Lynne Schnell and Luke Serkanic, Plaintiff, - against - The City of New York, New York City Department of Education, Ralph Santiago, Eileen Taylor, Joyce Seiden, Dino Charlalambous, Jerry Frohnhoefer, Soraya Cuervo-Digiorgio, and Mary Vigoa, Defendants.

4592/08

SUPREME COURT OF NEW YORK, QUEENS COUNTY

2011 NY Slip Op 31220U; 2011 N.Y. Misc. LEXIS 2168

April 11, 2011, Decided

CORE TERMS: notice of claim, staph, summary judgment, public concern, causes of action, infection, retaliation, working conditions, contracting, amend, contracted, entity, public school, speech rights, municipality, affirmation, municipal, asserting, compel discovery, leave to serve, leave to amend, statute of limitations, tort action, duty owed, dissatisfaction, discovery, emotional, entirety, rating, air

JUDGES: [**1] Present: HONORABLE KEVIN J. KERRIGAN, J.S.C.

OPINION BY: KEVIN J. KERRIGAN

OPINION

Motion by defendants for summary judgment (calendar No. 23) and motion by plaintiffs to compel discovery and to amend the complaint (calendar No. 24) are consolidated for disposition.

Upon the foregoing papers it is ordered that the motions are decided as follows:

Motion by defendants for summary judgment dismissing the complaint is granted. Motion by plaintiffs to compel discovery and for leave to amend their complaint is denied.

Plaintiff, employed by the New York City Department of [*2] Education (DOE) as a secretary at Aviation High School in Queens County, alleges in her complaint and avers in her affidavit in opposition to defendants' motion that, from January 2006 to June 2009, she suffered retaliation for complaining about her working conditions at the school. She alleges that from January 2006 to September 26, 2007 she was assigned a work space in a room (Room 149F) that had no windows, ventilation or adequate air and which reached a temperature of 120 degrees Farenheit in June 2006. She alleges that these conditions caused her to suffer colds and other ailments. Plaintiff alleges that she complained frequently and reported [**2] these conditions to the school's administration, her union, the Department of Health (DOH), the Occupational Safety and Health Administration (OSHA) and the Public Employee Safety and Health Board of the Department of Education(PESH). She avers that during the last two weeks of June 2006, she would come to work and then leave upon confirming that she was not being relocated to another room. As a result, she alleges, the previous rating she had received of satisfactory (S") was changed to an unsatisfactory ("U") rating for excessive absences. She also relates that on September 25, 2007, the Chapter leader of her union, defendant Frohnhoefer, came to the school, came into her room 149F, blocked the door and proceeded to scream and curse at her and throw a chair at her for complaining. Plaintiff also variously complains about the mishandling of her medical leave requests for various illnesses, including the development of a staph infection and an ankle fracture, the erroneous poor attendance ratings given to her and disciplinary letters issued to her relative to alleged acts of insubordination. She also alleges that she was given irrelevant and overly-burdensome work to do. She also avers [**3] that her last day of work at Aviation was in the last week of June 2009, after which she was sent to the "rubber room." She was transferred on December 1, 2010 to Townsend Harris High School, where she alleges she has had no problems.

A notice of claim was filed with the City on February 22, 2008 on behalf of plaintiffs by their former attorney alleging the nature of the claim in its entirety as follows: "Claim for Harassment, Intentional Influction of Mental Distres; Assault and Negligent Infliction of Mental Distries by Ralph Santiago and other officials of Aviation High School and principal Eileen Taylor Ralph Santiago; Guidance counselor; Eileen Taylor principal; Joyce Seiden Security; Dino Charalambous A.P.; and Jerry Fronhoefer did cause the Plaintiffs great emotional distress; physical

injury by acts of harassment" (sic). Added in pen are the words "Dates 2005 — now Feb 2008." Finally, it includes an ad damnum: "Physical and Emotional Injuries: $10,000,000." Plaintiffs commenced the underlying action by filing a summons and complaint on February 21, 2008.

[*3] An amended complaint was served on February 2, 2010. The amended complaint alleges causes of action for intentional infliction [**4] of emotional distress ("Count I"), assault ("Count II" against Froenhoeffer and Santiago), negligent supervision("Count III" against the City and the DOE), negligent hiring("Count IV" against the City and the DOE), violation of plaintiff's First Amendment free speech rights for speaking on a matter of public concern, to wit, her working conditions, and violation of her Fifth and Fourteenth Amendment due process rights, pursuant to 42 U.S.C. § 1983 ("Count V"), violation of plaintiff's First Amendment free speech rights pursuant to 42 U.S.C. § 1985 ("Count VI"), violation of Labor Law §§ 740 and 741 for retaliation against plaintiff for her reporting violations relating to her working conditions ("Count VII"), negligence for psychological injuries sustained by plaintiff's son, Serkanic, as a result of "what was done to his mother" and for contracting a staph infection from his mother through defendants' negligence ("Count VIII"), and for loss of consortium on behalf of Serkanic ("Count IX").

An administrative disciplinary proceeding brought against plaintiff by the DOE pursuant to CPLR 3020-a was subsequently settled pursuant to a stipulation of settlement entered into between the parties [**5] on August 5, 2010, and which was executed by plaintiff and her attorney representing her in that matter, under the terms of which, inter alia, "Respondent agrees that she will discontinue all claims in her civil lawsuit against the City of New York, et. al. Index No. 4592/08, amended complaint dated September 9, 2009, with the exception of Count V, First Amendment Right to Free Speech (section 101-107 under Count V) and Count VII, New York State Labor Law Section 740-741 Against All Defendants."

Therefore, the only remaining claims are plaintiff's § 1983 claim for violation of her First Amendment free speech rights for taking adverse employment actions against her in retaliation for reporting matters of public concern and her related claim under the "whistleblower" statutes, Labor Law §§ 740 and 741. Plaintiff's counsel so acknowledges in his affirmation in opposition, except that he also contends that the two causes of action alleged by Serkanic also remain.

In the first instance, it is undisputed, and plaintiff admits in her pleadings, that Aviation High School is a public school under the New York City Department of Education. It is also undisputed that the Department of Education [**6] (formerly known as the Board of Education) is a separate and distinct entity from the City (see NY Education Law § 2551; Campbell v. City of New York, 203 AD 2d 504, 611 N.Y.S.2d 248 [2nd Dept 1994]). Both plaintiff and defendants school personnel are employees of the DOE, not the City.

[*4] Pursuant to § 521 of the New York City Charter, although title to public school property is vested in the City, it is under the care and control of the Board of Education for purposes of education. Suits involving public schools, including actions involving intentional torts, may only be brought against the Department of Education (see New York City Charter § 521[b]; Perez v. City of New York, 41 AD 3d 378, 837 N.Y.S.2d 571 [1st Dept 2007]). Since the City does not operate, maintain or control the subject public school, it is entitled to summary judgment as a matter of law (see Cruz v. City of New York, 288 AD 2d 250, 733 N.Y.S.2d 112 [2nd Dept 2001]). Indeed, plaintiff does not oppose that branch of the motion by the City for summary judgment.

Defendants are also entitled to summary judgment dismissing plaintiff's causes of action under §§ 740 and 741 of the Labor Law. Labor Law § 740 does not apply to public employers, who are governed instead by § 75-b of the Civil Service Law [**7] (see Hanley v New York State Exec. Dept., Div. For Youth, 182 AD 2d 317, 589 N.Y.S.2d 366 [3rd Dept 1992]; Tamayo v City of New York, 2004 U.S. Dist. LEXIS 911, 2004 WL 137198 [SD NY 2004]). Moreover, Labor Law § 741 only protects a health care employee who "performs health care services" from being penalized by their employers for making complaints about violations by the employers of a law, rule or regulation adversely affecting patient health care (see Labor Law § 741; see also Reddington v Staten Island Univ. Hosp., 11 NY 3d 80, 893 N.E.2d 120, 862 N.Y.S.2d 842 [2008]; Phillips v Ralph Lauren Center for Cancer Care and Prevention, 22 Misc. 3d 1128[A], 880 N.Y.S.2d 875, 2009 NY Slip Op 50320[U] [Sup Ct, NY County]). Indeed, plaintiff does not oppose that branch of the motion for summary judgment dismissing her causes of action under §§ 740 and 741 of the Labor Law.

Plaintiff has also failed to set forth any viable cause of action against the DOE and its employees the co-defendants under 42 U.S.C. § 1983 for retaliation for exercising her First Amendment free speech rights.

The threshold issue in determining a First Amendment retaliation claim is "whether the employee spoke as a citizen on a matter of public concern" (see Rutuolo v City of New york, 514 F 3d 184, 188 [2d Cir 2008]). "Employee expression [**8] is not a matter of public concern when it 'cannot be fairly considered as relating to any matter of political, social, or other concern of the community'" (Singh v City of New York, 524 F 3d 361, 372 [2d Cir 2008], citing Connick v Myers, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 [1983]). "Thus, 'when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision' (id.).

[*5] "Whether speech is a matter of public concern is a question of law that is determined by the 'content, form and context of a given statement, as revealed by

the whole record'" (id. at 372). The record on this motion establishes that plaintiff's speech at issue did not relate to any matter of public concern, but only expressed her private grievance concerning her personal working conditions at Aviation High School. An employee's private complaint expressing dissatisfaction with her working conditions does not constitute a matter of public concern (see Tiltti v Weise, 155 F 3d 596 [2d Cir 1998]). "[S]peech on a purely private matter, [**9] such as an employee's dissatisfaction with the conditions of his employment, does not pertain to a matter of public concern. An employee who complains solely about his own dissatisfaction with the conditions of his own employment is speaking upon matters only of personal interest" (Sousa v Roque, 578 F 3d 164, 174 [2d Cir 2009] [citations and internal quotations omitted]).

Plaintiff's attempt to cast her private grievance concerning her personal workspace conditions into a matter of public concern by making complaints to OSHA, the DOH and PESH is unavailing. In the first instance the record on this motion contains no evidence that a violation of any law, rule or regulation was issued by any of these agencies concerning plaintiff's workspace in the subject Room 149F. Indeed, contrary to plaintiff's averment in her affidavit that a PESH representative declared her office unfit to work in and issued a violation, the PESH inspector, in his Investigation Narrative, dated February 4, 2008 (annexed to defendants' reply), stated that he inspected the subject room, noted its configuration, tested the air quality, found the carbon dioxide levels "well under the PESH standards" and determined [**10] that plaintiff's complaint about the poor ventilation and air quality was not sustained. He concluded, "No violations of OSHA/PESH standards were observed at the facility in regards to the subject matter of the complaint, thus this case is closed without the issuance of any citations."

In any event, plaintiff's complaints concerning her working conditions in her assigned private cubicle in Room 149F were clearly of no concern to and did not affect the public at large.

Therefore, defendants are entitled to summary judgment dismissing the complaint in its entirety against plaintiff Lynne Schnell.

That branch of the motion for summary judgment dismissing plaintiff Luke Serkanic's causes of action is also granted.

In the first instance, since defendants are entitled to summary judgment dismissing Schnell's complaint, Serkanic's purely [*6] derivative claims for psychological injuries sustained as a result of "what was done to his mother" and his claim for loss of consortium, must likewise fail. Plaintiff's counsel proffers no opposition to the dismissal of these claims. Serkanic's sole contention is that his claim of negligence for a staph infection that he contracted from his mother survives. [**11] Plaintiffs' counsel argues that the school was negligent in its sanitary practices and that it should have foreseen not only that such negligence would cause plaintiff to contract

a disease, but would cause her, in turn, to transmit such disease to her son with whom she had contact. He argues that the foreseeability of harm to Serkanic extends defendants' negligence to him.

A finding of negligence may only be based upon a breach of a duty and, therefore, the threshold inquiry in tort cases is whether the defendant owed the injured plaintiff a duty of care (see Espinal v Melville Snow Contractors, Inc., 98 NY 2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 [2002]). "If, in connection with the acts complained of, the defendant owes no duty to plaintiff, the action must fail" (see Darby v Compagnie National Air France, 96 NY 2d 343, 347, 753 N.E.2d 160, 728 N.Y.S.2d 731 [2001]). Moreover, there must be a duty owed to plaintiff directly; the breach of a duty owed to others does not establish negligence, regardless of how careless the conduct or foreseeable the harm was (see Hamilton v Beretta U.S.A. Corp., 96 NY 2d 222, 750 N.E.2d 1055, 727 N.Y.S.2d 7 [2001]). Whether defendant owed plaintiff a duty of care is a question of law to be determined by the Court (see id.).

It is not alleged that Serkanic [**12] contracted a staph infection at the subject school. He was not a student at the school during the relevant time periods in this matter but, in fact, was an adult. He only contends that he contracted a staph infection from his mother, more than three months after Schnell alleges she was discharged from the hospital for treatment of staph. Therefore, the only duty owed by the school was to Schnell, not to a remote third party with whom she had contact outside the school.

In any event, plaintiff's claim of negligence for contracting an infection is precluded since it was not included in his notice of claim. A condition precedent to commencement of a tort action against a municipality or municipal entity is the service of a notice of claim upon the municipality or municipal entity (see General Municipal Law § 50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531, 847 N.E.2d 1154, 814 N.Y.S.2d 580 [2006]). The notice of claim requirement applies to actions against the DOE and its employees through Education Law § 3813. The notice of claim must set forth "the nature of the claim" "the time when, the place where and the manner in which the claim arose" and "the items of damages or injuries claimed to have been sustained" [**13] (General Municipal Law § 50-e [2]). "[C]auses of action [*7] for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (Finke v City of Glen Cove, 55 AD 3d 785, 866 N.Y.S.2d 317 [2nd Dept 2008] internal quotations and citations omitted]). Therefore, since Serkanic's cause of action alleging negligence in contracting staph was not included in his notice of claim, it must be dismissed.

Plaintiff's counsel seeks leave, in his affirmation in opposition and in his reply to amend the notice of claim to include a claim on behalf of Schnell of retaliation pursuant to Civil Service Law § 75-b and a claim on behalf of Serkanic of negligence

by the DOE for causing him to contract staph. Counsel annexes to his opposition papers a proposed amended notice of claim.

In the first instance, plaintiffs have neither cross-moved nor at any time moved to amend their notice of claim. The request to amend their notice of claim in their attorney's affirmation in opposition to defendants' motion for summary judgment is patently improper and may not be considered. In the absence of a motion by plaintiff for such relief, the Court may not, sua sponte, deem the notice [**14] of claim amended (see Elliot v County of Nassau, 53 AD 3d 561, 862 N.Y.S.2d 90 [2nd Dept 2008]) which is what it would be doing if it were to simply accept plaintiff's proposed amended notice of claim at counsel's suggestion in his affirmation in opposition.

Even had plaintiffs moved to amend their notice of claim, a notice of claim may properly only be amended to correct technical, inconsequential mistakes or omissions (see General Municipal Law § 50-e[6]; Torres v. New York City Housing Authority, 261 AD 2d 273, 690 N.Y.S.2d 257 [1st Dept 1999]). Amendments of a substantive nature are not permitted (see Gordon v. City of New York, 79 AD 2d 981, 434 N.Y.S.2d 478 [2nd Dept 1981]).

The Court also notes that plaintiff has not sought leave to serve a late notice of claim, either, to assert these additional substantive claims and is now precluded from doing so. Pursuant to General Municipal Law § 50-e, a notice of claim must be filed within 90 days after the cause of action accrues. Therefore, even if Serkanic had a viable claim against the DOE for contracting staph, he was required to serve a notice of claim within 90 days after he allegedly contracted the infection. Schnell was required to serve a notice of claim, asserting retaliation under [**15] Civil Service Law § 75-b, within 90 days of the last retaliatory act (see Moore v Middletown Enlarged City School Dist., 57 AD 3d 746, 871 N.Y.S.2d 211 [2nd Dept 2008]). Since they have failed to serve a timely notice of claim asserting these causes of action, plaintiffs' only recourse would have been to seek leave to serve a late notice of claim to assert these claims. However, the Court only has the discretionary [*8] authority to allow the filing of a late notice of claim within the period of limitation for commencing tort actions against a municipality or municipal entity (see General Municipal Law § 50-e[5]; Pierson v. City of New York, 56 NY 2d 950, 439 N.E.2d 331, 453 N.Y.S.2d 615 [1982]). An action against a municipality or municipal entity must be commenced within one year and 90 days after the date the plaintiff's cause of action accrued, which is the date the event occurred upon which petitioner's claim is based (see General Municipal Law § 50-i). The one year and 90-day statute of limitations under General Municipal Law § 50-i applies to the DOE through Education Law § 3813(2). Moreover, a claim under Civil Service Law § 75-b is governed by a shorter one year statute of limitations (see Civil Service Law § 75-b[3][c]; Donas v City of New York, 62 AD 3d 504, 878 N.Y.S.2d 360 [1st Dept 2009]). [**16] Schnell avers that she developed a staph infection at the school in October 2007 and was admitted to the hospital on October 5, 2007 for staph infection and

discharged on October 11, 2007. She also avers that her son, Serkanic, contracted staph in mid-January 2008. She also avers that the alleged acts of retaliation continued until June 2009. Therefore, the statute of limitations on Schnell's claim under Civil Service Law § 75-b and Serkanic's negligence claim for contracting staph has now expired.

Finally, plaintiffs' counsel's contention that the motion is premature because discovery has not been completed is without merit. The mere hope that the discovery process may yield evidence favorable to plaintiffs is insufficient to warrant denial of summary judgment (see Goldes v City of New York, 19 AD 3d 448, 797 N.Y.S.2d 102 [2nd Dept 2005]).

Therefore, defendants are entitled to summary judgment dismissing the complaint.

Plaintiffs' motion to compel discovery and for leave to amend the complaint to allege a cause of action under Civil Service Law § 75-b instead of Labor Law §§ 740 and 741 is denied.

Since plaintiffs have failed to serve a notice of claim asserting claims for retaliation under Civil Service Law § 75-b [**17] and for negligence for contracting a staph infection, and since service of a proper, timely notice of claim is a prerequisite to commencement of a tort action against the DOE, moving merely to amend the complaint without first having sought and been granted leave to serve a late notice of claim asserting these additional claims, is futile.

Accordingly, defendants' motion for summary judgment is granted, plaintiffs' motion to compel discovery and for leave to amend the complaint is denied and the action is dismissed in its entirety.

Dated: April 11, 2011

KEVIN J. KERRIGAN, J.S.C