Public Employee's Right to Sue for Disparaging Comments Made & Publicized by His Employer

The U.S. District Court for the District of New Jersey recently issued an interesting decision on the subject of public employee rights when a public official makes a disparaging (or legally speaking "stigmatizing") comment about an employee. If you are a public employee, you should be aware of this limitation on your right to sue, *i.e.*, when you can do so and when you cannot.

In the case of Dantinne v. Brown *et al.,* Evesham Township Board of Education Personnel Director, Richard Dantinne, Jr., [1] filed a lawsuit after Evesham Township Mayor Randy Brown held a press conference – with three Board of Education (Board) members present – at which he alleged that sexual harassment complaints had been made against Mr. Dantinne and that Mr. Dantinne had "crossed the line;" further, that the board administration was "hiding and covering up" those complaints. Mr. Dantinne had previously obtained an offer of employment from another school district; however, after that district became aware of what Mayor Brown had alleged, it rescinded its offer. Although Mr. Dantinne had already tendered his resignation to the Board, the Board allowed him to continue his employment.

Mr. Dantinne filed suit pursuant to a federal law, 42 U.S.C. § 1983, which allows an individual injured by a deprivation of his or her rights under the Constitution or other laws by a person acting "under color of . . . any State or Territory" official action, policy or "usage" to bring a civil action against such person to redress the deprivation. Before the District Court was a preliminary motion by Mayor Brown, the school board members and the township to dismiss Mr. Dantinne's suit for "failure to state a claim," pursuant to Rule of Civil Procedure 12(b)(6).

In a decision issued on March 26, 2018, Senior Judge Joseph H. Rodriguez **dismissed Mr. Dantinne's federal lawsuit** but allowed him to pursue state law claims, including for defamation. The principal reason for dismissing the suit was that Mr. Dantinne had **neither been suspended nor terminated from his position** but had only suffered the loss of an employment offer from another employer.

While this may seem unfair – since Mr. Dantinne *did* suffer the loss of a job opportunity with another employer – the federal law in this area is very narrow and requires an employee to meet certain requirements or thresholds. This legal standard is known as "**stigma plus**." The stigma is essentially harm to one's reputation; the "plus" is suspension or termination of employment. Clearly, Mayor Brown's claim of complaints of sexual harassment and "cross[ing] the line" constituted a harm to Mr. Dantinne's reputation. His employment, nonetheless, was *not* terminated.

[1] See *Courier Post* article "Judge Tosses School Official's Suit Against Evesham Mayor," by Carol Comegno (March 27, 2018); www.courier postonline.com.

Judge Rodriguez explained the legal theory (with citations to other cases), as follows:

> "To make out a due process claim for deprivation of a liberty interest in reputation, a plaintiff must show a stigma to his reputation plus deprivation of some other additional right or interest." Hill v. Borough of Kutztown, 455 F.3d 225, 236 (3d Cir. 2006) (citing to Paul v. Davis, 424 U.S. 693 (1976)). "**[R]eputation alone is not an interest protected by the Due Process Clause**." Dee v. Borough of Dunmore, 549 F2d 225, 233 (3d Cir. 2008). A plaintiff must allege **actual termination or suspension from his job** to sufficiently meet the "**plus" factor**. Williams v. Board of Supervisors Conawego Twp., 640 Fed. App'x 209, 211 (3d Cir. 2016).

Dantinne v. Brown, Civil Action No. 17-486 (JHR/JS), slip opinion, at 10-11 (see P.A.C.E.R./ECF Docket, Doc. No. 8 (Emphasis added).

While this decision may seem to be only jurisdictional, *i.e.,* denying an employee the right to pursue redress in U.S. District (a/k/a federal court) when s/he can still bring a lawsuit in State Court, the practical effect is significant. That is because in a State court common law action, such as one for defamation, the prevailing plaintiff will *not* generally be able to recover his or her attorney's fees; such is known as the "American rule," *i.e.*, that each party bears his or her own attorney's fees. [2] However, **applicable to many federal statutes** – such as 42 U.S.C. § 1983 at issue in these cases – is a **provision requiring the defendant(s) to pay the plaintiff's reasonable attorney's fees if the plaintiff prevails**. See 42 U.S.C. § 1988. Such provision gives a plaintiff and a plaintiff's lawyer a great advantage in going forward and having leverage to settle and obtain a higher award than would generally be possible in a State common law case; the opposition recognizes that it will have greater exposure, since a successful plaintiff can recover not only his/her economic and other losses but also payment of "reasonable" attorney's fees.

In short, in order for an employee who has been stigmatized by his or her employer's or other governmental official's defamatory statement(s) to pursue a federal statutory case, s/he must have suffered a suspension or termination. If that is not the case, s/he may pursue other remedies, but the relief will probably be greatly diminished or, in some cases, not even be cost-

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[2] One common category of State statutes, *i.e.,* laws enacted by legislatures, in which there *is* provision for recovery of attorney's fees by a prevailing plaintiff, are civil rights or employment discrimination law, *e.g.*, New Jersey Law Against Discrimination, Pennsylvania Human Relations Act. However, common (a/k/a judge-made) law which originated with judicial decisions from the King's & Queen's Bench in Great Britain and which have continued in a succession of reported appellate decisions in the U.S. does not generally allow for recovery of attorney's fees by a prevailing party; those fees are usually the client's responsibility and will thus reduce the net amount of his or her recovery.

effective – especially with representation by an attorney; that will depend on the extent of loss or injury sustained and whether same exceeds the potential attorney's fees. It is not yet known whether Mr. Dantinne will pursue State law claims and what type of recovery he may eventually receive. However, this recent decision – and the Court of Appeals (Third Circuit) caselaw upon which it relies – offer guidance when evaluating such a case and the potential recovery therein.