



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FRANCESCO PORTELOS

Plaintiff,

JURY INSTRUCTIONS

-against-

12-CV-3141 (LDH) (VMS)

LINDA HILL, PRINCIPAL OF I.S. 49, IN HER
OFFICIAL AND INDIVIDUAL CAPACITY AND
ERMINIA CLAUDIO, DISTRICT SUPERINTENDENT
IN HER OFFICIAL AND INDIVIDUAL CAPACITY,

Defendants.
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PART II: SUBSTANTIVE LAW

I. First Amendment Retaliation Claim

Plaintiff alleges that he was retaliated against for engaging in “protected” speech in violation of the First Amendment. To establish a First Amendment retaliation claim under 42 U.S.C. § 1983, Plaintiff must demonstrate by a preponderance of the evidence that:

- (1) the actions of the Defendants were under color of state law;
- (2) Plaintiff engaged in constitutionally protected speech;
- (3) Plaintiff suffered an adverse employment action; and
- (4) there was a causal connection between the protected speech and the adverse employment action.

Under color of state law: Defendants do not dispute that they were acting under color of state law during the events at issue in this lawsuit. Thus, you should consider that this element of Plaintiff’s claim has been satisfied.

Protected speech: The parties do not dispute that Plaintiff has engaged in the following speech, which I hereby instruct you is protected by the First Amendment.

- a. Plaintiff's complaint to the NYC Department of Education's Office of Special Investigations ("OSI") concerning allegations that Principal Hill misappropriated funds as a result of her time card entries;
- b. April 18, 2012 complaint to NYC Department of Education's Office of Special Investigations ("OSI") and the Special Commissioner of Investigation ("SCI") raising allegations that Assistant Principal Diacomanolis placed an eighth-grade student in a sixth-grade classroom;
- c. June 2012 complaint to Special Commissioner of Investigation ("SCI") concerning allegations that Assistant Principal Diacomanolis engaged in corporal punishment; and
- d. December 4, 2012 statements at a Community Education Council Meeting ("CEC") concerning allegations of financial misconduct and that the assistant principal had inappropriately touched children.

Adverse action: Plaintiff has alleged that he was the subject of several adverse employment actions. You must determine whether a Defendant took adverse actions against the Plaintiff and what those actions were. To be adverse, an action must be more than minor or *de minimis*. An adverse employment action includes, but is not limited to discharge, refusal to promote, demotion, reduction in pay, and reprimand. It may also include lesser conduct. The core question for you to determine is whether the alleged adverse action is "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights."

Causal connection: Plaintiff must establish that there was a causal connection between his constitutionally protected speech and an adverse employment action. This requires a determination that Plaintiff's speech was a motivating factor in a Defendant's decision to carry out an adverse employment action.

What is a "motivating factor"? Plaintiff's protected speech is a motivating factor in a Defendant's decision to take adverse action if that speech played a substantial or important part in the decision. However, it need not be the only factor. The Defendant may have taken an action for many reasons. But if one of those reasons was Plaintiff's speech, and if that reason played a substantial part in a Defendant's decision to take action against the Plaintiff, then Plaintiff has satisfied the third element. Plaintiff can establish a causal connection to support a retaliation claim by showing that the protected activity was closely followed in time by the adverse employment action.

Dated: Brooklyn, New York
August __, 2016