COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-517

FALMOUTH FIRE FIGHTERS' UNION,
LOCAL 1497 & another[1]

vs.

TOWN OF FALMOUTH & another[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In 2008 and 2009, pursuant to a police investigation and lawsuit, the Town of Falmouth Information Technologies Department reviewed and copied emails of plaintiff Russell Ferreira ("Ferreira"), President of the Falmouth Firefighters' Union, Local 1497 ("the Firefighters' Union"). Ferreira and the Firefighters' Union (collectively "the plaintiffs") subsequently brought this action against the Town of Falmouth ("the Town") and Town Administrator Robert Whritenour (collectively "the defendants") for breach of privacy.[3] The defendants now seek summary judgment, arguing, in part, that Ferreira had no reasonable expectation of privacy in the emails. This court agrees. The defendants' motion for summary judgment is therefore ALLOWED.

1 Russell Ferreira
2 Robert Whritenour, in his capacity as Town Administrator for the Town of Falmouth
3 The plaintiffs also claimed conversion (Count II) and tortious inference (Count III). The parties, however, agreed to dismiss these counts under Mass. R. Civ. P. 41(a)(1).

BACKGROUND

Viewed in the light most favorable to the plaintiffs, the pertinent facts are as follows. Ferreira is a Town firefighter and President of the Firefighters' Union. The Firefighters' Union is a duly certified union for the Town's firefighters and officers.

The Town promulgated a new email policy in 2003. The policy, contained in the Town's Employee Handbook, provides

> The Town of Falmouth utilizes a system where employees receive and send messages through a computer mail system, email. Computer mail is intended for business use.
>
> In keeping with this intention, we maintain the ability to access any messages left on or transmitted over the system. Because of this fact, employees should not assume that such messages are confidential or that access by the employer or its designated representatives will not occur.

In a letter to the Town Administrator dated September 11, 2003, the Firefighters' Union informed him that the Town's internet policy was subject to collective bargaining and could not be imposed on the Union without negotiations. The Town then raised the subject during negotiations for a new collective bargaining agreement. The agreement, covering the period from July 1, 2001 through June 30, 2004, included a provision which stated "[n]ot withstanding the settlement of this [a]greement the parties shall continue to negotiate the matter of the Town's policy on e-mail and internet usage." No agreement with respect to the Town's email policy was ever reached. The Town also never told the firefighters that their emails were confidential.

From July 23, 2007 to August 19, 2009, the Town used Gmail, a free service offered by Google, for its email. The contract for the use of Gmail was between Google and the Town, and the Town purchased the domain names used for the email accounts. Each Town employee was given a Gmail address and managed the email sent to his or her address. Once read, the

employee could save the email, delete the email or do nothing, meaning that the email would remain in Gmail. The Town did not have a system that saved emails on any Town computer server or disc. The Town was, however, the administrator for the email accounts. The Town's email system was widely used by employees for personal communications. The firefighters also used the email system for union-related communications.

On June 9, 2008, the Town's Information Technologies Department changed four firefighters' email access passwords, including Ferreira's, at the request of the Falmouth Police Department. The four firefighters continued to receive email under new passwords. They no longer, however, had access to the emails saved under their old passwords. Pursuant to the investigation, the Falmouth Police copied a number of email messages between Ferreira and two women. The emails involved discussions of personal relationships, including some that were romantic or sexual in content. These emails were subsequently provided to the Town Administrator.

When the investigation was complete, the four firefighters were given new passwords that allowed them to access the emails saved under their old passwords. Thereafter, the Town's Information Technologies Department received another request from the Falmouth Police to temporarily freeze the four firefighters' email. In 2009, a third request to review the emails was received from the attorney representing the Town in a charge of sexual harassment brought by a former Town employee. Pursuant to this request, the Town's Information Technology Director Grant Major ("Major") copied approximately twenty of Ferreira's email messages. Major testified that the emails related to "[d]iscussions of relationships, whose cheating on who, stuff like that . . . I was your friend, now I'm not . . . [s]ome swearing . . . ." Major may have provided these emails to the Town Administrator.

DISCUSSION

Summary judgment is a "device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved." *Cassesso* v. *Comm'r of Corr.*, 390 Mass. 419, 422 (1983), quoting *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). Summary judgment is granted when there is no genuine issue of material fact and the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso*, 390 Mass. at 422. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles it to judgment as a matter of law. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 17 (1989). The moving party may satisfy its burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element. *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *Gen. Motors*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the burden shifts to the nonmoving party to respond by "set[ting] forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56(e); *Kourouvacilis*, 410 Mass. at 716.

Ferreira claims that the defendants violated the Massachusetts Privacy Act, G. L. c. 214, § 1B, when they disseminated his emails, containing highly personal and intimate information, to Town Administrator Robert Whritenour. Ferreira alleges that he had an expectation of privacy in his emails.

General Laws c. 214, § 1B provides "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." In order to maintain a viable invasion of

privacy claim, Ferreira needs to show an expectation of privacy and an unreasonable and either serious or substantial interference with his privacy. See *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 409 Mass. 514, 521-522 (1991); *Lemire v. Silva*, 104 F. Supp. 2d 80, 93 (D.Mass. 2000).

The parties cite no Massachusetts State Court case, and the court is aware of none, that addresses under what circumstances an employee has a reasonable expectation of privacy in his or her work email. The court notes that the "Legislature appears to have framed [G. L. c. 214, § 1B] in broad terms so that the courts can develop the law thereunder on a case-by-case basis, by balancing relevant factors, and by considering prevailing societal values and the ability to enter orders which are practical and capable of reasonable enforcement." *Merrill Lynch*, 409 Mass. at 519 (internal citations omitted).

In this instance, the court concludes that Ferreira had no privacy interest in the emails. Ferreira's opposition emphasizes that the Town's email policy was never adopted by the Union and that employee emails are stored on a third party server. While this may be true, the relevant inquiry is whether Ferreira's claimed expectation of privacy is reasonable. *Garrity v. John Hancock Mut. Life Ins.*, 2002 WL 974676, *1 (D.Mass. 2002), citing *Tedeschi v. Reardon*, 5 F. Supp. 2d 40, 46 (D.Mass. 1998).

On the record before the court, Ferreira did not have a reasonable expectation of privacy in the emails he voluntarily sent over the Town's email system absent any assurances that such communications were private or confidential. Once Ferreira sent the emails containing highly personal and intimate information to a second person any reasonable expectation of privacy was lost. "Significantly, the defendant did not require plaintiff, as in the case of an urinalysis or personal property search to disclose any personal information about himself. Rather, plaintiff

voluntarily communicated the alleged [personal and intimate] comments over the [Town's] e-mail system." *Garrity v. John Hancock Mut. Life Ins.*, 2002 WL 974676, *1 (D.Mass. 2002), citing *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D.Pa. 1996). For these reasons, the court finds no reasonable privacy interests in Ferreira's emails.

ORDER

For the foregoing reasons, the defendants' motion for summary judgment is **ALLOWED**.

Christopher J. Muse
Justice of the Superior Court

Dated: February 2, 2011