

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DANIEL SMITH

Plaintiff,

COMPLAINT

-against-

Jury Trial Demanded

DEWITT CLINTON HIGH SCHOOL, GRACE
DODGE HIGH SCHOOL, NEW YORK CITY
DEPARTMENT OF EDUCATION, ED GARDELLA,
CRAIG SHAPIRO, GERALDINE AMBROSIO,
PATRICIA SQUIRE, RICHARD J. CONDON,
OFFICE OF SPECIAL INVESTIGATIONS,

Defendants.

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Plaintiff, DANIEL SMITH, by and through his attorneys, Leeds Morelli & Brown, P.C., alleges, upon knowledge as to himself and his own actions, and upon information and belief as to all other matters, as follows:

JURISDICTION AND VENUE

1. This is a civil action for compensatory and punitive damages proximately resulting from defendants' violations of Plaintiff's rights, privileges and immunities as guaranteed him by the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. § 1983. This action is also brought based upon the defendant's violation of the New York State Executive Law, Human Rights Law, § 290 *et seq.*; New York City Administrative Code Title 8; retaliation, pursuant to Title IX of the Education Amendments of 1972, 20

U.S.C. §§ 1681 et seq. (“Title IX”) and any other cause of action which can be inferred from the facts set forth herein.

2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331.
3. Venue is proper pursuant to 28 U.S.C. § 1391.

PARTIES

4. At all times hereinafter mentioned, Plaintiff, Dan Smith (“Dan”), was and is a resident of the County of Rockland, State of New York.
5. At all times hereinafter mentioned, Defendant, Dewitt Clinton High School (“Clinton”) is located in the county of Bronx.
6. At all times hereinafter mentioned, Defendant, Grace Dodge High School (“Dodge”) is located in the county of Bronx.
7. At all times hereinafter mentioned, Defendant, New York City Department of Education is the Policy Making body governing both schools by which Dan was employed.

8. At all times hereinafter mentioned, Defendant, New York City Department of Special Investigations (“OSI”) is the body tasked with investigating allegations of sexual misconduct against teachers within the Department of Education.

9. At all times hereinafter mentioned, Defendant, Richard J. Condon (“Condon”) was the Special Commission of Investigation at the New York City Department of Special Investigations. Additionally, Condon is a policymaker charged with the responsibility of insuring that employees are not subjected to discriminatory and/or retaliatory practices. Condon, through the findings of his investigation, had the power to make personnel decisions regarding Plaintiff’s employment.

10. At all times hereinafter mentioned, Defendant, Geraldine Ambrosio (“Ambrosio”) worked as the principal of Clinton High School located in the county of Bronx. Additionally, Ambrosio is a policymaker charged with the responsibility of insuring that employees are not subjected to discriminatory and/or retaliatory practices. Ambrosio has the power to make personnel decisions regarding Plaintiff’s employment.

11. At all times hereinafter mentioned, Defendant, Ed Gardella (“Gardella”) worked as the assistant principal in charge of physical education at Clinton High School located in the county of Bronx. Additionally, Gardella is a policymaker charged with the responsibility of insuring that employees are not subjected to discriminatory and/or retaliatory practices. Gardella has the power to make personnel decisions regarding Plaintiff’s employment.

12. At all times hereinafter mentioned, Defendant, Craig Shapiro (“Shapiro”), was the principal of Grace Dodge High School located in the county of Bronx. Additionally, Shapiro is a policymaker charged with the responsibility of insuring that employees are not subjected to discriminatory and/or retaliatory practices. Shapiro had the power to make personnel decisions regarding Plaintiff’s employment.

13. At all times hereinafter mentioned, Defendant, Patricia Squire (“Squire”), was the assistant principal of Business Education at Grace Dodge High School located in the county of Bronx. Additionally, Squire is a policymaker charged with the responsibility of insuring that employees are not subjected to discriminatory and/or retaliatory practices. Squire had the power to make personnel decisions regarding Plaintiff’s employment.

Background Facts

14. Dan has continuously worked within the New York City Department of Education System, in various capacities, since 1985. In 1999 and again in 2001 the Daily News designated Dan as the Best Softball Coach in the Bronx. Dan was voted the Best Softball Coach in the Bronx again by his coaching peers in 2004, 2005, and 2006. The umpire’s association of the Public School Athletic League voted Dan one of the Top Four Softball Coaches in all five boroughs of New York.

15. During the 1997-1998 school year, Dan spoke out, adamantly, against a racist and regional bias that he perceived in the boys' P.S.A.L. football program. Dan complained of disparities in the hiring of non-Caucasian referees, and the program's reluctance to hire referees from the Bronx and Manhattan for the football program. Dan also complained about statements he witnessed school personnel make while pointing at his players, to the effect of, "You will not lose to this element." These statements were included in Dan's complaints about the bias his players faced. Following this complaint, the P.S.A.L. and the referees association began a policy of abusive officiating of Clinton games. Upon information and belief, pressure was placed upon the Clinton Administration which caused Gardella, who was both head coach of the football program and an administrator at Clinton, to seek a pretext to terminate Dan from his assistant football coaching position.
16. During the 1999 season, Dan was singled out and falsely accused of arguing and verbally abusing a referee. Gardella corroborated the false accusations against Dan in order to provide Ambrosio with grounds to terminate Dan. Ambrosio terminated Dan from his football coaching position based upon these false accusations. Although Dan was vindicated in arbitration, Dan was not allowed to return to his football coaching position.
17. Upon information and belief, Dan was fired from his assistant football coach position because he spoke out about inequality that concerned the public, being perpetrated within the Department of Education in which certain regions, based upon race and economic status,

were disadvantaged. Although removed from coaching football, Dan continued to teach physical education and coach women's softball at Clinton.

18. During the 2001-2002 school year, Ambrosio and Gardella severely cut the budget of the softball program, which Dan coached. Dan complained, verbally and in writing that the new budget for the softball program was inadequate.
19. Also during the 2001-2002 school year, Ambrosio and Gardella began to consistently discipline and issue formal written discipline against Dan, who, prior to speaking out about the racist bias in the football program and the budget disparity between softball and baseball, had received only positive evaluations.
20. The harassment Dan endured reached its peak at the end of the 2001-2002 school year. Gardella sat in on a lesson Dan was presenting in order to perform an official observation of Dan's teaching. Gardella performed the observation abnormally late in the term. Prior to this observation, Dan had always received positive evaluations and ratings for his teaching. At the end of the lesson, Gardella waited for the last student to exit the room, then asked Dan words to the effect of, "[d]o you think you are going to get an S (satisfactory) for that?" Dan responded, "[y]es," to which Gardella replied, "[d]on't bet on it." Dan received the first unsatisfactory rating of his career for that lesson. In response, Dan immediately filed a grievance seeking to overturn the unsatisfactory rating. At the first grievance stage, Ambrosio upheld the unsatisfactory rating Dan received. At the second stage of grievance,

Borough Superintendent Norman Wechsler, a prior principal of Dewitt-Clinton who had ties to Ambrosio and Gardella, also upheld the unsatisfactory rating. However, soon after learning that Dan filed for a Step 3 hearing which would be reviewed at the main Department of Education offices, Gardella and Ambrosio issued Dan a satisfactory rating on his end-term rating sheet, effectively overturning the prior unsatisfactory rating by Gardella and removing the need for Dan to pursue his grievance to the Departmental level. Upon information and belief, Gardella and Ambrosio overturned their first and only unsatisfactory rating of Dan's teaching in order to avoid review of their evaluation by an impartial party from the Department of Education.

21. Also in the 2001-2002 school year, Dan was injured during a softball practice. Dan suffered a three-centimeter tear in his right bicep and extensive damage to his cervical vertebra. Upon Doctors' advice not to return to work, Dan was granted Line of Duty Injury Status ("LODI"). Upon information and belief, during the summer of 2002, Ambrosio and Gardella sought to revoke Dan's LODI status despite doctors' orders that Dan not return to work. Ambrosio and Gardella were successful in revoking Dan's LODI status, as such Dan received no salary for the 2002-2003 school year, during which he could not return to work on doctors' orders.
22. Dan was cleared by his physicians to return to work in September 2003. In an attempt to avoid reprisals from the Clinton administration for speaking out against the regional bias in football and complaining about the budget disparity between womens' softball and mens' baseball, Dan transferred to a teaching position at John F. Kennedy High School. Dan

retained his softball coaching position at Clinton. Ambrosio asked the principal of John F. Kennedy High School, Anthony Rotunno (“Rotunno”), to pressure Dan to step down as softball coach at Clinton. Rotunno did ask Dan to step down as softball coach, but did not pressure Dan to step down.

23. Dan returned from his injury to coach softball in the 2003-2004 school year. Despite his written requests and complaints to Ambrosio and Gardella, the softball budget continued to be severely cut by the Clinton administration. In subsequent years, the boys’ baseball team received between \$7,000 and \$10,000 while the girls’ team received only \$300, a sum inadequate to even purchase sufficient softballs for the season. This budget disparity also affected the quality of program that Dan was able to provide his players and forced Dan to cut corners in his training. As such, Dan was unable to achieve the same level of success for his team that he may have achieved with an adequate budget. A coaches’ reputation often depends upon the record achieved by the teams he has coached, as such Dan’s reputation as a coach was harmed and his ability to continue on to other coaching positions was impaired when the team he was coaching received insufficient funds to conduct training correctly.
24. In 2006, Dan donated \$3,000 of his own money to the girls’ softball program so that the program could continue to exist. Dan also showed the girls in the softball program proof of the budget disparity between the girls’ program the and boys’ program, proof of a clear violation of Title IX.

25. After working for some time at John F. Kennedy, Dan found a position teaching physical education at Grace Dodge High School (“Dodge”) in the Bronx. Meanwhile, Dan continued to coach softball at Clinton.
26. For the 2005 football season, a new head coach, Howard Langley (“Langley”), was hired at Clinton. He was assured by Ambrosio that he could choose his own staff. However, when Langley offered Dan a football coaching position, Ambrosio blocked Dan from receiving the paid position. Dan volunteered his time as a football coach while Langley pressured Ambrosio to allow Dan to hold the paid position.
27. At the onset of the 2006-2007 school year, Gardella was promoted to borough head of security, a position that granted Gardella significantly more discretion and allowed him to interact intimately with the highest levels of the Department of Education administrators at the Tweed building.
28. Throughout the 2006-2007 school year, multiple written requests from Dan for funding for the softball program were ignored by the Clinton administration. Parents of softball players began to call and lodge complaints.
29. Throughout January and February 2007, the Daily News was investigating Title IX violations at Clinton. As part of their investigations the Daily News contacted the administration at

Clinton with questions about the budget disparity. The Clinton administration refused to comment.

30. In early March 2007, after speaking with Dan and his softball coaches, New York State Assemblywoman Carmen Arroyo attempted to meet with Principal Ambrosio to speak about the budget disparity between womens' and mens' sports programs. Upon information and belief, Ambrosio did not make herself available to meet with Assemblywoman Arroyo.
31. On March 12, 2007, a student made false allegations against Dan, stating that he had approached herself and another female student while they sat on mats in the Dodge gymnasium and said to her, "I want you to sit on me, on my lap." The student alleged that these events took place on March 9, 2009, a date which school records show that the student was absent from Dan's physical education class.
32. At that time, no investigation was conducted by the Shapiro or the Department of Special Investigations. The student was moved to the class of another gym teacher who taught in a shared gymnasium space with Dan. Dan was not sequestered in any way from the student who made the allegations, and continued to teach in the same gymnasium where she attended her new physical education classes.
33. Chris Fink ("Fink"), another physical education teacher who taught in the same gymnasium and during the same periods as Dan, and who witnessed the alleged events between Dan and

the student unfold, stated that the actual conversation occurred on a different day than alleged by the student. Fink stated that Dan said to the girl, “You’re going to have a hard time passing. Take a lap and sit on your spot.” Fink recalls the girl responding, “What? Do I have to sit on your lap?” Fink recalls Dan answering the girl, “No, I said take a lap and sit on your spot.”

34. In or around April 2007, an article entitled “Grudge Match” appeared in the Daily News mentioning Dan in his capacity as a softball coach for speaking out about the lack of equipment provided to the girls’ softball program at Clinton. In relation to the article, parents of children in the Clinton softball program began to call the school and request additional funding and equipment for the program.

35. Shortly after the appearance of the April 2007 article detailing the Department of Education’s Title IX violation in the Daily News, there was an attempt to discipline Dan, retroactively, for events that transpired months prior, in October 2006. It was alleged that Dan clocked in to coach after being absent from school during the day for a doctor appointment. Coaches are allowed to coach their teams on days they are absent from their teaching position. However, no time clock was provided at Clinton, and so Dan was issued no time card to help him track the dates he worked. As such, at the end of the season, when Dan prepared his time slips, he was forced to do so without the aid of a time card. He made a clerical error, recording that he coached for pay on an evening when he was absent from teaching. In fact, Dan had a surplus of days worked during that season and gained nothing by indicating that

he worked on the day he was absent. It is mandated that time cards be provided for exactly this reason, coaches need to rely on them in order to properly record their time, months later, at the end of a season. It is common for coaches in the system to make this clerical error, especially when the required time cards are not provided by the school. However, despite the common nature of this error Dan was the only individual selectively prosecuted. As such, the disciplinary charge was baseless, pretextual, and issued in retaliation for Dan's protected speech.

36. Also shortly after the appearance of the April 2007 Daily News article, an investigation of the allegations made by the female student was initiated through OSI. This investigation began more than a month after the student accused Dan, but very shortly after the appearance of the Daily News article, in which Dan criticized the Department of Education for violating Title IX. From the time the student made her allegation to the close of the school year, Dodge had made no effort to keep the student and Dan separate. Dan finished the school year as a teacher at Dodge. OSI has made no attempt to question Dan or any witnesses who were present beyond the girl who made the allegation and her friend, who was present with her at the time.

37. As an act of retaliation against Dan for speaking out about ongoing Title IX violations, OSI investigators deliberately chose not to interview Fink, even though they were aware that he was a witness to the events that occurred. Fink's account of events was not included in the Dodge principal's report, even though Fink had been interviewed by Principal Shapiro. Fink,

who had no special relationship with Dan and who had only known Dan for about two years in a co-worker capacity, voluntarily provided Shapiro with a written statement vindicating Dan. Investigators also failed to question any students present in the gymnasium at the time the alleged statements would have taken place.

38. Upon returning to work at the Big Apple Games, on August 1, 2007, Dan was informed that his supervisor had experienced a problem inputting Dan's hours for his previous work as a softball coach for the games. Dan had been placed on the Department of Education's ineligible list without being told. Upon inquiring, Dan learned that he had been reassigned to the "rubber room" as a result of the female student's allegations and allegations that Dan had coached his football team on a day in which he was ill and did not report to his teaching position. Dan was out sick that day, but was then cleared by his doctor to return to work. The rubber room is a special waiting area where teachers are to report daily in order to await a Department of Education hearing. This difficulty in inputting his hours has caused Dan to not be paid for two weeks of work he completed during the time in which he was not made aware that he had been reassigned to the rubber room. Dan has still not been paid for the hours he worked at the Big Apple Games prior to being made aware that he was on the Department of Education's ineligible list. Reassignment to the rubber room has left Dan ineligible to coach within the Department of Education system, in turn costing him income he regularly earned by coaching in years prior.

39. Dan languished in the rubber room without being charged from August 1, 2007 until May 2008. Dan was not charged, and as such could not clear his name. Instead, he was forced to await charging indefinitely. Upon information and belief, Defendants' actions in placing Dan in the rubber room, despite clear evidence that he was not guilty of improper conduct, and then delaying the proffering of charges against him for an entire school year, was done in retaliation for his engaging in protected speech.
40. In April 2008, a second, full page, article entitled, "Clinton coach slams ban" appeared in the Daily News chronicling Dan's plight in being sentenced to the rubber room without being charged and recounting his complaint against the disparity in funding that the womens' softball program experienced at Clinton.
41. Less than one month after the April 2008 article was released, after a full nine months of waiting uncharged in the rubber room, Dan was finally charged. Dan was charged with the unfounded sexual harassment allegations levied against him by a student who was absent on the day she claims to have been harassed, with coaching a team on a day in which he utilized sick time for a doctor's appointment, and for receiving an unsatisfactory rating from his supervisor. These charges were pretext in retaliation for speaking out about a matter of public concern.

42. Dan reported to the rubber room in the Bronx to await hearing. Since then Dan has been transferred to several different rubber rooms in different locations within the Department of Education. Dan continues to await a hearing in the rubber room to this day.

CLAIMS FOR RELIEF

43. Based upon the foregoing, Defendants have systematically harassed and brought disingenuous disciplinary actions against Plaintiff as retaliation for Plaintiff's exercise of his rights as guaranteed by the First Amendment to the United States Constitution.

44. The aforementioned acts constitute retaliation in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. Dan engaged in an activity protected by Title IX by opposing a practice made unlawful by Title IX. His employer was aware of that activity. Shortly thereafter Dan's opposition to the unlawful practice, Dan suffered a series of adverse employment actions which were causally connected, as acts of retaliation, to his opposition of the unlawful practices. As such Dan has suffered financial and emotional damages.

45. The aforementioned acts constitute unlawful discrimination in violation of the New York State Human Rights Law, Executive Law § 296 et seq., the New York City Human Rights Law, N.Y.C. Admin. Code Title 8, and any other causes of action which can be inferred from the facts set forth herein.

46. Defendants' have, while acting under color of state law, deprived plaintiff of his constitutional rights, as secured by the First and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. § 1983, and all related provisions of the New York State Constitution. Defendants intentionally committed, condoned or were deliberately indifferent to the aforementioned violations of plaintiff's constitutional rights. Such deliberate indifference may be inferred in the following ways:

- a. Defendants custom or practice of discriminating and/or retaliating against plaintiff based on his constitutionally-protected forms of speech, expression and association. The discriminatory practices were so persistent and widespread that they constitute the constructive acquiescence of policymakers.
- b. Supervisors failed to properly investigate and address allegations of retaliation and/or harassment.
- c. Inadequate training/supervision was so likely to result in the retaliation, and/or harassment that policymakers can reasonably be said to have been deliberately indifferent to the need to provide better training and supervision.
- d. Policymakers engaged in and/or tacitly condoned the retaliation.

46. Defendants' failure to pay Plaintiff for two weeks that he worked, during which time he was

not notified of his ineligibility to work, Defendant's deliberate attempts to force Plaintiff to resign or retire, the removal of Plaintiff from his football coaching position, the removal of Plaintiff from his position as coach of a softball team at the Big Apple Games, Defendant's attempts to keep Plaintiff from reaching his maximum pay and the corresponding pension consequences, and Defendants' attempts to block Plaintiff from taking educational credits that would allow him to qualify for promotion violate Plaintiff's Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution.

47. As a direct and proximate result of the aforementioned retaliation, Plaintiff was caused to suffer loss of earnings, accrued benefits, in addition to suffering great pain, humiliation, as well as physical and emotional damages.

**CAUSES OF ACTION
AGAINST THE INDIVIDUAL DEFENDANTS**

48. The individual defendants unlawfully participated in and/or permitted the aforementioned harassment and/or retaliation to perpetuate, without abatement, in violation of plaintiff's constitutional and statutory rights pursuant to 42 U.S.C. § 1983.
49. As a direct and proximate result of the aforementioned retaliation, the defendants caused plaintiff to suffer loss of earnings, accrued benefits, in addition to suffering great pain, humiliation, as well as physical and emotional damages. The individuals are also subject to punitive damages for their violations of 42 U.S.C. § 1983.
50. Individual Defendants aided, abetted, incited, compelled and/or coerced the

aforementioned unlawful conduct in violation of New York State Executive Law § 296,
and New York City Human Rights Law, N.Y.C. Admin. Code Title 8.

WHEREFORE, Plaintiff demands judgment against the Defendants, where applicable,
for all compensatory damages, injunctive relief, punitive damages (where applicable), reasonable
attorney's fees, and any other damages permitted by law. It is further requested that this Court
grant any other relief to which Plaintiff is entitled. Plaintiff demands a trial by jury.

Dated: Carle Place, New York

October 7, 2009

Respectfully submitted,

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