute. See G. L. c. 149, § 52E (g) (employee must exhaust all other available leave "prior to requesting or taking leave under this section, unless the employer waives this requirement" [emphasis added]); G. L. c. 149, § 52E (i) ("The taking of leave under this section shall not result in the loss of any employment benefit accrued prior to the date on which the leave taken under this section commenced"). Reading the act's notice requirement in the context of the statute as a whole, an employee's "appropriate advance notice" may come in the form of a specific request for time off on a particular date, or a statement of the need for some number of days of leave time within the next thirty days. See G. L. c. 149, § 52E (d) ("If an unscheduled absence occurs, an employer shall not take any negative action against the employee if the employee, within [thirty] days from the unauthorized absence," furnishes qualifying documentation pursuant to § 52E [e]).

In contrast, the regulations implementing the FMLA's notice requirements reflect that the FMLA contains a much broader leave provision, and more general notice requirements, than the act. The FMLA contains statutory leave protections for specific "foreseeable leave" conditions, such as pregnancy, adoption, or planned medical treatment for a "serious health condition." 29 U.S.C. § 2612(a), (e)(1)-(2). See 29 C.F.R. § 825.113(a)

("serious health condition" involves inpatient care or continuing treatment). The implementing regulations of the FMLA state expressly that notice of an FMLA-qualifying reason itself is sufficient to trigger its statutory protections and that "the employee need not expressly assert rights under the FMLA or even mention the FMLA" when requesting leave for the first time. See 29 C.F.R. § 825.302(c).

The foreseeable leave notice provisions are reasonable given the nature of FMLA leave, which contemplates, among other things, up to twelve weeks of leave (or twenty-six weeks for military service), 29 U.S.C. § 2612(a)(1)-(3); the employee's absence from work during the leave period due to one or more qualifying conditions, 29 U.S.C. § 2612(a)(1)(A)-(E); and the understanding that the leave generally may not be taken intermittently, 29 U.S.C. § 2612(b)(1). Even for a condition such as pregnancy or adoption, to which the foreseeable leave provisions of the FMLA are applicable, an employee seeking leave under the FMLA must still, at a minimum, communicate to the employer an "intention" to take such leave, generally at least thirty days before doing so.[5]

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[5] Title 29 U.S.C. § 2612(e)(1) provides:

> "In any case in which the necessity for leave . . . is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than [thirty] days' notice, before the date the leave is to

The plain terms of the act, however, contain no analogously general provision for "foreseeable leave" conditions. Rather, the act requires that an employee give his or her employer notice of the leave requested in order to trigger the statutory protections, and not simply provide a reason that leave may (or may not) be needed at some unknown future point in time. See G. L. c. 149, § 52E (d) ("an employee seeking leave from work under this section shall provide appropriate advance notice of the leave to the employer" [emphasis added]). Furthermore, and in contrast to the FMLA, leave under the act is measured in days, not weeks, and it is provided to allow employees to participate in legal proceedings, meet with law enforcement officers, obtain or enforce HPOs, or "address other issues directly related to the abusive behavior." G. L. c. 149, § 52E (b) (ii).

Unlike a qualifying condition under the FMLA, which necessitates that the employee be absent from his or her position, the existence of an HPO, alone, or its enforcement, does not necessarily mean that an employee will need to be absent from work. This is because the nature and scope of any

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begin, of the employee's intention to take leave . . . , except that if the date of the birth or placement requires leave to begin in less than [thirty] days, the employee shall provide such notice as is practicable" (emphases added).

judicial proceedings to enforce the plaintiff's HPO would be shaped by events that were yet to occur, may not happen, and may be able to proceed without the plaintiff's presence. When the plaintiff informed CHC of the existence of the HPO and her intention to enforce it, it was far from clear whether her efforts would require her to take time off from work and, if so, approximately when or for roughly how long.[6] Simply put, I am not persuaded that the plaintiff's complaint contained enough "factual heft," Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 609 (2017), to support the conclusion that the plaintiff had requested leave, or that she had any intention of requesting leave.[7]

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[6] This key fact is also what distinguishes this case from Federal cases holding that an employer had "reasonably adequate" notice of an employee's need for leave under the FMLA. See, e.g., Sarnowski v. Air Brooke Limousine, Inc., 510 F.3d 398, 403 (3d Cir. 2007) (defendant employer had sufficient notice of leave because plaintiff "missed approximately six weeks of work" for surgery, "informed his supervisor of his need for monitoring and possible additional surgery," and "made it clear to his employer that his health problems were continuing"); Mascioli v. Arby's Restaurant Group, Inc., 610 F. Supp. 2d 419, 435 (W.D. Pa. 2009) (defendant employer had sufficient notice of leave under FMLA because "[p]laintiff communicated her medical condition to defendant, and conveyed that future time off may be necessary because of her medical condition").

[7] The plaintiff also contends, and the court agrees, that CHC understood her disclosure as an implied request for leave because CHC requested "additional details" from her regarding the HPO pursuant to G. L. c. 149, § 52E (e) (§ 52E [e]). See ante at . That provision states that "[a]n employer may require an employee to provide documentation evidencing that the employee . . . has been a victim of abusive behavior and that

Furthermore, interpreting the act's notice requirement according to its plain terms "would not lead to an 'absurd result,' or contravene the Legislature's clear intent." Desrosiers v. Governor, 486 Mass. 369, 376 (2020), quoting Commonwealth v. Kelly, 470 Mass. 682, 689 (2015). Interpreting the act to require that employees make an affirmative request for leave would not "discourage [employees] from pursuing enforcement actions against their abusers," ante at , but rather would ensure that employers have a clear understanding of when an employee needs to take advantage of his or her statutory leave rights. Even in an emergency situation where the employee's health or safety is in imminent danger, the employee is not placed in danger by the notice requirement, as the employee is permitted to first take the necessary leave and then

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the leave taken is consistent with the conditions [set forth in the statute]." G. L. c. 149, § 52E (e).

However, the complaint did not allege that CHC exercised any of its rights under the act. The complaint alleged only that "[the plaintiff] provided [CHC] with copies of the [HPO]" and that "[CHC] responded to [the abuser's] false post by requesting more information from [the abuser] about [the plaintiff]." The complaint did not allege that CHC requested a copy of the HPO from the plaintiff, let alone required her to furnish the document as contemplated by § 52E (e). In any event, CHC's request for more information regarding the abuser's false social media post is in no way indicative of whether the plaintiff did, or would have, requested leave for any purpose enumerated in § 52E (b) (ii).

provide notice to the employer within three days thereafter.[8] See G. L. c. 149, § 52E (d).

If the Legislature intended for an employee's provision of a "condition precedent" for leave, without more, to satisfy the act's notice requirement, then the FMLA is a clear example of how the Legislature could have written the statute to effectuate that intent. Because the two statutes are distinguishable readily in both language and structure, however, I believe enforcing the act's notice requirement according to its plain

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[8] Relatedly, while CHC was within its rights to communicate with the plaintiff's abuser, I wish to emphasize that doing so could have posed a significant risk to the plaintiff's safety, which the HPO was intended to protect. In light of the risk of future incidents of abuse or harassment that could be inflicted by perpetrators, victims often will not want a perpetrator to have any information about the victim's whereabouts or efforts to enforce a protective order. I believe the Legislature clearly has recognized these concerns. See G. L. c. 149, § 52E (f) ("All information related to the employee's leave under this section shall be kept confidential by the employer and shall not be disclosed," save for certain enumerated exceptions).

In this case, even though I would conclude that the plaintiff did not request or attempt to request leave under the act, I nonetheless believe CHC's efforts to "hear [the abuser's] side of the story" unwittingly could have provided the abuser with information about the plaintiff's location and a renewed opportunity to inflict further harassment, thereby undermining the protective purposes of the HPO. To avoid such risks, I believe it behooves employers in CHC's position, who seek to investigate the backgrounds of new or potential employees, to exercise the utmost caution in their approach, including in determining in the first instance whether direct contact with the subject of the HPO is necessary or appropriate.

terms does no more (and no less) than simply abide by the Legislature's measured judgment in enacting the act.

In sum, while our review of a decision on a motion to dismiss requires us to accept all of the plaintiff's allegations as true, and to draw all reasonable inferences in her favor, I believe the facts alleged in the complaint are insufficient to demonstrate that the plaintiff requested any leave as required to invoke the act's statutory protections.[9] Accordingly, I would hold that the plaintiff failed to state a claim for either retaliation under G. L. c. 149, § 52E (i), or unlawful interference under G. L. c. 149, § 52E (h).

Conclusion. For the foregoing reasons, I would affirm the Superior Court judge's allowance of CHC's motion to dismiss. I respectfully dissent.

[9] Despite given the opportunity to do so, the plaintiff did not amend her complaint to allege additional facts showing that she actually requested leave, or that she notified CHC that she intended to request leave. In my view, this fact is indicative of the plaintiff's own realization that her claims were unfounded.