

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DELROY GISCOMBE,

No.: 12-civ-0464

Plaintiff,

AMENDED COMPLAINT

- against -

Jury Trial Demanded

NEW YORK CITY DEPARTMENT
OF EDUCATION,

Defendant.

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Plaintiff DELROY GISCOMBE, by and through his attorneys, The Law Office of Steven A. Morelli, P.C., respectfully alleges, upon knowledge as to himself and his own actions and upon information and belief as to all other matters, as follows:

PRELIMINARY STATEMENT

1. Delroy Giscombe, is a respected physical education teacher with nearly 20 years of experience, who in recent years has been subjected to a coordinated effort on the part of the Hispanic administrators and principal to drive African-American teachers like him from the A. Phillip Randolph High School.
2. The discriminatory actions that have been taken against Mr. Giscombe include unfair disciplinary action, disregard of legitimate complaints, and frivolous charges of sexual misconduct and corporal punishment followed by flawed investigations. Other African-American teachers have also been targeted with unfair investigations, or have been silenced by fear of suffering similar retaliation.

3. These have combined to create a caustic work environment for Mr. Giscombe, who has not only suffered damage to his reputation and work, but also faces physical danger in the school as students have realized they can attack him with impunity.
4. As more fully set forth below, Defendant discriminated and retaliated against Plaintiff on the basis of his race and gender, and good faith complaints of discrimination, in violation of the Equal Protection Clause and Due Process Clause of the United States Constitution (pursuant to 42 U.S.C. § 1983), 42 U.S.C. § 1981, the New York State Human Rights Law, and the New York City Human Rights Law, and have defamed him to the public at large.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over Plaintiff's federal law claims pursuant to 28 U.S.C. §§ 1331 & 1343.
6. Venue is proper in this case pursuant to 28 U.S.C. § 1391.

PARTIES

7. Plaintiff DELROY GISCOMBE is a 62-year-old African-American male and a resident of Nassau County, New York. At all times relevant to this complaint, Plaintiff was an "employee" of the New York City Department of Education as that term is defined by the New York State Human Rights Law and Title 8 of the New York City Administrative Code.
8. Defendant NEW YORK CITY DEPARTMENT OF EDUCATION is a municipal corporation incorporated under the laws of the State of New York, which is in charge of

all public schools in the City of New York, including terms and conditions of employment for all teachers, principals, superintendents, clerks, and other employees of the Department of Education. Its headquarters is located at 52 Chambers Street, New York, New York 10007. At all times relevant to this complaint, Defendant was an “employer” as that term is defined by the New York State Human Rights Law and Title 8 of the New York City Administrative Code.

FACTUAL ALLEGATIONS

9. From 1993 to the present, Mr. Giscombe has been a diligent and well-regarded physical education teacher and administrator in the New York City public schools system. He was first hired as a teacher in 1993 and received tenure in 1996. Until 2011, he has only received positive performance reviews and marks of “Satisfactory” in end-of-year evaluations.
10. In 2002, Mr. Giscombe received a position as a physical education teacher at the A. Philip Randolph High School, located at 443 West 135th Street, New York, NY 10031. He currently remains employed in this position.
11. At A. Philip Randolph High School, there exists a cultural segregation between the Hispanic staff, which include the principal and most administrators, and the African-American teachers. This has manifested itself in the decline in the number of African-American teachers and administrators in the school over recent years, and in discriminatory treatment meted out by the Hispanic administrators to the African-American teachers.

12. Even the students are aware of this divide, and among them the Hispanic students will often speak Spanish to the Hispanic administrators and escape discipline after breaking rules, while Hispanic administrators punish African-American students more severely for similar infractions.
13. Due to Mr. Giscombe's outspoken nature and belief in rigorously enforcing school policies, he has been a proverbial lightning rod in attracting discriminatory investigations and discipline over the course of his employment.
14. This pattern began after 2006, when completely unsubstantiated accusations of sexual misconduct arose against Mr. Giscombe. For an entire year, he was placed in a reassignment center, where he performed no teaching role, while the charges were being investigated. After he was cleared of the charges, he was allowed to return to A. Philip Randolph.
15. He served as the dean of the high school for one year from 2007-08, but was returned to his physical education teaching position after one year. Upon information and belief, he was not allowed to continue as the school's dean because he was African-American while the other top administrators were Hispanic.
16. In 2010, another false charge of sexual misconduct arose against Mr. Giscombe because he was rigorously enforcing the dress code as a physical education teacher. Several female students concocted charges against him that he made inappropriate sexual comments and touched them during gym class. Mr. Giscombe denied these charges and explained that any comments he made about their clothing only occurred as he was enforcing the dress code against inappropriate clothing.

17. The Department of Education performed a flawed investigation of the incident, and in a report dated May 25, 2010, declared that the accusations were substantiated.
18. There were numerous problems with this investigation. Around the time of the report, Mr. Giscombe was approached by several students who told him that the girls making the accusations had asked them to lie and accuse Mr. Giscombe, but they refused to do so. However, these students, who had evidence against the accusations, were never interviewed by the Department.
19. In addition, the report claims that “through his attorney, Delroy Giscombe declined the opportunity to speak with investigators.” This was patently false, as Mr. Giscombe never retained an attorney during this time, and in fact wanted to talk to the investigators to refute the charges. To date, he has never found an answer as to how this claim arose that he refused to speak through his non-existent attorney.
20. In allowing the girls’ allegations to be taken as fact, without properly investigating the matter, the school discriminated against Mr. Giscombe because of his male gender.
21. Strangely enough, the school declined to discipline Mr. Giscombe in any way after the report was made. He continued to teach physical education for the rest of 2010. Since the charges against him were very serious in nature, this lack of punishment leads to the supposition that the administrators knew that had they actually punished Mr. Giscombe and a legal grievance or lawsuit resulted, the charges could not be substantiated under heightened scrutiny.
22. Since no actual disciplinary action was taken against him, Mr. Giscombe decided not to press a grievance at the time against the sexual misconduct charges.

23. At or around this time in 2010, there were several incidents in which students pushed Mr. Giscombe in the halls at school. Mr. Giscombe reported these incidents to school administrators, but their investigations occurred late – two weeks after the incidents occurred – and by that time the witnesses to the incidents had forgotten or changed their accounts. Therefore, no action was taken against the students. Because the students became aware that they could assault Mr. Giscombe with impunity, such events became more likely to occur.
24. In February 2011, Mr. Giscombe was reassigned to the “safe room” for students who were suspended from regular classes.
25. Despite his requests for one, Mr. Giscombe was not provided with a walkie-talkie radio for his sessions in the safe room. The suspended students are known to have violent altercations during which the teacher requires a radio to call for backup. The administrators’ act of not providing Mr. Giscombe with a radio was an intentional decision to make it more likely for a violent incident to occur.
26. Such an incident did occur on May 26, 2011. Mr. Giscombe was trying to close the door leading to the classroom when a suspended student tried to prevent him from doing so. The student pushed Mr. Giscombe and tried to swing a punch at him, and Mr. Giscombe pushed the student outside of the classroom to protect himself and other students should the violent student become more agitated. After the incident, Mr. Giscombe was treated at an emergency room for a back strain caused by the student pushing him.
27. The school administrators performed an inaccurate investigation of this incident. From Mr. Giscombe’s account, they used only the portion stating that he had pushed the student. In their report dated June 27, 2011, the administrators claimed that he had

performed “corporal punishment” on the student, ignoring the fact that Mr. Giscombe had pushed the student only to protect himself.

28. At or around the end of May 2011, the school administrators also met with Mr. Giscombe to discuss his supposed excessive absences for the school year. However, Mr. Giscombe had valid doctors’ notes to justify most of these absences, and the claim that he had taken excessive absences was unjustified.
29. Using the charges of corporal punishment and excessive absences, the school administrators gave Mr. Giscombe an “Unsatisfactory” rating in his year-end evaluation in June 2011. This was the first time Mr. Giscombe has ever received such a rating.
30. Mr. Giscombe decided to pursue a grievance against his unsatisfactory rating and the claim of corporal punishment. In his opposition to the June 27 report, Mr. Giscombe correctly points out that the definition of “corporal punishment” makes an exception for when a teacher is using force to protect himself or other students from physical injury. Because Mr. Giscombe was trying to protect himself and the other students by moving the aggressive student out of the classroom, he was clearly not violating the rules against corporal punishment.
31. Mr. Giscombe is also aware of another African-American teacher at A. Phillip Randolph High School, Gary Lewis, who was unfairly accused of corporal punishment by school administrators. Mr. Lewis was attacked by a student, and even though he actually did nothing to defend himself, the student claimed that Mr. Lewis had choked him. An investigation of this incident was flawed in that it did not interview other students who corroborated Mr. Lewis’s claim that he never touched the offending student. Mr. Lewis

was also given an “Unsatisfactory” rating at the end of the school year for alleged corporal punishment.

32. In the current 2011-12 school year, the discriminatory discipline and ignoring of legitimate concerns has continued for Mr. Giscombe.
33. In September 2011, Mr. Giscombe was unfairly disciplined for leaving the gymnasium unattended when he had stepped outside for under a minute to tell a wayward student to come to class. Other teachers often do the same thing, briefly leaving the gymnasium unattended to perform routine tasks like picking up equipment, but are never criticized for their actions.
34. On or around October 2011, Mr. Giscombe was also disciplined for allegedly writing too many disciplinary referrals for misbehaving students. Mr. Giscombe is simply enforcing school policy in referring students for breaking school rules, and yet his legitimate concerns have only led to disciplinary action against him.
35. On or around November 1, 2011, another student pushed Mr. Giscombe, which he reported to school administrators. These attacks occur because students are aware of the fact that school administration unfairly accused Mr. Giscombe of corporal punishment after the May 2011 incident. Such discriminatory actions pose a very real physical threat to Mr. Giscombe’s safety as he tries to manage a difficult school environment.
36. Ever since the unfair investigations against Mr. Giscombe started several years ago, he has become aware that other African-American teachers in the school have become afraid of speaking up about their concerns to the primarily Hispanic school administrators. This is because they are afraid that will be treated like he has been, and also made a target of frivolous investigations and charges.

37. The unjustified investigations and discipline against Mr. Giscombe have not only damaged his reputation and standing as a respected teacher, but have also taken their toll on his health and emotions. He has had to see a therapist to deal with the anxiety and anger caused by the caustic work environment at his school. He believes that the discriminatory actions by the school administrators represent a concerted effort to drive the African-American teachers from the school – and with the silencing of teachers’ complaints and the departure of several African-American teachers, so far it is working.
38. By a letter dated January 18, 2011, one of the students who originally accused Mr. Giscombe admitted that all the allegations against Mr. Giscombe regarding inappropriate contact with students was not true. She admitted that she was peer pressured by some students to join in on falsely accusing Mr. Giscombe because the students did not like Mr. Giscombe and were afraid he was going to give them a failing grade. This statement retracting the allegations was given to and witnessed by the Assistant Principal at A. Phillip Randolph High School.
39. Mr. Giscombe commenced this lawsuit against the New York City Department of Education on January 19, 2012. On February 3, 2012, Mr. Giscombe served the New York City Department of Education with the summons and complaint by personal service upon an agent authorized to receive service on behalf of the New York City Department of Education.
40. Within one week of service, the School Chancellor went to the media to report that he was reopening investigations against eight teachers for “past inappropriate conduct with children.” Most of these involved instances of extreme misconduct, including inappropriately touching students in a sexual manner. The investigations were reported

both in television segments and in news articles. One news article states “most of the cases involve DOE employees saying inappropriate comments to students . . . [o]ther cases involve employees touching students.” One article in fact states that “[a] total of seven DOE employees have been arrested since early February and charged with sex crimes involving children.”

41. Mr. Giscombe’s name was included among the eight teachers charged, and his name was included among the media reports, despite the fact that the school had already received the letter retracting the allegations against him and had knowledge that the allegations against Mr. Giscombe were in fact false.
42. On or about March 26, 2012, Principal David Fanning of A. Phillip Randolph filed disciplinary charges against Mr. Giscombe pursuant to 3020-a of the Education law. The charges against Mr. Giscombe alleged criminal misconduct, including the false allegations against him, which one of the original complaining students admitted to the school’s administration were false in her January 18, 2011, letter.
43. In addition to bringing disciplinary charges against Mr. Giscombe, Mr. Giscombe was suspended from teaching and reassigned to the “rubber room” pending the outcome of the disciplinary hearing. The “rubber room” is a room in an administrative building not located at A. Phillip Randolph High School. Mr. Giscombe’s teaching duties have been taken away and he is currently only allowed to do clerical work. Mr. Giscombe has also been told that he is not allowed to enter the school building.

CLAIMS FOR RELIEF

AS AND FOR A FIRST CAUSE OF ACTION
(Discrimination)

44. By reason of the foregoing, the Defendant has unlawfully discriminated against the Plaintiff in his terms, conditions and privileges of employment, in that Defendant created a hostile work environment, subjected him to an atmosphere of adverse acts, and treated him disparately, because of Plaintiff's race and gender, in violation of the Equal Protection Clause of the United States Constitution (pursuant to 42 U.S.C. § 1983), 42 U.S.C. § 1981, the New York State Human Rights Law, and the New York City Human Rights Law.

AS AND FOR A SECOND CAUSE OF ACTION
(Retaliation)

45. By reason of the foregoing, after the initiation of this lawsuit, the Defendant has unlawfully discriminated against the Plaintiff in his terms, conditions and privileges of employment, in that Defendant created a hostile work environment, subjected him to an atmosphere of adverse acts, and treated him disparately, because of Plaintiff's good faith opposition to discriminatory practices, in violation of the Equal Protection Clause of the United States Constitution (pursuant to 42 U.S.C. § 1983), 42 U.S.C. § 1981, the New York State Human Rights Law, and the New York City Human Rights Law.

AS AND FOR A THIRD CAUSE OF ACTION
(Due Process Claim)

46. By reason of the foregoing, Defendant while acting under the color of law, deprived plaintiff of his rights to due process, under the State and Federal Constitutions and under

42 U.S.C. § 1983 because defendants made stigmatizing statements to the public about plaintiff that called into question the plaintiff's good name, reputation, honor or integrity, and failed to provide plaintiff with a reasonable opportunity to rebut the statements prior to making them. In addition, such statements were made concurrently with, or in close temporal relationship to, plaintiff's suspension from teaching at the A. Phillip Randolph High School and the 3020-a disciplinary charges which were brought against plaintiff.

AS AND FOR A FOURTH CAUSE OF ACTION
(Defamation)

47. By reason of the foregoing, Defendant defamed Plaintiff to the public at large by making false statements of fact concerning Plaintiff to the news media, and thereby to the public at large.
48. As a result of such false statements of fact, Plaintiff was exposed to public hatred, contempt, ridicule, and/or disgrace.
49. This statement imputed incompetence or dishonesty in plaintiff's profession, and accused plaintiff of serious crimes, and as a result injured plaintiff's reputation.

DEFENDANT'S LIABILITY

50. The New York City Department of Education intentionally committed, condoned or was deliberately indifferent to the aforementioned violations of Plaintiff's constitutional rights. Such deliberate indifference may be inferred in the following ways:

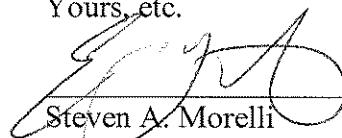
- i. Defendant's custom or practice of discriminating against Plaintiff based on his race and gender. The discriminatory practices were so persistent and widespread that they constitute the constructive acquiescence of policymakers.
 - ii. Inadequate training/supervision was so likely to result in the discrimination that policymakers can reasonably be said to have been deliberately indifferent to the need to provide better training and supervision.
 - iii. Supervisors failed to properly investigate and address allegations of discrimination.
 - iv. Policymakers engaged in and/or tacitly condoned the discrimination.
51. Defendant is liable under state law for the constitutional and common law torts committed by its employees under a theory of respondeat superior.

WHEREFORE, Plaintiff demands judgment against Defendant for all compensatory, emotional, physical, and punitive damages (where applicable), injunctive relief, and any other damages permitted by law. It is further requested that this Court grant reasonable attorneys' fees and the costs and disbursements of this action and any other relief to which Plaintiff is entitled.

Plaintiff demands a trial by jury.

Dated: Garden City, New York
May 14, 2012

Yours, etc.



Steven A. Morelli
Eric S. Tilton
THE LAW OFFICE OF
STEVEN A. MORELLI, P.C.
1461 Franklin Avenue
Garden City, New York 11530
(516) 393-9151
F: (516) 280-7528