

Commonwealth Not Immune for Decision of State Police K-9 Handler to Release Dog

Dudley v. Massachusetts State Police, 91 Mass. App. Ct. 616 (June 1, 2017)

The Appeals Court has taken yet another bite out of the immunity traditionally afforded public employers under the Massachusetts Tort Claims Act (MTCA).

In *Dudley v. Massachusetts State Police*, the Court rejected the Massachusetts State Police's (State police) discretionary immunity claim for the decision of a state trooper, Trooper Edward T. Blackwell, to release his K-9 unit after a fleeing suspect, William P. Monopoli.

Mr. Monopoli led State police on a high speed chase through several communities before crashing his vehicle on a highway off-ramp in West Bridgewater. Mr. Monopoli then fled on foot through a commuter "park and ride" lot as Trooper Blackwell arrived at the scene of the crash with his 82-pound German Shepherd, "Jager." Trooper Blackwell ordered Mr. Monopoli to give himself up, or he would release Jager. Mr. Monopoli chose to keep fleeing and, as promised, Trooper Blackwell released Jager and ordered him to apprehend Mr. Monopoli. Unfortunately, Jager instead attempted to bite and hold an innocent onlooker in the nearby parking lot, the plaintiff, Richard Dudley, Jr.

Mr. Dudley filed suit against the State police under the MTCA, seeking damages for Trooper Blackwell's allegedly negligent decision to release Jager and order him to attack in a busy commuter parking lot. The State police moved for summary judgment, claiming entitlement to, inter alia, discretionary function immunity under Section 10(b) of the MTCA. The trial court granted the motion and dismissed the case on the strength of *Audette v. Commonwealth*, 63 Mass. App. Ct. 727 (2005).

In *Audette*, the Court granted discretionary function immunity under virtually identical circumstances, holding that police K-9 handlers:

had the discretion to decide when to release a K-9 unit; and
the decision was the type of decision afforded protection under Section 10(b).

Instead of following its own precedent, the *Dudley* Court distinguished *Audette* on the grounds that, in that case, the dog was not instructed to attack, but merely commanded to check a vehicle for drugs. In comparison, according to the *Dudley* Court, Trooper Blackwell ordered Jager to attack, thereby requiring a different result. The Court ruled that, at the summary judgment stage, it could not be determined whether Trooper Blackwell's conduct in commanding and releasing the dog involved the use of planning or policy making or, instead, the carrying out of the State police's general policy regarding canine use in the field. The Court also gave short shrift to the State police's claim to Section 10(j) immunity, holding that Trooper Blackwell's affirmative act of releasing the dog could be fairly viewed as the original cause of the harm.

The *Dudley* decision is curious for two reasons. First, it is not clear why the Court did not grant the State police immunity under Section 10(h) of the MTCA. Added to the MTCA in 1994, Section 10(h) affords immunity for a variety of police services, including the failure to "identify or apprehend criminals or suspects, [or] arrest or detain suspects . . ." The Legislature clearly chose not to saddle officers with fear of liability as they make split-second decisions, with the difference

between life and death often hanging in the balance. Trooper Blackwell, it appears, was engaged in police activity when he commanded and released Jager.

Second, the *Dudley* Court's analysis with respect to *Audette* is suspect. It is difficult to reconcile the two cases - the decision to release a police dog is either the type of decision protected by immunity, or it is not. Trooper Blackwell was no less carrying out existing policy than was the officer in *Audette*, a fact that somehow was a nonissue in *Audette*, yet outcome determinative in *Dudley*.

The *Dudley* Court appears to have held that because Trooper Blackwell's decision to release his dog was more culpable than the officer's decision in *Audette*, it should not be protected. The character of a decision to release a police dog does not change, however, based upon degree of blame. As the Appeals Court has recognized, immunity is not needed for acts that are free from culpability. *Anderson v. City of Gloucester*, 75 Mass. App. Ct. 429, 435, rev. den. 455 Mass. 1105 (2009).