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Original Content

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Principal's Response to Complaint Could Be Actionable

A federal court in New York recently ruled that a teacher can amend her complaint to include a claim against her principal, individually, for retaliation, but not discrimination. In *Eldridge v. Rochester City Sch. Dist.*, Eldridge claimed that the principal discriminated against her because of her race, and retaliated against her for making internal complaints. The complaint alleged that her name was removed from her mailbox, she was not issued a key, was sent harassing emails, was subjected to an internal investigation by a police officer, rather than by human resources as mandated by District policy, and received threats that she would be transferred to a "less desirable school." 2013 WL 5104279 (W.D.N.Y. 2013). The school district and principal opposed Eldridge's proposed amendments, claiming that they are futile and lack merit.

Eldridge's two proposed causes of action under 42 U.S.C. 1983 — discrimination and retaliation — mandate that plaintiff allege having suffered an "adverse employment action." However, the threshold demonstration to satisfy this element under the two causes of action is much different, which is why the Court denied Eldridge leave to add the discrimination claim, but granted her leave to include the retaliation claim.

To constitute an "adverse employment action" under a 1983 discrimination claim, a plaintiff must allege having suffered a "materially adverse change in the terms and conditions of employment." This "must be more disruptive than a mere inconvenience or an alteration of job responsibilities. Actions that cause a plaintiff embarrassment or anxiety are insufficient to qualify. * * * To be materially adverse, the action must have a negative consequence, such as a demotion, a reduction of wages, a loss of benefits or a significant loss of material responsibilities." *Eldridge*, at *8. Here, the only factual allegation which could potentially

suffice surround a transfer to a "less desirable school." Transfers can constitute adverse employment actions in certain circumstances; however, without any loss of salary, benefits, or some other set back in plaintiff's career, a transfer will not suffice. Further, Eldridge was never actually transferred — she was only threatened with a transfer. As such, her 1983 claim for discrimination failed.

Under a 1983 retaliation claim, however, the standard for "adverse employment action" is *lower* than that for discrimination. In retaliation cases a plaintiff need only allege facts that demonstrate that an employee would be dissuaded from engaging in a protected activity, *i.e.* the filing internal complaints. Here, the courts consider the actions "separately, and in the aggregate, as even minor acts of retaliation can be sufficiently substantial in gross as to be actionable." *Id.* at *10. Eldridge alleges that after she made internal complaints of racial discrimination, the Principal subjected her to an investigation which did not conform with District policy, and began pressuring and threatening to transfer her to another school. The Court held that these actions could dissuade a reasonable employee from engaging in protected activities, and thus Eldridge adequately alleged having suffered an "adverse employment action" for the Section 1983 retaliation claim.

Absolute Privilege to Defame

Sometimes a defendant's clearly wrongful behavior, for one reason or another, simply does not amount to a legally cognizable civil cause of action. The case of *Savitt v. Estate of Passantino*, is a perfect example of failing to state a legal cause of action, despite what most would consider reprehensible conduct, if true. 41 Misc.3d 1219(A), 2013 N.Y. Slip Op. 51769(U) (Sup. Ct. N.Y. Cnty. 2013).

According to the complaint, Savitt, an attorney, and Nick Passantino ("Santino") met when Santino was referred to him for legal services, which Savitt declined. Sometime thereafter, Savitt began receiving threatening messages from Santino. Then, while at a sports club, Santino allegedly confronted Savitt, attempted to hit him in the head from the behind with a dumbbell, slapped him and then ran away. Savitt claims he filed police reports after several run-ins with Santino, but there was no arrest or order of protection.

The Complaint further alleges that the two met again in December 2011 during a court proceeding, where Santino threatened Savitt's life in the courtroom, and was subsequently thrown out. Santino then began writing emails to another attorney, Abderashmann, wherein he made allegedly false statements about Savitt. Abderashmann was a friend of Savitt's, and was representing the defendant in a case where Santino was the *pro se* plaintiff, and Savitt had previously assisted the defendant prior to Abderashmann's retention. Savitt claims that Santino also sent a letter to the judge in that case containing false statements about Savitt —

namely that Savitt was an "unethical attorney" who took his money and provided no legal services. Santino committed suicide before Savitt's complaint was filed.

Savitt's complaint sought over $1,000,000 from Santino's Estate for libel and slander *per se*, and for harassment, among other things. The Estate moved to dismiss the entire complaint. With respect to the libel and slander claims, the Estate claimed that the allegedly defamatory statements were subject to an "absolute privilege" barring any liability.

> *An absolute privilege is based upon a communicator's official participation in the process of government, and is intended to insulate him from any inhibitions in carrying out that function. Attorneys are considered as much protected participants in this process as are Judges, jurors, parties and witnesses. Furthermore, the privilege is not limited to statements made in open court, but also embraces communications between attorneys as long as the subject of an out-of-court communication relates to pending or contemplated litigation, and is made in connection with a judicial proceeding.*

Savitt, at *3.

Here, the allegedly defamatory statements made by Santino were made in the courthouse, in emails sent to opposing counsel Abderashmann, and in a letter sent to the judge presiding over Santino's proceeding. These statements, made in open court, and out-of-court, were made in connection with a pending litigation in which Santino was the *pro se* plaintiff, and even if false or maliciously made, were nevertheless protected by an absolute privilege – hence the term "absolute." As a result, the defamation claims were dismissed. The law also recognizes a "qualified" privilege that has the same effect, but does not protect statements made with malicious intent – but we'll save this analysis for another day.

Savitt's other cause of action, for harassment, was also properly dismissed. Contrary to popular belief, "New York does not recognize a common-law civil cause of action for harassment." *Id.* Thus, regardless of the veracity of Savitt's allegations of physical threats and harassment, this cause of action was also dismissed.

Wartime Looting Does Not Establish Good Title

It is not every day that an ancient Mesopotamian artifact is the subject of a legal proceeding in Nassau County, New York. However, in *Matter of Flamenbaum*, this is what resulted when a three-thousand-year-old gold tablet dating back to the reign of Assyrian King Tukulti-Ninurta I (1243 – 1207 BC) resurfaced among the possessions of Riven Flamenbaum, resident of Nassau County and holocaust survivor, who passed away in 2003.

The decedent's daughter as executor of the Estate petitioned to judicially settle the final account, listing a "coin collection" as an asset of the Estate. Her brother, the decedent's son, filed objections to the accounting. He claimed that "one item identified as a 'gold wafer' which is believed to be an ancient Assyrian amulet" did not belong, as it was actually property of the Vorderasiatisches Museum in Berlin, Germany, and duly notified the Museum.

The Museum appeared before the Nassau Surrogate, and claimed title to the tablet. It produced one witness who testified that the tablet, along with many other artifacts, disappeared from the Museum near the end of World War II, and was likely taken by Russian or German troops, or those who took refuge in the Museum — but did not know which. A report from a professor of Assyriology at Yale University was submitted as well, which stated that the tablet was last seen in the hands of a dealer in New York in 1954.

After the hearing, the Surrogate's Court determined that although the Museum met its burden of proving superior legal title to the tablet, its claim was barred by the doctrine of laches. This equitable doctrine requires a demonstration that the Museum "failed to exercise reasonable diligence to locate the tablet and that such failure prejudiced the Estate." The Surrogate found that because the Museum failed to report the tablet's disappearance or list it on any international stolen art registries, the Estate's ability to defend against the Museum's claim to the tablet was diminished, and therefore prejudiced.

The Appellate Division disagreed and reversed the Surrogate. The Court of Appeals recently affirmed that reversal, holding that the essential element of "prejudice" was lacking.

> *While the Museum could have taken steps to locate the tablet, such as reporting it to the authorities or listing it on a stolen art registry, the Museum explained that it did not do so for many other missing items, as it would have been difficult to report each individual object that was missing after the war. Furthermore, the Estate provided no proof to support its claim that, had the Museum taken such steps, the Museum would have discovered, prior to the decedent's death, that he was in possession of the tablet.*

Further, as a matter of policy, the Court stated that "to place a burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would . . . encourage illicit trafficking in stolen art."

Similarly, the Court rejected the Estate's final claim that the tablet was a "spoil of war," and that the Russian government, when it invaded Germany, gained title to the Museum's property, and then transferred that title to the decedent. Even assuming the Estate proved such a transfer, the Court of Appeals declined to "adopt any doctrine that would establish good title based upon the looting and removal of cultural objects during wartime by a conquering military force."

As a result, the tablet must be returned to the Vorderasiatisches Museum in Berlin.