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## **MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE**

### **Second Department Partially Dismisses Plaintiff's Claims of Wrongful Retaliation from the Police Department.**

*Schultz v. Town of Wheatfield*, 2014 N.Y. Slip p 00827

Plaintiff commenced suit against his municipal employer, alleging that he was demoted from his rank of sergeant because he attempted, unsuccessfully, to run for political office. Plaintiff alleged five causes of action: the first for defamation (based upon a letter written by one of his superiors and given to a local newspaper); the second for constructive discharge; the third for violation of his due process (for demoting him without a proper hearing) and violation of his First Amendment rights. Defendants moved for summary judgment as to all claims. The Appellate Court found that the lower Court properly dismissed the defamation cause of action but held that it also should have dismissed plaintiff's First Amendment rights claim.

The Court held that defendants failed to eliminate all factual issues as to plaintiff's claims for constructive discharge and violation of due process because while defendants claim that a "sergeant" position never existed (and that plaintiff, thus, could not have been demoted from this position), their submissions failed to eliminate plaintiff's claim that his assignments and schedules were terminated in retaliation for his political activities.

However, the Court held that plaintiff's political activities are not exempt from political comment, even by his superiors, and that his claims for defamation and violation of First Amendment rights were properly dismissed. Notably, plaintiff did not even challenge the dismissal of his defamation claim on appeal.

### **Fourth Department Upholds Suppression of Incriminating Evidence Due to Lack of Reasonable Suspicion.**

*People v. Ingram*, 1115 KA 13-00437.

Defendant was searched and arrested after two police officers responded to an anonymous tip of two illegal firearms being stashed behind a building in a seedy Buffalo neighborhood. The two officers found defendant and his friend (a victim of a prior shooting) in

front of or near the building where these weapons were supposedly stashed. One officer began speaking to defendant's friend while the other noticed that defendant's eyes widened and that he began walking away swiftly. The second officer asked defendant what his name was. The defendant did not respond and, according to some muddled testimony, began pulling at his jacket to get something out of it. The officers began yelling "don't do it" in vain and eventually drew their weapons. Defendant then ran off on foot and a bulge in his jacket as he did. The officers ultimately, confiscated an illegal firearm from him.

At a suppression hearing, the gun and a statement defendant allegedly made were both suppressed from evidence. On appeal, the Fourth Department found this to be an appropriate ruling because the officers did not have the requisite reasonable suspicion to search him. The Court rejected the prosecution's argument that the anonymous tip was reliable and should have been considered in the circumstances that amounted to an alleged reasonable suspicion. The Court opined that the tip was not reliable because it did not specify the type of guns, who placed the guns in the location, the exact location of the guns or the identity of the speaker. Furthermore, the Court found that while the defendant was near the area (a high crime area) where the guns were supposedly stashed, the officers observed nothing about his behavior other than him walking swiftly away and not giving them his name. The Court deemed this to be insufficient justification for the search of defendant.

The Court did not even find the defendant's reaching and pulling at his jacket to rise to a reasonable suspicion because there was no visible indication that he had a weapon on him. It was not until the chase pursuit began that either of the officers noticed any type of bulging in his jacket.

The dissent found more than sufficient evidence to rise to a reasonable suspicion because the tip was reliable, the defendant was in a high crime area, he became nervous and evasive upon the officers' arrival and then vigorously pulled at his jacket. While the dissent agreed that the defendant's flight alone would not rise to a reasonable suspicion, the dissent opined that it would given all the other circumstances present.

### **First Department Upholds Spoliation Sanction Imposed Against a Gym That Disposed of an Allegedly Defective Treadmill.**

*Malouf v. Equinox Holdings Inc.*, 2014 N.Y. Slip Op. 00165 (1<sup>st</sup> Dept. 2014).

Plaintiff claimed that she fell off of a defective treadmill at the defendant's gym. Some two years after the alleged accident and during the pendency of the litigation, the gym was unable to make the treadmill available for inspection because it had been disposed of. Defendant gym procured an affidavit from the gym's manager stating that the treadmill had likely been removed as part of an upgrade and that there were also no particular documents concerning the treadmill at issue.

Upon motion of the plaintiff and third party defendant for spoliation of key evidence, the lower Court found it appropriate to sanction the gym by precluding it from offering any

affirmative evidence at trial that the treadmill was in good and proper working condition. The Court also struck the gym's third party complaint for improper machine maintenance because it had destroyed key evidence.

In rendering this decision, the Court emphasized that the gym had notice of the plaintiff's accident well before the lawsuit was filed and that the gym could not even provide a definitive explanation for how or why the treadmill was destroyed or any records at all concerning the treadmill.

**Court of Appeals Finds Municipality's Lawsuit Untimely Under All Proposed Theories of Liability for Damaged Roadways.**

*Town of Oyster Bay v. Lizza Ind. Inc.*, 2013 N.Y. Slip Op. 8370.

Plaintiffs were various municipal entities whose territories were damaged due to defective sewer work performed by defendants as part of their public works contract with Nassau and Suffolk County. The public works contract was entered into in the 1970s and the work complained of was completed at various points in the 1970s and 1980s. Post completion of the work, plaintiffs noticed roadway, sidewalk and curb damage due to defendant's improperly sewer line installation and commenced suit as a result.

Plaintiffs commenced suit in 2009, claiming that defendants committed faulty workmanship under the public works contract. The defendant contractors succeeded on a motion to dismiss for untimeliness at the lower Court and intermediate Appellate level. The Court of Appeals affirmed the dismissal. The Court of Appeals examined the timeliness of plaintiff's suit under several theories of liability, finding the suit to be grossly late under each.

Under a breach of contract cause of action, plaintiff's had six years from the alleged "breach" to commence suit, which in the context of construction and architectural work would be six years from the completion of the work. Because the work was completed in the 1970s/1980's, plaintiffs' 2009 lawsuit was over a decade late. It was noted that plaintiffs were third party beneficiaries of the public works contract as they had jurisdiction/ownership over the territories allegedly damaged from the defendants' work.

Under an injury to property cause of action, plaintiffs had to commence suit within three years of the "injury," i.e., the completion of the work. Obviously, plaintiffs' suit was also untimely under this theory.

Finally, the Court rejected plaintiffs' argument that the suit is timely under a "continuing public nuisance" theory of liability. Plaintiffs' tried to argue that the time of the "injury" should have been measured from when each respective incident of property damage was discovered because the damage surfaced continuously and in an ongoing manner for some period of time in the 2000s. The Court opined that there must be "continuing wrongs" to set forth a continuing public nuisance cause of action and that defendants conversely, did not perform any new or

additional work since the 1970s/1980s and that their conduct consisted of discrete and limited acts of construction, excavation and backfilling.

The concurring opinion would only have measured the timeliness of plaintiffs' case under an injury to property theory of liability, opining that their allegations had nothing to do with contracts. The concurring opinion disagreed with the majority's application of a construction contract statute of limitations, but set forth that the result would still have remained the same.

**Second Circuit Issues First Impression Decision Time Barring Plaintiff's State Law Tort Claims Even In Light of her Pre Suit EEOC Filing.**

Castagna v. Luceno, 2014 WL 840964; Docket No. 13-0796-CV.

Plaintiff resigned from her job after allegedly experiencing a pattern of pervasive sexual harassment from her male supervisor. Plaintiff claimed that throughout the course of her employment, females and her in particular, were treated differently by her supervisor than male co workers and subjected to lewd gestures and remarks, inappropriate touching, profanity and violence. Plaintiff promptly resigned from her job after her supervisor screamed and swore at her while shoving his computer monitor at her. Based upon her supervisor's behavior in this encounter and in various prior encounters, plaintiff commenced suit in Federal Court alleging Title VII violations and State law claims of assault and battery. The assault and battery charges were specifically based upon the supervisor's shoving of the computer monitor.

Prior to commencing suit, plaintiff filed a claim with the Employment Opportunity Commission (EEOC) concerning her former employer's conduct.<sup>1</sup> Plaintiff's claim could not be resolved with the EEOC and she was granted permission to sue. Because of the pendency of her EEOC claim, plaintiff ultimately commenced suit against her employer beyond the one year statute of limitation for her state law tort claims of assault and battery. When defendant moved to dismiss these claims for untimeliness, plaintiff argued that filing a complaint with the EEOC as to her *Federal* law claims tolled the one year statute of limitations on her *state* law claims. The Court of Appeals for the Second Circuit, in a matter of first impression, disagreed.

In rendering its decision, the Court looked to the Seventh and Ninth Circuit (the only two Circuits that have decided the issue of whether an EEOC filing tolls state law claims), both of which would have dismissed the plaintiff's state claims. The Court followed their lead and opined that while EEOC filing is encouraged (and mandated in some cases) to facilitate pre suit dispute resolution of federal discrimination claims, it does not have the effect of tolling state statutes of limitation, even if the state law claims are based upon the same occurrence for which the EEOC claim was filed. The Court also relied heavily on the Supreme Court of the United States decision in Johnson v. Railway Express Agency Inc., which reached a similar conclusion.<sup>2</sup>

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<sup>1</sup> The EEOC is a Federal law enforcement agency that enforces laws against workplace discrimination, investigates discrimination complaints and mediates many complaints pre suit. The EEOC is also empowered to file discrimination suits against employers on behalf of alleged victims and to adjudicate claims of discrimination brought against federal agencies. Pursuant to 42 U.S.C. section 2000 e5 (f)(1), the EEOC's permission to sue is needed for certain types of employees.

<sup>2</sup> 421 U.S. 454 (1975).

In *Johnson*, the Court held that plaintiff's claims, which were all Federal causes of action, were not tolled by his EEOC filing. The Seventh, Ninth and now Second Circuit Court applied this principle to state law claims as well.

### **Eastern District Court Bench Trial Decision Strikes Down Racially Discriminant Zoning Plan.**

*Mhany Mgmt Inc. v. Incorp. Vill. of Garden City*, 2013 WL 6334107.

A non profit, community-based housing developer of affordable housing and community reform organization sued the Village of Garden City and its board of trustees alleging that the village discriminatorily re-zoned certain land to prevent plaintiff from building low income and middle income housing on it. After a bench trial, the District Court for the Eastern District of New York agreed with plaintiff on almost all theories of liability.

#### **A. Fair Housing Act (FHA) Claims**

Plaintiff alleged that defendant violated the FHA by re-zoning land that plaintiff wanted to develop on under both a theory of (1) disparate treatment and (2) disparate impact.

(1) Under a disparate treatment theory of FHA liability, plaintiff had to and did show that the animus against the protected group (here, low and middle income families) was a significant factor in the municipality's decision/conduct. The impact can be inferred from the official action where it bears more heavily on one race than another or the sequence of events leading up to the challenged decision departed from normal procedural sequence. The Court emphasized that once plaintiff successfully alleged a discriminatory intent behind the defendant's zoning ordinance, the burden shifted to defendant to establish a non discriminatory reason behind it, with the final burden returning to plaintiff to show that the conduct was indeed, pre textual.

On plaintiff's initial burden of proof, plaintiff sufficiently demonstrated that the re zoning had a heavier impact on lower income families by preventing the opportunity to live in the zone where the proposed development was to take place. Plaintiff's expert opined that the village's re-zoning of the area where the development was to occur would results in a significantly lesser amount of African American/low income families residing there. Plaintiff also successfully demonstrated that the sequence of events leading up to the re zoning gave rise to an inference of racial discrimination. The village initially seemed agreeable to the plaintiff's development proposal, but then re zoned the area where the low income housing was to occur immediately after citizens in the area raised concerns about it at a public meeting.

Defendants also satisfied its burden in proving a non discriminatory intent behind the ordinance, presenting evidence that the proposed development would increase traffic, eliminate office use and reduce the number of multi-family units.

Plaintiff ultimately prevailed when the burden of proof returned to it, by showing that while there were legitimate concerns behind the defendant's conduct, these concerns only came to light after the public opposition to the development, suggesting that it actually had no bearing

on the Village's initial decision to re zone. It was also unclear whether traffic would even increase significantly with the proposed development of low income housing.

(2) Under a theory of disparate impact, plaintiff had to and did sufficiently demonstrate that defendant's seemingly neutral practices had a discriminatory effect/ impact by showing that the Village's plan to develop more multifamily dwellings (as opposed to low income housing) perpetuates segregation in the area because it decreases the housing available to minorities where they already only made up 4.1% of the overall population.

The burden then shifted to defendant to show that there was no less discriminatory alternative to serve its legitimate interest. The Court found that defendant failed to do so because all of its zoning proposals had the effect of adversely impacting minorities seeking to live in the area.

#### B. 42 U.S.C. 1981 and 1983 Claims

Plaintiff also claimed that under 42 U.S.C. 1981 and 1983 defendant violated the Equal Protection clause of the Fourteenth Amendment by acting with discriminatory intent. The Court agreed because of the same reasons it relied upon in deciding plaintiff's FHA claims.

#### C. 42 U.S.C. 1982 Claim

The Court did, however, strike down plaintiff's claim under 42 U.S.C. 1982 because plaintiff failed to identify a cognizable property interest/right in as yet-built or planned affordable housing.

#### D. Relief

The Court emphasized the judiciary's general reluctance to impose affirmative relief in cases like this, recognizing that it could be a "massive judicial intrusion on private autonomy." As such, the Court directed the parties to draft a proposed order with the appropriate remedies and submit it to the court for approval.

### **Second Circuit Denies Municipality's Summary Judgment Motion as to Qualified Immunity.**

*Royal Crown Day Care LLC v. Dept of Health and Mental Hygiene*, 12-4959-cv (2d Cir. 2014).

Plaintiff was a day care center opened and operated under New York State law. Plaintiff informed the Department of Health and Mental Hygiene (DOHMH) that a rival day care center had threatened to use its influence in the DOHMH to have plaintiff's day care closed down unless plaintiff paid money. A DOHMH official indeed pled guilty to charges brought against him for accepting payments from the organization associated with this rival day care in exchange for him taking official actions in its favor.

Plaintiff then sent a letter to a State Senator alleging that a rival day care center was trying to harm its business, that the DOHMH was harassing its business on behalf of this rival

day care center and that there was corruption in the DOHMH generally. This letter was forwarded to DOHMH and an internal memorandum circulated and called for an “inspection” of the plaintiff’s day care center. The inspection ultimately led to revocation of plaintiff’s license and permits and the total shut down of the day care center, allegedly because of various violations of the New York City Health Code. Plaintiff then sued the DOHMH under 42 U.S.C.1983 alleging, among other things, that the DOHMH retaliated against plaintiff for complaining to the Senator and that this violated its substantive due process rights under the First Amendment.

On Appeal, the Second Circuit Court of Appeals was asked to decide whether defendants were entitled to qualified immunity on plaintiff’s substantive due process claims. Affirming the lower court’s decision on this issue, the Second Circuit answered in the negative.

A municipality enjoys qualified immunity when it performs discretionary acts and violates what is not a clearly established constitutional right or does not violate a constitutional right. The Court found that plaintiff’s right to be free of arbitrary and improperly motivated closure of its business was a clearly established constitutional right. The question then became if this constitutional right was violated by defendants.

The Court opined that the New York City Health Code’s language gives the DOHMH discretion as to how to handle discovered violations, allowing the DOHMH to either order immediate correction or cease operations. Because the DOHMH had the discretion to shut down plaintiff’s day care center (but did not have to), its motive in doing so was relevant and there was sufficient evidence that the DOHMH’s motive could have been improper. The DOHMH was thus, not entitled to qualified immunity. The Court emphasized that the defendant allegedly improper motive in carrying out a discretionary act prevented it from enjoying qualified immunity even if there was a valid basis to shut plaintiff’s day care down under the New York City Health Code. Because the issue of defendant’s motives is a factual one, the Court declined to decide this issue, which will be decided by a jury.

**Northern District Strikes Down a Majority of Plaintiff’s Claims of Discrimination  
Against her Employer.**

*Taylor v. New York State Office for People with Developmental Disabilities*, 2014 WL 12025587 (March 24, 2014).

Plaintiff, an employee of the Office for People with Developmental Disabilities (“OPWDD”) sued her employer alleging that it wrongfully retaliated against her after she made both internal complaints about her department and external complaints to the New York Times. She asserted a cause of action under 42 U.S.C. 1983, alleging violations of the First, Fifth and Fourteenth Amendment and various other state and Federal claims.

First and foremost, the defendants argued and the Court agreed that plaintiff’s claims were barred by the Eleventh Amendment because she was suing her employer, i.e., the State and was required to commence suit in the Court of Claims. However, her claims for compensatory

and punitive damages against individually named officers, in their individual capacities, were allowed to stand but were then mostly dismissed for substantive reasons.

Regarding plaintiff's First Amendment claims, the Court noted that only her speech to the New York Times was arguably protected because her internal complaints were mandated by the very nature of her job. While defendants argued that plaintiff could not show any adverse employment action taken as a result of her speech because she was never actually fired or reprimanded (she remained an employee and was at best, not considered for a higher position), the Court viewed plaintiff's allegations in the light most favorable to her and found that she had come forward with enough evidence to survive a motion to dismiss.

The Court dismissed plaintiff's claim of Constructive Discharge (a doctrine that converts an employee's voluntary resignation into discharge) because plaintiff is still employed.

The Court dismissed plaintiff's breach of contract claims because they were based off of a contract she entered into with her employer, i.e., the State, and were thus barred by the Eleventh Amendment.

The Court dismissed her claim under the Equal Protection Clause of the Fourteenth Amendment because plaintiff failed to allege that she was a member of a protected class.

The Court dismissed plaintiff's claim of defamation because she commenced it after the one year statute of limitations expired.

The Court dismissed plaintiff's claim under the State and Federal False Claims Act because it does not allow for claims against government officials either in their individual or official capacity.

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