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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
TEACHERS4ACTION, *et al.*,

Plaintiffs,

v.

08 Civ. 548 (VM)

MICHAEL G. BLOOMBERG, *et al.*,

Defendants.
-----x

New York, N.Y.
January 28, 2008
10:40 a.m.

Before:

HON. ANDREW J. PECK

Magistrate Judge

APPEARANCES

REGUS WORLDWIDE OFFICE CENTERS
Attorneys for Plaintiffs
BY: EDWARD D. FAGAN

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York
Attorney for Defendants
BY: BLANCHE GREENFIELD
Assistant Corporation Counsel

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1 (In open court)

2 THE COURT: I assume, Mr. Fagan, you have handed this
3 to Ms. Greenfield as well.

4 MR. FAGAN: I did, your Honor.

5 THE COURT: Give me a minute to read it.

6 MR. FAGAN: Thank you, Judge.

7 (Pause)

8 THE COURT: I have read the complaint and I have read
9 Mr. Fagan's letter to Judge Marrero, which was memo endorsed
10 sending it over to me. With that, I guess this is your
11 application, Mr. Fagan. So proceed.

12 MR. FAGAN: Thank you, your Honor. First of all, your
13 Honor, I wanted to introduce my client. The gentleman to my
14 right is Florian Lewenstein. He is the named plaintiff in the
15 entity called Teachers4Action, and behind me sit eight or
16 nine --

17 THE COURT: I hope they are not math teachers.

18 MR. FAGAN: Well, I am certainly not, your Honor.

19 -- teachers who are affected by what is going on and
20 teachers, some of whom I will refer to by name during the
21 course of the hearing and some of whom are concerned about
22 retaliation, which is one of the things that I mentioned.

23 THE COURT: Let me ask you this. To the extent you
24 have John Does 1 to 50 and Jane Does 1 to 50 as plaintiffs,
25 what does that mean? Are you planning on making the

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1 appropriate application to the court to have anonymous
2 plaintiffs? Frankly, absent something that makes this
3 different than any other employment discrimination or
4 employment-related case, retaliation would be against the law.
5 That doesn't mean that no employer ever retaliates, but I
6 cannot think of a single employment case that I have had in the
7 13 years I have been on the bench with an anonymous plaintiff.

8 MR. FAGAN: Your Honor, I am familiar with the hurdle
9 that we must reach in order to go forward with anonymous
10 plaintiffs. I am prepared to start amending the complaint,
11 make that application. I can make that application to your
12 Honor by the end of this week.

13 As your Honor pointed out, I may not be successful,
14 and I don't want to waste the court's time. What I would
15 propose to do would be to disclose those people in certain
16 categories who are prepared to disclose their identity, to
17 identify them specifically.

18 THE COURT: Time out. Let's be very clear because
19 there are a lot of issues with respect to the complaint, and
20 perhaps I should let Ms. Greenfield do her own work, but to the
21 extent it affects my docket, either you are going to amend the
22 complaint and change John Doe to Sherlock Holmes, John Watson,
23 and whatever the names are -- obviously, I am using fictitious
24 names, hopefully with a literature teacher back there. Either
25 you are going to amend and name actual teachers or there is no

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1 point in motion papers that say Sherlock Holmes is willing to
2 be named but here is why the other people shouldn't. So either
3 amend them for those who are willing to be named or make your
4 application with respect to the anonymous plaintiffs.

5 I am not 100 percent up on the case law, but it
6 strikes me as a losing proposition. So if you are going to
7 make that motion, make sure that you have dotted your Is and
8 crossed your Ts because otherwise you are just wasting your
9 money or your client's money and my time.

10 MR. FAGAN: May I have until Friday to either make
11 that motion or amend the complaint to name those specific
12 individuals in those categories?

13 THE COURT: And to drop the John Does?

14 MR. FAGAN: And to drop the John Does.

15 THE COURT: That is fine.

16 Let me ask another question while we are lining up our
17 plaintiffs. Is Teachers4Action incorporated or unincorporated,
18 and what is it and what is its standing?

19 MR. FAGAN: It is an unincorporated association,
20 Judge, of teachers.

21 THE COURT: Is it a real organization or is it just a
22 group of people who got together because the UFT isn't doing
23 what they want done?

24 MR. FAGAN: No, Judge, it is a real organization.
25 They have already communicated with the State Board of

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1 Education in order to get the forms -- the State Board has to
2 pass on anything that mentions the name education, any
3 organization that proposes to do that. They are in the process
4 of doing that.

5 Mr. Lewenstein, the named plaintiff, is a teacher. He
6 is not just an officer of the company, of the association. By
7 the time we get further down the line, the next week or so, we
8 hope to be able to provide you not just with the application
9 that has been made to the State Board, Department of Education,
10 but also the documents that show that they have got it and at
11 least there is provisional authority for the association.

12 THE COURT: All right. Are all members of the
13 association people who are in the temporary reassignment
14 centers or does it have a different membership?

15 MR. FAGAN: Every member of the association as is
16 presently constituted is sitting confined in a rubber room
17 somewhere. Later on they will have other goals, there are
18 other things they are going to do, but for these purposes, for
19 now, every one of the people that are in the courtroom today
20 and Mr. Lewenstein and the members of the association itself,
21 Teachers4Action, are confinees in these rubber rooms.

22 THE COURT: OK. Continue.

23 MR. FAGAN: Your Honor, may my client interrupt for 30
24 seconds? I don't know what he wanted to ask me.

25 THE COURT: Yes.

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1 MR. FAGAN: Thank you.

2 (Pause)

3 MR. FAGAN: Judge, we came before the court because
4 there are certain emergent issues. This is not a normal case
5 in the sense of it can go its normal process for motion
6 practice. The reason for that is there are, as I put on the
7 outline, there are certain issues that are pressing for which
8 we submit emergency relief is appropriate in some form. It may
9 not be complete. It may not be everything that we wanted. But
10 there has to be something in order to protect a group of people
11 who have been targeted and who are in one stage or another
12 along the way to being terminated, further confined, harassed,
13 retaliated against, or fined.

14 The reason I say that is the history of what has gone
15 on with the rubber rooms, as it relates to our application
16 today, is a history where people are, according to us, deprived
17 of their due process rights pursuant to New York State law.
18 They are sent into these rubber rooms, where they are literally
19 confined. They have to punch in time clocks. They walk in
20 every morning, they punch in a time card. They can't leave.
21 Some of them are actually confined to --

22 THE COURT: They are here today.

23 MR. FAGAN: Actually, they are here today. They are
24 allowed to take personal days, your Honor.

25 We are concerned about the issue of retaliation. I

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1 will get to the issue of retaliation, but I only want to focus
2 on the emergency issues right now.

3 The emergency issues fall into, I would say, three
4 categories. One of them is an issue of preservation of
5 documents. This is not to suggest anything nefarious is going
6 to be done by the DOE. But I am mindful of your Honor's
7 decision in *In Re NTL*. The concern that we have is that
8 somewhere within this vast behemoth of the DOE and all its
9 offices and all its computers and all its recordkeeping
10 systems, the exact same thing that your Honor encountered in
11 the *NTL* case is going to happen. There is going to be --

12 THE COURT: Are you familiar with the case law with
13 respect to preservation orders in this district?

14 MR. FAGAN: I am, your Honor.

15 THE COURT: So how do you satisfy that standard?

16 MR. FAGAN: I satisfy that standard, your Honor, by --

17 THE COURT: I guess since you claim to be familiar,
18 what case are you relying upon?

19 MR. FAGAN: Actually, I briefed the issue in a case
20 called, in the *Kaprune* case.

21 The issue with regard to preservation -- I do
22 apologize, your Honor. I left my computer at Fed-Ex. I came
23 running over. I have all that information there.

24 What I am relying on is the issue of the necessity to
25 preserve documents that are going to automatically be recycled

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1 and could be destroyed in the normal --

2 THE COURT: I guess what I am saying is, once the
3 litigation has commenced; which it has, if not beforehand, the
4 Department of Education has a duty under the federal rules, and
5 you may have now served to wake them up and get this in
6 Ms. Greenfield's control a lot sooner than normally an
7 assistant would be assigned to the case, etc., but under the
8 rules automatically they have preservation obligations. For
9 the court to impose an order under *Treppel v. Biovail Corp.*,
10 the leading case in this district by Judge Francis, there has
11 to be more than just it's a big organization and maybe they
12 won't do what they are supposed to do. If they don't do what
13 they are supposed to do without any court order for
14 preservation up front, they are going to have NTL-like problems
15 down the road. But why should the court impose an order?

16 MR. FAGAN: The reason that the court should impose an
17 order on them, your Honor, is because, number one, during the
18 past -- the teachers who are here, different teachers can
19 provide testimony that they have asked for information and been
20 denied the information.

21 THE COURT: That doesn't mean it's been destroyed;
22 that just means they are not entitled to it.

23 MR. FAGAN: Your Honor, that is correct.
24 Mr. Lewenstein also is a computer expert, and Mr. Lewenstein
25 had communications with people at the DOE where they talk about

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1 the e-mail files are regularly deleted. The e-mail records are
2 regularly deleted because the DOE system is not, or the way
3 their servers are set up they are not big enough or they choose
4 to implement a system where the employees are regularly told to
5 delete e-mails.

6 Now, again, I am not suggesting anything nefarious,
7 but what I am suggesting is the DOE is a huge organization.
8 There is a way, I believe, to structure a very simple order
9 that informs these people that the procedures that they are
10 implementing right now are procedures that they cannot utilize
11 going forward. They are destroying e-mails related to
12 communications between teachers, they are destroying e-mails
13 related to the rubber rooms and the use of the rubber rooms,
14 and I submit they are also destroying information related to
15 requests that have been made by politicians, city council
16 people, and even the teachers themselves to gain access to the
17 information.

18 I believe we will be able to meet that hurdle. We can
19 do it by way of affidavits and submissions. I raised the issue
20 because it is a very serious issue.

21 THE COURT: Let me hear from Ms. Greenfield on it and
22 then if we do have to have formal motion practice on it, you
23 will put in your affidavits. But remember, something that says
24 we tell people to delete e-mails so as not to clog up the
25 system or even e-mails unless saved are deleted automatically

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1 every 30 days, all the stuff that, frankly, is the same at
2 almost any big corporation is a very different story than what
3 happens when a federal lawsuit where federal rules are
4 triggered will apply.

5 Ms. Greenfield.

6 MS. GREENFIELD: First of all, good morning, your
7 Honor. I haven't seen you in quite some time.

8 Counsel started by talking about a group of people.
9 Your Honor, we are not here on a pleading which addresses a
10 group of people. We are here on a pleading where only one
11 named plaintiff is named and there are no factual allegations
12 in the complaint that shows he has any viable cause of action.

13 Also, while counsel is now speaking about e-mails, I
14 would note that in all the correspondence I have from counsel,
15 while they note the need, he notes the need for this meeting,
16 there is nothing specifically addressed which puts us on notice
17 about what information plaintiffs are claiming are in jeopardy
18 of being destroyed.

19 The reassignment centers, your Honor, there is no
20 secret about what the reassignment centers are. Everybody in
21 the Board of Education knows about it. I don't know what type
22 of e-mails would bring any additional facts forward to the
23 court about the reassignment centers. They are there.
24 Plaintiff can speak about it. People at the Board of Education
25 can speak about it. The UFT can speak about it.

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1 I can't speak to particular e-mails because I really
2 don't know what counsel is talking about. The Board of Ed has
3 system-wide e-mail addresses, but I don't know what e-mails
4 counsel is talking about that pertain to the claims of this
5 particular plaintiff.

6 This particular plaintiff, Mr. Lewenstein, from what I
7 understand, your Honor -- and, again, this case was brought to
8 my attention at 4:30 Friday evening, thank you -- he had an
9 allegation of corporal punishment at the end of June 2007. It
10 was investigated by OSI commencing in September of 2007. There
11 was a contact made to the student at issue, his parent, I
12 believe it was September 14, 2007. On September 17, 2007,
13 Mr. Lewenstein was removed from the classroom and sent to a
14 reassignment center. OSI continued its investigation,
15 substantiated the allegation, but sent it back to the Office of
16 Legal Services. They determined that only a letter of
17 reprimand was appropriate. He was returned to the classroom in
18 early January of '08.

19 Following that, there was another allegation of verbal
20 corporal punishment made, and he has since been reassigned
21 again to the reassignment rooms.

22 That is the facts that we have right now. Based on
23 that factual scenario, I don't know how this pleading states a
24 viable cause of action, and, therefore, I believe any
25 discussion regarding discovery or preserving any records, your

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1 Honor, is wholly inappropriate.

2 MR. FAGAN: I thank you for setting forth that
3 chronology, but the chronology that was just set forth by
4 Ms. Greenfield underscores the need for not just preservation
5 of evidence but access to evidence. What Ms. Greenfield just
6 allocuted was 100 percent inaccurate as it relates to a very
7 specific period of time.

8 In September, the OSI did not contact the student.
9 The student was out of the country. Mr. Lewenstein was sitting
10 very comfortably in his school doing work until one thing
11 happened. On January, the 15th, Mr. Lewenstein sent a letter
12 to the Mayor and to the Board of Education informing them that
13 he believed they were in violation of his rights and the
14 teachers' rights and asking them to do certain things. The
15 very next day Mr. Lewenstein -- I'm sorry, the same day
16 Mr. Lewenstein gets a letter, that is hand delivered to him
17 there in school, that he is being sent back to this rubber
18 room, the reassignment center.

19 If that is your record, Ms. Greenfield, then I urge
20 the court on that record alone to give us access to every
21 e-mail that names --

22 THE COURT: We have two different issues. One is
23 preservation.

24 MR. FAGAN: Yes, Judge.

25 THE COURT: The other is motions with respect to the

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1 complaint, which I have to tell you has lots of motions to be
2 aimed at. Unless you are telling me -- let's try to be fair
3 across the board here.

4 Are you telling me that Mr. Lewenstein or
5 Teachers4Action has gone to the EEOC?

6 MR. FAGAN: Some have.

7 THE COURT: I am not talking some. I have got at the
8 moment one named individual plaintiff and an organization. So
9 even assuming that, has either Mr. Lewenstein or
10 Teachers4Action filed a Title VII or ADEA complaint with the
11 EEOC?

12 MR. FAGAN: On behalf of the teachers, the UFT went to
13 the EEOC.

14 THE COURT: UFT isn't a party here.

15 MR. FAGAN: It is not, your Honor.

16 THE COURT: Maybe it should be.

17 Is there a right to sue letter with respect to
18 Mr. Lewenstein or Teachers4Action or anyone else you are going
19 to be bringing in as a named plaintiff?

20 MR. FAGAN: There is a right to sue by the union on
21 behalf of its members through the EEOC. I can produce that
22 letter. That came --

23 THE COURT: Who does that give the right to bring the
24 action? If it is the UFT, then you don't have standing under
25 Title VII or the ADEA. Frankly, I am not sure why the UFT

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1 isn't in here whether as a plaintiff or a defendant to the
2 extent you are attacking a system that is quasi-contractual or
3 perhaps fully contractual.

4 MR. FAGAN: Your Honor, one of the things that we had
5 envisioned was we had hoped to avoid a fight with the UFT. It
6 is possible that we need to bring them in as a defendant.

7 On the issue of whether or not Mr. Lewenstein has
8 filed or Teachers4Action filed with the EEOC, they didn't. But
9 the union did.

10 THE COURT: How does that give you, and are you within
11 the statutory period, number one, even if that gave the right
12 to sue, and, secondly, I would have to see the letter, but I
13 don't see how the fact that party A gets a right to sue letter
14 means that party B with a similar claim gets a right to sue.

15 For example -- put the UFT aside -- if Mr. Lewenstein
16 had gotten a Title VII right to sue letter from the EEOC, that
17 would not mean that any of the ten people in the back could
18 piggyback it.

19 MR. FAGAN: Your Honor, what the court is bringing up
20 is a very interesting issue as it relates to what it is that
21 the UFT can do and what it is that the UFT can't do.

22 THE COURT: I am not interested in what the UFT can
23 do. I am interested in what you can do.

24 MR. FAGAN: That is correct, your Honor, and I
25 appreciate that. What I am suggesting is that there are

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1 certain elements of the complaint that may be subject to a
2 challenge of failing to go through the EEOC process. That is
3 possible. There are other elements to the complaint that I
4 submit are not subject to that type of challenge. I am
5 prepared to deal with the issues of the various motions to
6 dismiss.

7 THE COURT: What I am suggesting, counsel, is that,
8 with all due respect to having this for a broader audience than
9 this court, if you want to --

10 MR. FAGAN: I was just looking to see if there was a
11 broader audience, your Honor. Just plaintiffs.

12 THE COURT: Whether it is grandstanding for your
13 clients, there was an article in the Daily News and it didn't
14 come from this court. So whether you planted it or they just
15 happened to pick it up, I don't know. But in any event, where
16 I am going, without all the other things, is you have 14 causes
17 of action, at least three or more of which do not seem to state
18 a claim, certainly as pled, and possibly much more.

19 Preservation is one thing. As I say, whether I enter a
20 preservation order or not, the city, the Department of
21 Education is under an automatic obligation with the lawsuit
22 having been started to preserve documents and electronically
23 stored information, and if they don't, they do so at their
24 peril. But to the extent you are talking about emergency
25 access to the documents, I am not going to let this case be

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1 used as a way to get documents for use in the UFT, Board of Ed
2 hearings that come out of these reassignment centers or
3 anything else. So frankly, I fail to see any emergency.

4 MR. FAGAN: May I address that issue?

5 THE COURT: Well, first, let's address whether -- I
6 guess I would say this. You have said you wanted until Friday
7 to name certain additional plaintiffs. Unless you are going to
8 either argue that the UFT right to sue letter, which you then
9 have to attach to the complaint, is timely and gives your folks
10 a right to sue in their own name, etc., etc., and that each
11 one, what is their Title VII claim -- I mean, frankly, you are
12 being very creative here, but this isn't a Title VII case. It
13 is certainly not a global Title VII case. I mean, just looking
14 at your client sitting next to you and the ten people in the
15 back, not every single race, creed, etc., can be discriminated
16 against by a global policy.

17 Now, it may be that the principal of P.S. XYZ has it
18 in for Caucasians and the principal of junior high school 80
19 has it in for a different ethnic group or a racial group and
20 all of that, but let's cut the garbage from this complaint. If
21 you have what it seems to be is a pure due process case, let's
22 get to the -- misuse of public tax payer funds. Have you
23 looked at the standing cases with respect to that? I mean, I
24 don't want to start saying Rule 11, but if you want all sorts
25 of nice, quick relief, get the garbage out of the complaint.

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1 Because if there is a motion to dismiss, I am not sure what I
2 am going to do with discovery. As it is, you are here two days
3 to five days, whatever it is, after the complaint has served on
4 some but not all defendants, or even if it is all defendants,
5 you are here because of emergency relief in terms of a
6 preservation order.

7 MR. FAGAN: May I address that, Judge?

8 THE COURT: Yes.

9 MR. FAGAN: I am not addressing it in the context of
10 people who can't be specifically identified. There are very
11 specific examples.

12 By the way, the court's comment about grandstanding, I
13 am not grandstanding here. I wanted my clients to come here so
14 that they could hear your Honor, understand how the case is
15 going, understand all of this, because I specifically do not
16 want to play the game of, I will tell you what the judge said
17 and I will tell you what I think the judge said. I wanted them
18 to hear it directly from your Honor and to see the exchange.
19 That is why they are here.

20 Two of them, however, are here for very specific and
21 very emergent relief. For example --

22 THE COURT: They are not plaintiffs yet, though. That
23 is my problem.

24 MR. FAGAN: Your Honor, they are named as John Does.

25 I can --

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1 THE COURT: You want to amend the complaint, amend it.
2 I will listen to the claim for emergency relief, but I think
3 from what you have said and what you have said in your letter,
4 the emergency relief is they have got a hearing of some sort
5 before the Board of Ed coming up. This is not discovery for
6 that purpose. Damages can alleviate any concerns.

7 MR. FAGAN: Actually, your Honor, in certain of these
8 circumstances damages cannot relieve some of these concerns. I
9 will give you two examples. One example is a gentleman named
10 Mr. McLaughlin, who is here. Mr. McLaughlin, the time within
11 which Mr. McLaughlin has to file his Article 78 motion for
12 relief expires today.

13 THE COURT: How long does one have to file an Article
14 78?

15 MR. FAGAN: Four months.

16 THE COURT: Why is that my problem if he waited until
17 the day before it expires?

18 MR. FAGAN: Your Honor, the reason that it has now
19 become your Honor's problem is we filed the complaint. The
20 complaint has to do with certain issues as they relate to these
21 people, including their violation of due process.
22 Mr. McLaughlin's due process rights, we submit, in the context
23 of the complaint were violated. I met these people three weeks
24 ago. We have had meetings every single week. What I learned
25 is, last night, that a stipulation was -- he was, let's call

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1 it, encouraged to execute a stipulation, and the time within
2 which he has to attack that under Article 78 and based on the
3 information that we now know expires today.

4 The reason we need that emergency relief is, one, no
5 one is interested in pursuing a course of action that is going
6 to further cause injuries and damages to these people. It is
7 not just money, Judge. Some of these teachers are charged with
8 very serious offenses. I am not suggesting that --

9 THE COURT: What is the relief you are requesting with
10 respect to this Mr. McLaughlin?

11 MR. FAGAN: What I am requesting, Judge, with respect
12 to Mr. McLaughlin is -- I set that forth in the proposed
13 evidence preservation order. It would actually be converted to
14 a proposed production order. One, I want the time within which
15 or I submit the time within which he would have to file his
16 Article 78 should be stayed.

17 THE COURT: What is my authority to do that?

18 MR. FAGAN: That is the problem. I don't believe your
19 Honor has that authority.

20 THE COURT: That makes two of us.

21 MR. FAGAN: Because I don't believe your Honor has
22 that authority, then what Mr. McLaughlin needs is he needs to
23 get access to the -- he needs to get access to those e-mails.

24 THE COURT: He is not going to get them today. Come
25 on, be serious.

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1 MR. FAGAN: He is not, your Honor, but if he doesn't
2 get them, Mr. McLaughlin's deal was cut at the end of
3 September. If your Honor remembers what I talked about --

4 THE COURT: What you are asking for is, in essence,
5 some form of preliminary injunctive relief when your clients
6 have sat on their duff until the day before the deadline. You
7 may have picked your worst example because even assuming I said
8 to Ms. Greenfield, you have made a persuasive case, Mr. Fagan,
9 go produce the e-mails, it certainly can't be done between
10 11:30 or 12:00 when she gets back to her office and 5:00 today.

11 So once the Article 78 deadline has passed,
12 Mr. McLaughlin will bring his Article 78 and get whatever
13 relief the state courts give him, including any discovery that
14 the Article 78 court is going to give him, or they won't. I
15 don't see the issue.

16 MR. FAGAN: Let me go back to the issue of sitting on
17 their duff. These clients have not sat back passively. They
18 have utilized literally every opportunity that they could short
19 of commencing this lawsuit in order to gain access to the
20 evidence, including -- Judge, I am only explaining to you and
21 responding to the issue of sitting back passively. They have
22 not sat back passively.

23 Number one, they have attempted to get the information
24 through freedom of information law under New York State rules,
25 and they have been denied.

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1 THE COURT: Excuse me. Have they taken that to court?

2 MR. FAGAN: No, Judge. It just happened.

3 THE COURT: But why me? Why am I so lucky, Mr. Fagan?

4 MR. FAGAN: The reason you are so lucky, your Honor,
5 is because these particular -- this concept of the rubber rooms
6 and the 3028 process are not just violation of due process,
7 these people are actually considered they are confined. The
8 reason it came to you -- I actually expected us --

9 THE COURT: This has been going on for years, has it
10 not?

11 MR. FAGAN: It has, your Honor, but it has only
12 increased in the last two years. It has gotten --

13 THE COURT: So even the last two years, what I am
14 basically suggesting, if you want to make motions, I will let
15 you make motions. I don't see that you have got a record on
16 this complaint. And with the McLaughlin example, even assuming
17 that John Doe No. 1 is Mr. McLaughlin, I don't see this. What
18 I see is a challenge, in essence an injunctive relief type
19 challenge, to the temporary reassignment centers or, in your
20 language, the rubber rooms to that process. The court will
21 decide that.

22 The good news for you, as you have appeared in front
23 of me, I believe, and Ms. Greenfield has certainly appeared in
24 front of me, the good news is you are in a rocket docket
25 generally. So things will move. But they are not going to

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1 move with document discovery until a document demand is served
2 that deals with whoever the named plaintiffs are. And of
3 course, if there is significant motion practice against your
4 complaint, since you have thrown in everything except the
5 kitchen sink, that may stay discovery. I don't know that yet.
6 I haven't heard from Ms. Greenfield about that. But if she
7 isn't annoyed by the Title VII and ADEA claims, I certainly am
8 absent seeing a right to sue letter, which is nowhere referred
9 to in the complaint about UFT right to sue, etc.

10 So what I am suggesting is you and your clients really
11 need to step back, take a deep breath, and do this right.

12 MR. FAGAN: May I add two more examples, your Honor?

13 THE COURT: No, because I don't have a document
14 request. I can't do anything absent a document request. If
15 you want to serve a document request on Ms. Greenfield after
16 you amend the complaint, be my guest.

17 MR. FAGAN: Thank you, Judge.

18 THE COURT: I will deal with the repercussions of that
19 or whether discovery is stayed or anything else. But neither
20 she nor I can figure out what you want when we have got John
21 Doe plaintiffs, and it is unclear, are you attacking the policy
22 memos from Joel Klein and whoever else in central board set up
23 these so-called rubber rooms or are we attacking the way it
24 applied to Mr. Lewenstein, Mr. McLaughlin, and other
25 unidentified people? I don't know that. I am sure

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1 Ms. Greenfield doesn't know that.

2 When the complaint is amended to make that clear --
3 frankly, the factual allegations of the complaint seem to be
4 there are rubber rooms, my clients are suffering, now let me
5 come up with 14 different causes of action without really
6 saying how that applies. So take a step back. Fix it. Once
7 the amended complaint is served, serve a document request. You
8 want to make any other motions, you can make them in writing
9 subject to Rule 11, with client affidavits and legal research,
10 and I will deal with them. If you want to make a motion to
11 expedite anything, we will deal with that.

12 MR. FAGAN: Your Honor, in light of the court's
13 statement about a document request, may we have permission to
14 serve subpoenas on third parties? The reason I say that is --

15 THE COURT: Who?

16 MR. FAGAN: The UFT.

17 THE COURT: I guess my question is, is the UFT, and
18 this gets back to the shape of the pleadings and necessary
19 parties, is the UFT a necessary party? I don't want them going
20 through discovery in part as a nonparty if either you are going
21 to bring them in or the city is going to bring them in in 30
22 days or less when the city is to answer the complaint.

23 Let me ask you, because I am reading between the lines
24 here, is the temporary reassignment center process something
25 that is either contractual or has been negotiated in part with

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1 the UFT and the Board of Ed?

2 MS. GREENFIELD: Your Honor, it is my understanding
3 that that whole process came about because teachers are paid
4 during the time of their reassignment and it was agreed, and,
5 your Honor, I will have to go back and get more information,
6 that this is where teachers would go to receive their pay
7 during this period when they are under investigation or
8 whatever else is going on before charges are preferred or after
9 charges are preferred. Depending on the seriousness of the
10 allegations, some teachers, it is determined that they should
11 not be returned to the classroom and this is where they remain
12 while they receive their full salary.

13 MR. FAGAN: Again, unfortunately, I don't believe
14 Ms. Greenfield -- perhaps I am wrong. That is not what my
15 client just told me. There is no contractual provision that
16 authorizes the existence or confinement in rubber rooms.
17 Number two, the law --

18 THE COURT: Let's take away adjectives. Is there
19 something in the contract that says, or if not the contract the
20 side letters, agreement between the UFT, that if a teacher is
21 coming up on charges that they will be paid their salary and
22 assigned to central board or district office and taken out of
23 their school?

24 MR. FAGAN: Not according to what my client just told
25 me. The law upon which the issue comes up is a law which

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1 specifically states that the teachers can be suspended with
2 pay, but there is no provision to assign them to a rubber room
3 and no provision in letters that have been sent by the UFT to
4 my clients that suggest that the creation of the rubber rooms
5 is a contractual creation between the UFT and the DOE.

6 We have also checked before we came in here today that
7 outside of the City of New York the rubber room process or the
8 temporary reassignment center process is not utilized. There
9 are no such things. It is a unique creature --

10 THE COURT: The UFT is in New York City. I am not
11 saying this is a nationwide practice or even statewide. The
12 question is, what is the UFT's role in this?

13 MR. FAGAN: But the UFT has to go by the state law,
14 which is 3020(a). 3020(a) has no provision for the rubber
15 rooms, has no provision for the reassignment, and some of the
16 teachers -- we can make a motion on the issue of the rubber
17 rooms. I am prepared to do that.

18 If Ms. Greenfield produces a document to me that says
19 there is a contract that specifically authorizes the existence,
20 the creation, confinement into rubber rooms, I will be happy to
21 review that. That was one of the things I was asking for or I
22 was going to ask for in my suggestion about evidence
23 preservation and documents to be produced. It was whatever
24 documents they have on the creation of rubber rooms, the
25 implementation of rubber rooms, the assignment to the rubber

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1 rooms, I think we should get.

2 THE COURT: All right. Here is what I will let you
3 do. You can subpoena the UFT at this point with a preservation
4 subpoena so that they are on notice of this lawsuit and the
5 obligation to preserve whatever it is you want them to
6 preserve, subject, of course, to their objecting. But at least
7 that will put them on notice as of today, if they don't read
8 the paper, they don't consider the newspaper binding, that they
9 have got potential involvement here whether as a party or as a
10 witness.

11 But I am not producing any documents to you until I
12 see what the new complaint looks like, whether there is a
13 motion to dismiss in whole or in part, and where we are going
14 with all of this, subject to any other emergency-based motions
15 that you may make.

16 MR. FAGAN: Apropos of that, Judge, may I make the
17 following suggestion, because I know this is a rocket docket
18 and I certainly don't want to burden the court with unnecessary
19 allegations in a complaint or unnecessary motion practice.

20 We are filing our amended complaint by Friday, and I
21 will do that. Included in that I would request permission,
22 since I also asked in the letter this should be considered a
23 premotion conference, I would like permission to file a motion
24 to compel certain discovery, evidence preservation issues. I
25 will make that. Combined with that, if your Honor wants to

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1 jump down to the third item on my proposed agenda, it is not
2 just the defendants who wish to make motions. I believe that
3 there is a motion for partial summary judgment to be made --

4 THE COURT: Then why are we bothering with discovery?
5 You can't have it both ways.

6 Rule number one, each side gets one summary judgment
7 motion per case. You want to make it now, go right ahead. The
8 city responds with 56(f) that they need discovery from you,
9 that is fine. Frankly, since at the moment we have one
10 plaintiff or one and a half if the organization has standing,
11 all of this talk -- I brought you in quickly because you said
12 emergency -- all of this is premature. You want to make a
13 partial summary judgment motion on what? What violates the
14 law?

15 MR. FAGAN: The rubber room process.

16 THE COURT: As far as I am concerned, you want to do
17 this without discovery, let's just jump to the summary judgment
18 stage. I am not giving you expedited discovery for an
19 expedited partial summary judgment motion.

20 MR. FAGAN: Judge, I was talking about establishing a
21 schedule. A moment earlier --

22 THE COURT: The schedule is very simple. We are going
23 to have a date for you all to come back and see me in a week or
24 two after I have seen your complaint, see what Ms. Greenfield's
25 response to it is, and since you and I have done most of the

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1 talking I will give her the opportunity to get up and shoot
2 herself in the foot or otherwise --

3 MS. GREENFIELD: I am going to save it for my motion
4 papers, your Honor.

5 THE COURT: But seriously, I could give you a complete
6 discovery schedule now and say, OK, you have got three months
7 for discovery, you have got six months for discovery, whatever
8 makes sense, but are you able to tell me now how many
9 plaintiffs we are talking about? And I guess the other thing,
10 as we get into each plaintiff, was assignment to the temporary
11 reassignment center appropriate, which it seems to me is an
12 arbitrable issue or whatever you call the UFT process, that
13 whole process, or are we dealing with, is there something in
14 general in the way that if people have to spend their
15 eight-hour workday or however long teachers work, which is less
16 than eight, if they have to spend 9 to 3 in the reassignment
17 center room, it may be a waste of my tax money, but is the
18 issue is that improper? So I really don't know what you would
19 want to move on.

20 I am not likely to consider, and of course substantive
21 motions go back to Judge Marrero absent consent from all of
22 you, but the court is not likely to look at is Mr. Lewenstein's
23 case valid, meaning -- I will rephrase it. Is the Department
24 of Education's reason for assigning him into the so-called
25 rubber room valid, did he really physically or verbally abuse a

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1 student or any of that, as opposed to was he given whatever due
2 process rights he was entitled to under the Fifth and
3 Fourteenth Amendment and the education law and whatever else
4 may apply.

5 So I really think you need to think about it. This is
6 not the replacement for the Article 78s that each affected
7 individual can bring after whatever action the Board of Ed
8 takes based on the facts of those particular hearings.

9 MR. FAGAN: Your Honor, I absolutely agree. One of
10 the suggestions that I might make to expedite the process is, I
11 certainly don't want to file an amended complaint making
12 certain allegations, on good faith, that don't need to occupy
13 the court's time when in fact Ms. Greenfield has told the court
14 on the record that she believes that there is some document
15 that authorizes the creation of these rubber rooms. She
16 believes there is a contract provision, there is something
17 there that authorizes this.

18 THE COURT: I am not sure she said contract as opposed
19 to that it has been discussed with the UFT.

20 MR. FAGAN: Well, your Honor, that is precisely the
21 point that I wanted to get to, which is I am not looking for a
22 whole pie, I am not looking to create a complaint that has
23 frivolous causes of action. I am looking for a very specific
24 issue.

25 THE COURT: Generally the complaint comes first and

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1 discovery comes second.

2 MR. FAGAN: It does, your Honor, except in this
3 particular instance, when your Honor was so careful to explain
4 to us about the way we should go forward in this case, and I am
5 very mindful of that, and I am also mindful of the issue of the
6 standing and the issue of whether or not it is even appropriate
7 to include a challenge to the rubber room, what your Honor
8 focused on was the second part of the equation. The second
9 part of the equation is if it is appropriate to assign a
10 plaintiff or to discipline a plaintiff. That is the second
11 part. But the first part is the creation of the rubber rooms
12 themselves.

13 There is no question that Mr. Lewenstein or other
14 people could in fact, pursuant to contract, pursuant to state
15 law, be charged with whatever the offenses are. That is not
16 the issue. That comes later, whether those charges are proven,
17 and that is not going to be before the court, I don't believe.
18 What goes before the court is whether or not on January, the
19 15th, in the afternoon, it was appropriate for the Department
20 of Education -- January 15th of this year, for the Department
21 of Education to send Mr. Lewenstein to a preassigned room in
22 which he is going to be confined.

23 The creation of the rubber room --

24 THE COURT: Does he want to get paid?

25 MR. FAGAN: He has a right to be suspended with pay,

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1 your Honor. That is the law. What Ms. Greenfield said --

2 THE COURT: How is this any different than when police
3 officers are put on administrative duty?

4 MR. FAGAN: In their precinct.

5 MS. GREENFIELD: That is not accurate.

6 MR. FAGAN: In their precinct, Judge.

7 THE COURT: First of all, there is a difference
8 between a precinct and a school.

9 MR. FAGAN: Let me give you an example of that.

10 Actually, she is not here. I'm sorry. She is not
11 here because she lives in Queens, she teaches in Queens, and
12 she was assigned to a rubber room in Staten Island.

13 These teachers are being sent outside of their
14 district. They are being sent to confinement centers, and all
15 I ask for is if Ms. Greenfield has a document that talks about
16 the creation of the rubber rooms, let us have it. One
17 document.

18 THE COURT: Then what? Then the case is over?

19 MR. FAGAN: No, Judge. Well, it could be over for
20 them.

21 The issue is the rubber rooms, is it a violation of
22 due process -- one of the issues in the case -- is it a
23 violation of due process for the teachers to be confined to the
24 rubber rooms, sent to the rubber rooms, reassigned to the
25 rubber rooms.

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1 THE COURT: Why do we need any discovery on that at
2 all?

3 MR. FAGAN: The reason we need that discovery is that
4 one of Ms. Greenfield's defenses, and she said it to your
5 Honor, one of her defenses is there is some type of right that
6 exists between the DOE and the UFT that allows them, pursuant
7 to agreement or contract, to send the --

8 THE COURT: Let me put it a different way and then let
9 me hear from Ms. Greenfield.

10 Assuming it is not covered by the UFT but the UFT
11 hasn't grieved it and hasn't challenged it, what is it in some
12 law that prevents an employer, even a municipal employer, from
13 saying we have brought you up on charges, the validity of the
14 charges have to be assumed to be true for purposes of your
15 challenge to the rubber room, and we have decided that to make
16 sure you are not out earning money doing something else or that
17 you are not getting a benefit by being suspended with pay, we
18 are going to make you stay in. I know you say it is
19 confinement, and maybe then one gets into how bad are the
20 conditions in the room, but what would prevent an employer from
21 saying, you work with children. Because of the charges against
22 you, you should not be in a school building with children so
23 report to the central office or report to Staten Island and sit
24 in this room from 9 to 3, whatever your normal workday is,
25 punch in and out so that we know whether you are taking sick

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1 leave or personal days or whether you are the equivalent of
2 working and we are going to pay you for that until the charges
3 are resolved?

4 MR. FAGAN: Your Honor, what prohibits that is the law
5 itself. The law does not provide -- I am talking about the
6 state law -- does not provide for the confinement of teachers
7 into any other location. If they want to be suspended, they
8 are suspended with pay or if --

9 THE COURT: I'm sorry. If the law just says, and you
10 read it to me before, that the Board of Ed or any other
11 educational district has the right to suspend the teacher with
12 pay and that is all it says, what prevents the board from
13 adopting what it considers reasonable regulations to deal with
14 that?

15 MR. FAGAN: Your Honor, now we are getting to the
16 issue of the reasonable regulations and the creation of the
17 rubber rooms, and here is why I say that.

18 The law also provides that each of these teachers be
19 provided notice of their charges. First of all, there has to
20 be an executive session which is convened within five days,
21 voted on, and every teacher who is going to be charged has to
22 receive notice that there has been an executive session, they
23 voted on it, the majority of the people have voted that there
24 are going to be charges made. That is pursuant to the state
25 law.

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1 Second, once they do that, then the teachers
2 themselves have a right to -- they have to be notified not just
3 five days of the charges, then they have to be given very
4 specific notice of what the charges are, with their opportunity
5 to defend. They also, right after that, and I can quote the
6 sections but I would rather paraphrase them for your Honor.
7 They also have a right to have expedited hearings, they have a
8 right to have an unbiased arbitrator, and they have a right to
9 have closure. The process is supposed to be a quick,
10 definitive process so that those teachers who are, let's say,
11 unfortunately --

12 THE COURT: Now you are changing the issue.

13 MR. FAGAN: No, your Honor, I am not changing the
14 issue. I am going to the heart of the rubber rooms.

15 The heart of the rubber rooms are confinement. They
16 are retaliatory. This is not a process whereby teachers are
17 sitting there until they get their day in court. This is a
18 process where some teachers sit there for months and years
19 before they are ever given notice of the charges. This is not
20 an issue of saving taxpayers money. This is an issue of
21 costing taxpayers money. This is not an issue of efficient use
22 of public employees.

23 By the way, these are not teachers --

24 THE COURT: When I run for mayor and get elected, we
25 can deal with policy issues. This is a question of law. But

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1 OK.

2 MR. FAGAN: It is, your Honor.

3 THE COURT: Let me hear from Ms. Greenfield.

4 MS. GREENFIELD: Your Honor, I agree, I believe we are
5 mixing some issues here. One, we have a strict issue of law.
6 We don't need discovery about whether or not there are these
7 reassignment centers. There are. It seems like counsel is
8 arguing no matter what we do not have the right pursuant to
9 education law to take people out of their school and reassign
10 them to these places. Whether we can or cannot is an issue of
11 law.

12 Then there is the issue of whether or not they are
13 getting proper notice or timely notice of the charges against
14 them, and then whether or not they are getting timely hearings.
15 I would just like to note, your Honor, the one named plaintiff
16 we have before us was not charged. The allegation of corporal
17 punishment was substantiated but it was determined not to go
18 forward with charges and all he received was a letter of
19 reprimand.

20 The allegation was made in June of '07. He was back
21 in the classroom by January of '08. That is what we are
22 talking about. That is the factual scenario that we have here.
23 Until we have other plaintiffs and other factual scenarios, it
24 is hard for me to express to the court what I really think this
25 case is about because I think it is about a lot of different

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1 things, a lot of different challenges. But, your Honor, to me,
2 they all seem to be legal challenges. Not whether or not in
3 this case the charges should have been substantiated against
4 me, but whether or not the process that was employed from the
5 initiation of the reassignment to the rubber room until
6 bringing the charges violated due process. Again, I don't see
7 the need for all this discovery on those legal issues.

8 MR. FAGAN: She is absolutely right with one caveat.
9 She went right to the heart of it.

10 MS. GREENFIELD: Thank you.

11 MR. FAGAN: By the way, with respect to
12 Mr. Lewenstein --

13 THE COURT: I don't care if the timing is off on that.
14 Let's get to the legal issues.

15 MR. FAGAN: The legal issue in this case, your Honor,
16 is, are the rubber rooms -- is it permissible to assign these
17 teachers and confine them to the rubber rooms, full stop. Then
18 there are other things that come after that, but that is one of
19 the threshold issues in this case.

20 Ms. Greenfield has told us, and it is in the record,
21 that she believes there is some type of an understanding that
22 allows that process.

23 THE COURT: You are missing the point. You are
24 totally missing the point.

25 MR. FAGAN: I am trying to get discovery.