

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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ALLEN STEVENSON,

Plaintiff(s),

Index No. 19239/08

-against-

Motion Submitted: 2/25/11

Motion Sequence: 002

GREAT NECK UNION FREE SCHOOL DISTRICT
a/k/a GREAT NECK PUBLIC SCHOOL DISTRICT,
JOHN POWELL, ROBERT DEVLIN, AND DR.
RONALD L. FRIEDMAN,

Defendant(s).

_____ x

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	
Briefs: Plaintiff's/Petitioner's.....	X
Defendant's/Respondent's.....	XX

Motion by defendants pursuant to CPLR §3212 for summary judgment dismissing the complaint is granted and the complaint is hereby dismissed.

Plaintiff, who had been employed at defendant Great Neck Union Free School District (School District) as a groundskeeper and security officer since June 1993¹, resigned from his

¹Plaintiff began working in defendant School District in 1986 as a part-time cleaner and was eventually promoted to a full time position as groundskeeper in 1993. During the course of

position effective October 29, 2007 after approximately 21 years of service.

In or about September, 2007 plaintiff, who was accused of performing side jobs during working hours, was transferred from the north grounds crew to the south grounds crew where there was more supervisory oversight. Plaintiff does not allege, however, that he experienced any change in the conditions of his employment as a result of that transfer. Although plaintiff allegedly complained to co-workers about other co-workers' misconduct for more than ten years, he apparently never spoke to members of the School District's administration about these matters until two days after he was transferred in September, 2007. Nevertheless, he contends he was transferred, and was ultimately forced to resign, in retaliation for speaking out about other employees' drinking, drug use and theft of gas.

In his complaint, plaintiff alleges that, in violation of New York State whistleblower protection codified in Civil Service Law § 75-b and 42 U.S.C. § 1983, defendant School District forced him to resign his position under threat of possible criminal prosecution for the sale of drugs to a fellow employee and loss of pension benefits.² This alleged forced resignation was, according to plaintiff, in retaliation for disclosures/complaints he made regarding, *inter alia*, the co-workers' use of drugs and alcohol and operating School District vehicles on school grounds under the influence during school hours. Plaintiff further alleges that his complaints to defendant School District regarding such on-the-job transgressions by his co-workers constituted free speech on matters of public concern protected under the first amendment to the United States Constitution. As such, he contends his resignation, which was, in fact, a "discharge" resulting from the exercise of his constitutional right of free speech, was violative of 42 U.S.C. § 1983.

Civil Service Law § 75-b provides that adverse employment action may not be taken against a public employee based upon his disclosure of information to specific entities, which the employee reasonably believes to be true. An adverse employment action requires a materially adverse change in the terms and conditions of employment i.e., termination, demotion, decrease in wages/salary, material loss of benefits, diminished responsibilities, etc. (*Messinger v. Girl Scouts of the U.S.A.*, 16 A.D.3d 314, 315, 792 N.Y.S.2d 56 [1st Dept., 2005]). An employee so disciplined, may commence an action under the same terms and conditions as set forth in Article 20C of the Labor Law (Labor Law § 740) which governs retaliatory actions against whistleblowers by private employers. The burden is on the

his employment, plaintiff occasionally performed security work for defendant School District during his non-scheduled work hours.

²Plaintiff was given the opportunity to resign rather than be fired after defendant School District learned that he had allegedly sold Percocet to a co-worker.

plaintiff, in the first instance, to present evidence of a statutory violation. Civil Service Law § 75-b *vis-a-vis* retaliatory discharge applies to discharges by public employers. A cause of action for violation of the statute may not, however, be maintained against individual public employees. (*Moore v. County of Rockland*, 192 A.D.2d 1021, 1024, 596 N.Y.S.2d 908 [3d Dept., 1993]).

In pertinent part, Civil Service Law § 75-b(2)(a) provides that a public employer

“shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee’s employment because the employee discloses to a governmental body information: (i) regarding a violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.”

Where, as here, an employer presents evidence of a specific instance of inappropriate conduct, which demonstrates a separate and independent basis for the action taken, a claim under Civil Service Law § 75-b cannot be sustained. (*Rigle v. County of Onondaga*, 267 A.D.2d 1088, 1090, 701 N.Y.S.2d 222 (4th Dept., 1999); *Crossman-Battisti v. Traficanti*, 235 A.D.2d 566, 568, 651 N.Y.S.2d 698 [3d Dept., 1997]). In addition, plaintiff has failed to raise a triable issue of fact as to whether plaintiff suffered an adverse employment action in retaliation for his complaints/disclosures to defendant School District. His cause of action for violation of Civil Service Law § 75-b must, therefore, be dismissed. Plaintiffs’ mere conclusions, expressions of hope, and unsubstantiated allegations are insufficient to defeat defendants’ motion.

It is well established that a governmental entity may not discharge or retaliate against an employee based on the employee’s exercise of the right of free speech. (*Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775, 780 (2nd Cir., 1991) *cert den.* 502 U.S. 1013 [1991]). A public employee’s freedom of speech is not, however, absolute. A public employee who seeks to recover on the ground that he has been disciplined because of his exercise of his first amendment rights must establish as an initial matter that his speech may be fairly characterized as constituting speech on a matter of public concern (*Connick v. Myers*, 461 U.S. 138, 146 [1983]), and that the speech at issue was at least a substantial or motivating factor in the adverse action taken by the employer. (*Heil v. Santoro*, 147 F.3d 103, 109 [2nd Cir. 1998]).

Discharge, refusal to hire or promote, demotion, reduction in pay and reprimand are considered adverse employment actions. (*Morris v. Lindau*, 196 F.3d 102, 110 [2nd Cir., 1999]).

Whether the speech of a public employee is protected from retaliation under the first amendment depends on “ ‘whether the employee spoke as a citizen on a matter of public concern’ and, if so, ‘whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.’ ” (*Ruotolo v. City of New York*, 514 F.3d 184, 188 [2nd Cir. 2008] quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 [2006]). Whether an employee’s speech addresses a matter of public concern must be determined by the content, form and context of a given statement as revealed by the record as a whole. (*Kelly v. Huntington Union Free School Dist.*, 675 F. Supp. 2d 283, 294 [E.D.N.Y. 2009] (citation and internal quotation marks omitted)). The heart of the matter is whether the employee’s speech was calculated to redress personal grievances or whether it had a broader public purpose. When employees make statements pursuant to their official duties, they are not speaking as citizens for first amendment purposes and the Constitution does not insulate their communications from employer discipline. (*Garcetti v. Ceballos*, *supra* at p. 418).

As a threshold matter, a plaintiff bringing such a claim must demonstrate that: a) his speech was constitutionally protected; 2) he suffered an adverse employment decision; and that 3) a causal connection existed between his speech and the adverse determination against him so that it can be said that his speech was a motivating factor in the determination. (*Kline v. Town of Guilderland*, 289 A.D.2d 741, 734 N.Y.S.2d 333 [3d Dept., 2001]). To satisfy the causal connection requirement, plaintiff must show that his disclosures/complaints regarding the alleged misconduct of co-workers were a substantial motivating factor in defendant School District’s decision to “force” plaintiff to resign. (*Washington v. County of Rockland*, 373 F.3d 310, 321 [2nd Cir. 2004]). The causal connection must be sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action i.e., the action would not have been taken absent the employee’s protected speech. (*Morris v. Lindau*, *supra*). In short, plaintiff must come forward with sufficient proof to raise a question of fact as to whether his discharge (in this case, plaintiff’s purported forced resignation) was in retaliation for reporting the alleged misconduct of other employees and demonstrate that it was defendants’ practice, policy or custom to punish employees who report the misconduct of others. (*Phelps v. Cortland County*, 271 A.D.2d 909, 910-11, 706 N.Y.S.2d 522 [3d Dept., 2000]).

Once a plaintiff has sustained the burden of proving that protected speech was a substantial motivating factor in an adverse employment decision, the employer has the opportunity to prove, as an affirmative defense, that it would have taken the same adverse

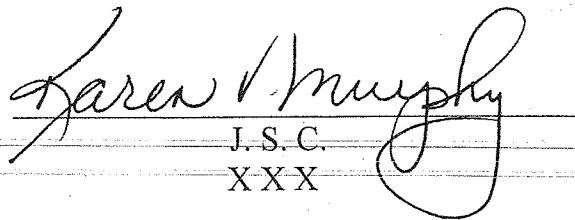
action for a legitimate reason, even if this improper motive had not existed. (*Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270, 274 [2nd Cir. 1996]). The question whether certain speech enjoys a protected status under the first amendment is one of law not fact. (*Morris v. Lindau, supra*, citing *Connick v. Myers*, 461 U.S. 138, 148 n. 7 [1983]).

Here, plaintiff's speech is not entitled to first amendment protection as it did not address matters of public concern but, rather, addressed issues related to plaintiff's job. The complaints/disclosures made by plaintiff to defendant School District generally related to plaintiff's own personal interests as a School District employee who might possibly be held responsible for his co-workers' misconduct; was fearful for his own physical safety and worried that he was unable to perform his job properly because of his co-workers' alleged misconduct. "[P]ublic employees who convey complaints or grievances about a matter pertaining to their official duties to their supervisors do so in their capacities as employees rather than private citizens, even when the subject matter of their speech touches upon a matter of public concern." (*Weintraub v. Board of Educ. of City of New York*, 489 F. Supp. 2d, 209, 221 (E.D.N.Y. 2007), *cert den.* 131 S. Ct. 444 [2010]). Moreover, plaintiff has failed to show the requisite nexus between plaintiff's purported exercise of his first amendment rights and the alleged retaliatory action by defendant School District.

Accordingly, the motion by defendant School District to dismiss the complaint pursuant to CPLR §3212 is granted.

The foregoing constitutes the Order of this Court.

Dated: March 25, 2011
Mineola, N.Y.



J.S.C.
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