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Municipal Lawyer

A joint publication of the Municipal Law Section of the New York State Bar Association and the Edwin G. Michaelian Municipal Law Resource Center of Pace University

A Message from the Chair

Patricia Salkin

Happy 60th birthday Municipal Law Section! To celebrate this milestone, our Fall 2010 meeting will be held October 16-18, 2010 in Washington, DC, with a special opportunity for Section members to be "sworn in" to practice before the United States Supreme Court. There are only a few seats left in our block of fifty for this ceremony at the Court. Each attorney being admitted to practice before the Court is provided with a ticket for one guest to attend the ceremony at the Supreme Court. It is a truly memorable event, and one that should not be missed!

By the time you are reading this column, our substantive program for the weekend should be posted on the Section website (www.nysba.org/Municipal2010SavetheDate). Executive Committee members Sharon Berlin and Steven Leventhal have been hard at work designing an informative CLE program for New York municipal attorneys that takes advantage of the resources in the Washington, DC metropolitan area.

We are also seeking sponsors for the Fall program. If your organization has an office in DC and might consider hosting a reception during the meeting, or if your firm/organization might consider sponsoring some aspect of the meeting ($500 to $5,000), please send an email to Linda Castilla at lcastilla@nysba.org. Underwriting support enables us to keep registration fees affordable and provides flexibility to encourage young lawyers to attend our program.

Our Committees are the lifeblood of the Section. This is where the bulk of our substantive work is done. During our April meeting, new Executive Committee member Lisa Cobb was appointed to help coordinate committee activities across the Section and to make sure that all Section members have an opportunity to more fully participate and to take advantage of networking opportunities. Our Committees are listed in the back of this publication, along with the names of the Chairs. Please consider getting involved by volunteering to write for the *Municipal Lawyer*, helping to plan a CLE program, developing a proposal for a book or suggesting a topic for a short lunch hour teleconference on a current hot topic in municipal law.

The Ethics Committee, under the leadership of Mark Davies and Steve Leventhal, has been particularly busy over the last couple of months in review-

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ing proposed changes to Article 18 of the General Municipal Law offered by Comptroller DiNapoli. The Section looks forward to working collaboratively with the Comptroller's Office and the statewide municipal associations to develop an appropriate comprehensive reform effort. Section members, including Mark and Steve, new Executive Committee member Michael Kenneally, and Jim Cole, recently met with the Comptroller's staff to discuss the initial draft. The Section also looks forward to working on issues related to Government Ethics under the leadership of new State Bar President Stephen P. Younger.

Are you a blogger or interested in becoming one? This quarter my "to do" list includes setting up a Section blog from our home page on the State Bar website. We are looking for Section members interested in committing to blogging weekly, bi-weekly or monthly on a host of municipal law topics such as: ethics, labor relations, finance, environmental law, land use law, Section 1983 and municipal liability, preventive law strategies, etc. Be a leading voice in your area of practice by becoming a blogger. All interested members are invited to send me an email (psalk@albanylaw.edu) and I will arrange a conference call to set up a schedule for bloggers. This initiative will be a terrific complement to an already active listserve.

The Real Property Law Section has invited our Section to join them and the Environmental Law Section in a roundtable on green development. The program will take place at the end of July during their Summer meeting in New Jersey. Special thanks to Committee Chair Daniel Spitzer for agreeing to represent our Section.

I look forward to seeing you in October in Washington, DC, and as always, your comments and involvement are most welcome.

Patricia E. Salkin

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact the *Municipal Lawyer* Editor:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/MunicipalLawyer

From the Editor

Land use lawyers are accustomed to representing zoning boards of appeal in litigation brought by dissatisfied applicants or their neighbors. However, board counsel are less accustomed to being defendants in those lawsuits. A recent decision by a Federal District Judge provides comfort to the lawyer finding himself or herself being sued for damages individually as part of a federal civil rights complaint challenging the propriety of a zoning board's actions.

In *Alfano v. Village of Farmingdale*,[1] plaintiffs Jeff and Kelly Hicks-Alfano sought to subdivide residential property that they owned in the village and to construct an additional house on the new lot to be created. On June 1, 2006, the Alfanos applied for the necessary permits from the village building department. Before any permit was issued, the village board of trustees enacted a moratorium that prohibited the plaintiffs from constructing an additional home. Thereafter, the village board amended the village zoning ordinance in a manner which precluded further subdivision of the plaintiffs' property.

The Alfanos then applied to the village zoning board of appeals for a variance from the new zoning laws. The zoning board denied the Alfanos' application. The Alfanos then filed a notice of claim and subsequently brought suit in state court for monetary damages against several village defendants including the zoning board and its counsel, Claudio DeBellis. The state court action was subsequently removed to federal court and an amended complaint was served by plaintiffs.

Moving to dismiss the claims against him, DeBellis argued that he was immune from suit for his actions as legal counsel to the village zoning board of appeals. The District Court agreed.

At the outset, Judge Arthur Spatt noted that in New York State, "zoning boards of appeal and their members are immune from suit for actions taken in their quasi-judicial capacity."[2] When considering a variance application, the court stated, a zoning board performs a quasi-judicial function and thus is entitled to immunity.[3] However, because DeBellis is not a member of the zoning board he may not directly benefit from this immunity. Indeed, the Court professed to be unaware of any case where the zoning board's immunity has been extended to its counsel. Yet, the Court noted that the Second Circuit Court of Appeals had ruled that "legal advisors to state and federal judges are entitled to judicial immunity."[4]

Against this background, the Court found it would be appropriate to extend the zoning board's immunity to DeBellis' actions in providing legal advice to the zoning board on plaintiffs' application. Thus, Judge Spatt opined:

> The Court finds that his position is sufficiently analogous to that of a legal secretary or law clerk, and therefore, he should enjoy the same immunity afforded to the quasi-judicial principal he advises. The Court is also moved by the fact that exposing DeBellis to liability while protecting the zoning appeals board would isolate the Board from important, proper legal advice. That is, an attorney advising a zoning appeals board could be chilled in giving advice if he feared civil liability because he recommended the rejection of a variance petition. In the Court's view, granting immunity here to DeBellis is thus consistent with the doctrine of immunity as expressed by New York State and this Circuit. Therefore, the Court finds that DeBellis is immune from suit for his role in advising the Farmingdale Zoning Appeals Board with respect to the denial of the plaintiffs' petition.[5]

Further, the Court held that to the extent DeBellis' actions were not entitled to quasi-judicial immunity, plaintiffs' allegations that DeBellis wrongfully advised the zoning board not to grant their application can only support a claim for professional negligence. Such a claim, however, would be barred by the absence of privity of contract between plaintiffs and DeBellis.[6]

This Issue

The Municipal Law Section is proud to be celebrating its 60th birthday. In her Message from the Chair, Patricia Salkin discusses the special events, including Supreme Court admission, to be held at the Section's Fall 2010 meeting in Washington, D.C. She also urges members to become more active in the Section's Committees and to help establish a Section blog on municipal law topics.

The free speech rights of public employees is the subject of an article by Douglas E. Gerhardt, Harris Beach, PLLC. Reviewing the United States Supreme Court's recent decision in *Garcetti v. Ceballos*[7] and recent New York federal cases interpreting that decision, Mr. Gerhardt provides guidance to public employers and

employees on the factors essential to determining the extent of public employee free speech rights.

Litigation strategies for attacking bare bones allegations in a complaint are the subject of an article by Lalit K. Loomba, Wilson, Elser, Moskowitz, Edelman and Dicker LLP. The article provides guidance to municipal attorneys in defending against time-consuming and costly litigation.

Finally, in their quarterly Land Use Law Update, Henry M. Hocherman and Noelle V. Crisalli, Hocherman, Tortorella and Wekstein, LLP address issues of vested rights, adherence to precedent and compliance with the Open Meetings Law.

Recently, it has been encouraging to receive inquiries from Section members concerning writing articles for the *Municipal Lawyer*. Should there be an aspect of your practice that you feel would be valuable to share with our membership, please do not hesitate to contact me about writing for this publication.

Endnotes

1. __ F. Supp. 2d __ (E.D.N.Y. 2010).
2. *See Hi Pockets Inc. v. Music Conservatory of Westchester, Inc.*, 192 F. Supp. 2d 143, 157 (S.D.N.Y. 2002); *Allan and Allan Arts Ltd. v. Rosenblum*, 201 A.D.2d 136, 140-141, 615 N.Y.S.2d 410 (2d Dep't. 1994); *Moundroukas v. Foley*, 99 A.D.2d 784, 472, N.Y.S.2d 32 (2d Dep't 1984).
3. *Allan and Allan Arts Ltd. v. Rosenblum*, *supra* at 141, quoting *Knight v. Amelkin*, 68 N.Y.2d 975, 977 (1986).
4. *See Gollomp v. Spitzer*, 568 F.3d 355, 365 (2d Cir. 2009) (judge's law secretary is entitled to judicial immunity); *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988) (judicial immunity extended to the judge's law clerk).
5. *Alfano v. Farmingdale*, *supra* at ___.
6. *Hi Pockets Inc. v. Music Conservatory of Westchester, Inc.*, *supra.*
7. 547 U.S. 410 (2006).

Lester D. Steinman

NYSBA

New York State Bar Association
Municipal Section
Fall Meeting
October 15-18, 2010
Washington, DC

The 2010 Fall Meeting of the New York State Bar Association's Municipal Law Section will be held from Friday, October 15 through Monday, October 18 in Washington, DC.

A highlight of this meeting will be a Supreme Court Admission program open only to members of the Municipal Law Section. If you have not previously been admitted, you will not want to miss this unique opportunity.

The meeting will be held at The Ritz-Carlton located on 22nd Street in Washington, DC.

Educational programs will offer MCLE credits toward your bi-annual requirements.

Because this is a special meeting, we would like to have an advance indication of those who would be interested in attending. Please send an email to Linda Castilla at lcastilla@nysba.org if you are planning to participate. Thank you.

Mark your calendar now and plan to attend!!

Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

Just as biblical Egypt was graced by seven fat years and then plagued by seven lean ones, the first quarter of 2010 brings us little of interest following a quarter in which we had the privilege of reporting on *Goldstein v. New York State Urban Development Corporation*[1] and *Kaur v. New York State Urban Development Corporation*,[2] both fascinating and potentially far-reaching constitutional cases.

This quarter we report upon *Glacial Aggregates LLC v. Town of Yorkshire*,[3] a case which addresses vested rights in zoning and may, in the end, be limited in scope due to the uniqueness of the activity, mining, that the case involves; *Bout v. Zoning Board of Appeals of the Town of Oyster Bay*,[4] which teaches us a little bit about the longstanding requirement that a zoning board of appeals must adhere to its own precedent or explain why it failed to do so; and two cases, *Cunney v. Board of Trustees of the Village of Grand View*[5] and *Aliano v. Oliva*,[6] both decided by the Second Department, which remind us that while few would argue that a constitutional democracy cannot operate in the absence of transparency, in actual practice the New York Open Meetings Law may well be a paper tiger, an illusory right without a remedy.

I. Vested Rights

In *Glacial Aggregates LLC v. Town of Yorkshire*,[7] the Court of Appeals shed some light on the rule, enunciated by that Court in *Town of Orangetown v. Magee*,[8] governing when and under what circumstances a party becomes vested in the right to develop a property under its prior zoning, when that zoning has been changed in a way that prohibits or severely restricts the contemplated use. In this case, petitioner acquired its property at a time when the Town of Yorkshire had no zoning ordinance, with the consequence that the planned use of the property as a sand and gravel mine was permitted without the necessity of obtaining a local permit. After the property owner had expended large sums in obtaining the requisite DEC mining permits, but before the actual commencement of mining operations, the Town amended its zoning ordinance to make mining a special permit use. In an insightful and well-reasoned decision, the Court of Appeals held that petitioner had acquired a vested right to engage in mining activities on its property, a decision which broadens somewhat

the limits of the *Magee* doctrine, but which may in fact be limited to mining as an activity in which the cost of obtaining permits and approvals, an essentially front-loaded soft cost, well exceeds the up-front costs of infrastructure, since it is the nature of a sand and gravel mine that its operation and its construction are one and the same activity.

In *Glacial Aggregates LLC* the plaintiff was the owner of an approximately 375-acre parcel of property in the Town of Yorkshire, which it had acquired for the purpose of mining sand and gravel.[9] At the time that it purchased the property, the Town of Yorkshire had no zoning law in effect and therefore mining was a permitted use of the property with no permits required from the Town.[10] In 1996, plaintiff began the long and expensive process of obtaining a mining permit from the DEC, which included a full environmental impact statement review process under SEQRA, all at a cost of approximately $500,000.[11] In 1998, the Town adopted a moratorium on, among other things, mining while it considered adopting its first zoning ordinance.[12] In September of 1999 the DEC adopted SEQRA Findings and granted plaintiff a 5-year mining permit. The permit was conditioned on plaintiff, among other things, completing the construction of a haul road and a bridge over a creek on the property.[13] On March 13, 2000, plaintiff advised the Town that it had obtained the DEC mining permit and, on that same day, the Town lifted the moratorium on mining.[14] Plaintiff subsequently removed 40 truckloads (approximately 400 tons) of material for testing, cleared a certain portion of the site, performed some preliminary work on the haul road, acquired steel for the bridge, and dug monitoring wells. By the end of 2000, the property was ready to be mined with the exception that the haul road and bridge were not complete. In total, plaintiff spent more than $800,000 on the property (approximately $750,000 spent to acquire the land and obtain the DEC permit and approximately $50,000 on the balance of the work).[15]

In June of 2001, the Town adopted its first zoning law, which prohibited mining as a use without a special use permit.[16] In late 2003 or early 2004, plaintiff advised the Town, among other things, that it had attracted additional investors to fund the mining operation on the property and that it had secured a $2.9

million loan to finance the mining operations.[17] To aid plaintiff in closing on the loan, the Town provided plaintiff with a letter dated July 8, 2004 stating that plaintiff had the right to mine the property provided that its mining operations commenced before the DEC permit expired.[18] The letter made no reference to the need for a special use permit. However, on July 12, 2004, the Town changed course and authorized the Town supervisor to issue a letter stating that the plaintiff's property was subject to the new zoning law which made mining operations a special permit use. On July 22, 2004 the Town supervisor issued such a letter which provided that "[the plaintiff's mining operation] must comply with the Town's Zoning Law, since actual mining operations were not commenced prior to the adoption of the Zoning Law."[19]

In response to the supervisor's July 22nd letter, the plaintiff brought the instant action seeking a declaration that it had a vested right to use the property for mining without obtaining any local permits, that its use of the property for mining was a legal nonconforming use, and that it was entitled to monetary damages pursuant to 42 U.S.C. § 1983 on the theory that the Town acted in violation of its constitutional rights in denying it the use of its property for mining.[20] The Supreme Court, Cattaraugus County, after a jury trial, held that plaintiff had acquired a vested right to use the property for the mining of sand and gravel and that such use was a lawful nonconforming use and that it was entitled to monetary damages under section 1983.[21]

The Appellate Division, Fourth Department reversed, holding that, among other things, the plaintiff did not acquire a vested right to mine the property and that the mining of the property was not a nonconforming use.[22] In support of its finding that mining was not a legal nonconforming use, the Appellate Division reasoned that all of plaintiff's actions were in contemplation of mining and that actual mining activities had not commenced on the property before the zoning law was enacted, thereby precluding a finding that the use was nonconforming.[23] Applying (although, as it turns out, misapplying) the well settled rule that "a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development,"[24] the Appellate Division held that because most of the plaintiff's expenditures on the mining use were made before the DEC permit was issued, such expenditures were not made in reliance on a validly issued permit and therefore could not be considered in the analysis of whether the post-permit expenditures were substantial.[25] The Appellate Division held, however, that the post-DEC permit expenditures were not "substantial" so as to give the plaintiff a vested right to proceed with the mining use and that there was simply no rational basis on which the jury could have found "that plaintiff had commenced substantial construction of its sand and gravel mine sufficient to acquire a vested right to mine."[26]

Applying the same rule as applied in the Appellate Division, the Court of Appeals reversed and held, among other things, that plaintiff had acquired a vested right to mine the property.[27] In so holding, the Court of Appeals first points out that this case is unique because the Town had no zoning law when plaintiff first applied for the DEC permit and mining is a unique land use.[28] The Court held that because there was no zoning law in effect when plaintiff applied to the DEC for a mining permit, that it was doing so in reliance on the fact that the Town did not require any approval in order to establish a mining operation on the property—in other words, the lack of a zoning ordinance requiring permission to mine was tantamount to a permit or permission to mine on which the plaintiff could rely in expending money to acquire a vested right.[29] Because it was the local permission on which plaintiff was entitled to rely on in the vested rights analysis rather than the DEC-issued permit, the Court of Appeals held that the Appellate Division erred when it failed to consider the cost of the DEC permitting process in the analysis of whether the plaintiff had made a substantial expenditure in reliance on the Town's permission to mine the property. In fact, the Court of Appeals stated that the DEC permit is the key requirement in a mining operation since no substantial construction need occur before a mining operation can commence. Rather, the DEC permit, which could cost hundreds of thousands of dollars when considering the scope of the studies that must be completed to obtain the permit, was the primary cost for a mining operation.[30] The Court found that the only thing that needed to be completed was the haul road and the bridge, and given the substantial expenditure of time, money and effort in reliance on the Town's tacit permission to mine the property a rational jury could have found that plaintiff had a vested right and legal nonconforming use to continue its mining operation.[31]

Due to the somewhat unique facts of this case—the mining use plus the fact that the Town did not have a zoning law in place when the petitioner applied to the DEC for a mining permit—the general applicability of this case to future non-mining cases is uncertain. However, outside of the mining context, this case supports the argument that the cost of acquiring post-municipal approvals to construct a project should be considered in the analysis of whether an applicant has incurred a substantial expense in reliance on a validly issued permit in order to obtain a vested right, perhaps with the caveat that such approvals have to be specific to the

use permitted by the permit rather than an approval of general applicability.

II. Zoning Boards of Appeals: Adherence to Precedent

In *Bout v. Zoning Board of Appeals of the Town of Oyster Bay*,[32] the Appellate Division, Second Department held that the respondent zoning board of appeals acted in an arbitrary and capricious manner when it denied petitioner's application for a *de minimis* amendment to existing area variances because the Board did not provide a rationale for departing from its original decision to grant the variances. This decision reinforces the long-standing rule that a zoning board that "neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious…even if there may otherwise be evidence in the record sufficient to support the determination[.]"[33]

In this case the petitioner owned a house in the Town of Oyster Bay. He sought and was granted variances to construct an addition to his house.[34] During construction, the Town's building inspector noticed window cutouts that were not in accord with the notice of the variances granted and issued a stop work order. While the stop work order was pending, neighboring property owners complained to the respondent zoning board of appeals that the footprint of the addition was larger than permitted by the earlier variance and that the side-yard setback was smaller than permitted. The zoning board of appeals held a public hearing on this issue and, apparently, on an application by petitioner for amended variances, denied the amended variances, finding that the side yard was 16 inches narrower than it had originally permitted and the footprint of the house was larger.[35] Petitioner brought the instant Article 78 proceeding and the Court reversed and ordered the board to issue the requested variance amendment. The Court held that there was no basis in the record to support the conclusion that the side yard was 16 inches narrower than as originally approved, and, even if the dimension and setback of petitioner's home had changed slightly, such changes were *de minimis.* As such, in order to deny the variance amendments, the zoning board would have had to make findings explaining why it reached a different result on essentially the same facts, which it did not do.[36]

III. Open Meetings Law

In two recent cases, *Cunney v. Board of Trustees of the Village of Grand View*[37] and *Aliano v. Oliva*,[38] both decided on the same day, the Appellate Division, Second Department upheld the decisions of two local boards, notwithstanding that the decisions were adopted in violation of the Open Meetings Law,[39] reasoning that under the facts and circumstances of each case, the petitioners failed to establish "good cause" to annul the boards' determinations on Open Meetings Law grounds.

In *Cunney*, the petitioner was the owner of a parcel of property in the respondent Village of Grand View. He received site plan approval and a building permit to construct a home on his property and constructed the home according to the approved plans. However, there was an error in the topographical data used by petitioner's architect in calculating the height of the home and the house was actually three feet taller than permitted by the Village's zoning ordinance.[40] Upon learning that the house was taller than permitted by code, petitioner applied to the Village's zoning board of appeals for an area variance for the height difference. The variance was granted subject to the condition that an accessory pool house on the property be removed to provide an unobstructed view over the property.[41] Apparently, the vote on this application was taken in violation of the Open Meetings Law.

Petitioner challenged the condition on the grounds that it was unreasonable and inconsistent with the zoning law, and also challenged the decision on the grounds that it was adopted in violation of the Open Meetings Law.[42] The Supreme Court, Rockland County did not take issue with the condition of the variance, but annulled the board's action because of its violation of the Open Meetings Law. The Second Department held that the condition was proper and reversed the lower court's annulment of the board's decision on the Open Meetings Law ground, holding that the petitioner had not established "good cause" to declare void the action of the board since there was no evidence in the record to suggest that the board's failure to comply with the Open Meetings Law was anything more than negligent.[43]

In *Aliano*, the petitioner obtained a building permit to construct a house on his property. Apparently, the building permit was issued in error and permitted the construction of the building within a required setback. Accordingly, after the building permit was issued, the Town's director of code enforcement issued a stop work order. Approximately one month after the stop work order was issued petitioner applied to the Town's zoning board of appeals for a variance permitting him to continue the construction. Notably, the petitioner did not appeal the code enforcement officer's decision to issue the stop work order, but rather only applied for the variance (essentially, in the court's opinion, conceding that the stop work order was correctly issued).[44]

Ultimately, the zoning board of appeals adopted a resolution denying the petitioner's application. This action was apparently (or at least arguably) taken in violation of the Open Meetings Law. The petitioner then

brought the instant Article 78 proceeding to, among other things, annul the stop work order, annul the zoning board's decision denying the requested variance and order the zoning board to issue the requested variance, on the grounds that the board's decision was arbitrary and capricious and that the zoning board's decision was issued in violation of the Open Meetings Law and the procedural requirements of the Town Law.[45]

"The local board should be reminded that compliance with the Open Meeting Law's requirements is mandatory and that the courts have the authority to annul actions taken in violation of that Law."

The Supreme Court, Suffolk County, denied the petition to the extent that it challenged the stop work order, reasoning, among other things, that petitioner failed to exhaust his administrative remedies since he did not appeal the determination to the zoning board of appeals, but rather only applied for the area variance. The lower court also upheld the zoning board's denial of the variance and denied the portions of the petition challenging the board's decision based on the Open Meeting Law and Town Law procedural requirement grounds. The Second Department affirmed the decision of the lower court in its entirety.[46]

With regard to petitioner's claim that the zoning board's decision was adopted in violation of the Open Meeting Law, the court held that even if the board acted in violation of the Open Meeting Law, petitioner did not meet his burden of showing good cause to annul the determination on that ground since the decision was adopted after a public hearing and after all interested parties had a chance to comment on the application.[47]

Local boards and members of the public alike can take away something from these cases. The local board should be reminded that compliance with the Open Meeting Law's requirements is mandatory and that the courts have the authority to annul actions taken in violation of that Law. However, theses cases are also a cautionary reminder to the public that a local action will not necessarily be undone simply because the board did not strictly comply with the requirements of the Open Meetings Law, particularly where the court finds that the board's failure to comply with the Law was the result of simple negligence or oversight rather than malfeasance.

Endnotes

1. *Goldstein v. New York State Urban Development Corporation*, 13 N.Y.3d 511 (2009).
2. *Kaur v. New York State Urban Development Corporation*, 72 A.D.3d 1, 897 N.Y.S.2d 335 (1st Dep't 2009).
3. *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127 (2010).
4. *Bout v. Zoning Board of Appeals of Town of Oyster Bay*, 71 A.D.3d 1014, 897 N.Y.S.2d 205 (2d Dep't 2010).
5. *Cunney v. Board of Trustees of the Village of Grand View*, 2010 WL 1611059 (2d Dep't April 20, 2010).
6. *Aliano v. Oliva*, 2010 WL 1611121 (2d Dep't April 20, 2010).
7. *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127 (2010).
8. *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996).
9. *Glacial Aggregates LLC*, 897 N.Y.S.2d at 678 (Plaintiff owned or had the option to purchase 375 acres. The Fourth Department's decision indicates that the Plaintiff owned 216 acres (*Glacial Aggregates LLC v. Town of Yorkshire*, 57 A.D.3d 1362, 1363 (4th Dep't 2008)).
10. *Glacial Aggregates LLC*, 14 N.Y.3d at 131.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Glacial Aggregates LLC*, 14 N.Y.3d at 132; *Glacial Aggregates LLC*, 57 A.D.3d at 1363-1365.
16. *Glacial Aggregates LLC*, 14 N.Y.3d at 132.
17. *Id.*
18. *Id.*
19. *Id.* at 133.
20. *Id.*
21. *Glacial Aggregates LLC v. Town of Yorkshire*, 2007 WL 7117797 (Sup. Ct. Cattaraugus County 2007) (Trial Order).
22. *Glacial Aggregates LLC v. Town of Yorkshire*, 57 A.D.3d 1362 (4th Dep't 2008).
23. *Id.* at 1362-1364.
24. *Id.* at 1364 (quoting *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996) and citing *Ellington Construction Corp. v. Zoning Board of Appeals of Incorporated Village of New Hempstead*, 77 N.Y.2d 114 (1990)).
25. *Glacial Aggregates LLC*, 57 A.D.3d at 1364-1365.
26. *Id.* at 1365.
27. *Glacial Aggregates LLC*, 14 N.Y.3d at 135. The Court of Appeals also held that plaintiff's use of the property was sufficient to obtain the status of a lawful nonconforming use citing its recent decision in *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88 (2009), holding that overt manifestations of an intent to utilize a property for mining can establish a nonconforming use.
28. *Glacial Aggregates LLC*, 14 N.Y.3d at 136.
29. *Id.*
30. *Id.*
31. *Id.* at 137.
32. *Bout v. Zoning Board of Appeals of Town of Oyster Bay*, 71 A.D.3d 1014, 897 N.Y.S.2d 205 (2d Dep't 2010).
33. *Id.* at 1014 (2d Dep't 2010) (internal quotations omitted).

34. *Id.* at 1015.
35. *Id.*
36. *Id.*
37. *Cunney v. Board of Trustees of the Village of Grand View*, 2010 WL 1611059 (2d Dep't April 20, 2010).
38. *Aliano v. Oliva*, 2010 WL 1611121 (2d Dep't April 20, 2010).
39. Public Officers Law, Art. 7; *see* Public Officers Law § 107[1] ("Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.").
40. *Cunney v. Board of Trustees of the Village of Grand View*, 2010 WL 1611059 (2d Dep't April 20, 2010).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Aliano v. Oliva*, 2010 WL 1611121 (2d Dep't April 20, 2010).
45. *Id.*
46. *Id.*
47. *Id.*

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Making *Garcetti's* "Practical Inquiry" into Public Employee Free Speech Rights

By Douglas E. Gerhardt

Introduction

Historic dogma[1] denied public employees free speech rights at work. Rooting out that dogma, courts invalidated statutes seeking to suppress public employee free speech.[2] It is now well-settled that public employees do enjoy First Amendment freedoms even at work.[3] Yet, as clear as the Supreme Court's pronouncement has been, guidance on the extent of those public employee rights is more opaque.

Garcetti v. Ceballos,[4] the Court's latest pronouncement on public employee free speech rights, explained the extent of such rights requires practical inquiry into the specific facts surrounding what was said and the manner in which it was said.[5] However, the Court stopped short of enunciating precise factors which control that inquiry. Recent New York Federal District Court and Second Circuit cases shed light on these factors and provide guidance to public employers and employees. This guidance ought to be taken into account when determining whether an employee has properly exercised her / his free speech rights at work.

This article provides a brief background on the cases leading up to and including *Garcetti*. It then examines recent case law delineating factors endemic to the "practical inquiry" now required under *Garcetti*.

Prelude to *Garcetti*

In 1968, the Supreme Court defined public employees' free speech rights at work. Examining public school teachers' statements to a local newspaper regarding recent proposed tax increases, the Court concluded that while the free speech rights enjoyed by private citizens do not automatically flow to public employment (here a school building), they are not entirely devoid.[6] The Court established that limiting public employees' free speech rights requires balancing the speaker's interest in free expression with the government's interest in efficient operation of (in this case) schools.[7]

The Court honed the *Pickering* analysis several years later in *Connick v. Meyers*.[8] Analyzing the propriety of an assistant district attorney's comments after being fired, the Court added a component to the public employee free speech analysis. There, the Court held speech on matters of public concern is entitled to greater protection than when a public employee speaks on matters of a private or work related nature.[9] The Court found relevant the time, place and manner of the speech.[10] *Connick* involved a questionnaire distributed by a disgruntled assistant district attorney.[11] The Court found parts of the questionnaire evaluation addressed matters of public concern and, thus, were protected speech even though much of the questionnaire did not.[12]

Rankin et al. v. McPherson[13] relied on *Pickering* and *Connick* when analyzing comments by a Texas law enforcement official about presidential policies. The remarks were made shortly after a Presidential assassination attempt and suggested such an attempt ought to be successful.[14] The Court determined the speech addressed a matter of public concern—the Presidential policies—and then went on to balance the speaker's interests on speaking out on matters of public concern against government's interest in promoting the efficiency of public service.[15] Considering the context of the speech, including the time, place and manner of the utterance as well as the fact that it was on a matter of public concern, the Court sided with the employee and found termination of the employee based on the speech was not proper.

Garcetti v. Ceballos

In *Garcetti v. Ceballos*,[16] the Supreme Court built on the framework established in *Pickering* and *Connick* and applied in *Rankin* to further articulate the nature of public employee speech deserving of constitutional protection.[17]

Richard Ceballos was a deputy district attorney in Los Angeles County DA Garcetti's office.[18] In February 2000, at the request of a defense attorney, Mr. Ceballos examined the validity of a search warrant and supporting documentation in a pending case. He found the warrant "contained serious misrepresentations."[19] Mr. Ceballos memorialized his concerns in a memo to supervisors where he recommended the case be dismissed.[20] The case ended up proceeding to trial where Mr. Ceballos was called as a defense witness and testified about his findings.[21]

Following the trial, Mr. Ceballos experienced what he alleged were retaliatory actions by his employer, including reassignment to a different position, transfer to a different courthouse and denial of promotion. He filed a grievance (denied) claiming retaliation.[22] Mr. Ceballos sued claiming his employer's actions violated his First Amendment rights because they were retaliation for his search warrant memo. The trial court dismissed the case finding the memo was written as part of Mr. Ceballos job duties and was, therefore, not protected speech.[23] The Ninth Circuit Court of Appeals reversed concluding the memo was protected speech.[24]

The United States Supreme Court reversed the Ninth Circuit. Relying on prior precedent, the Court acknowledged public employees enjoy liberties while working in government but accept limitations to ensure the smooth operation of government.[25] Determining whether speech is permissible requires analyzing whether an employee spoke as a citizen or in his / her official capacity. The Court made clear, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."[26] The decision further delineates speech on matters of public concern. When an employee speaks on a matter of public concern, the *Pickering* balancing of interests (the speaker's versus government's) must occur.[27] Speech not on a matter of public concern is accorded no such protection.

Applying these principles, the Court found Mr. Ceballos spoke in his official capacity. Critical to its conclusion was the fact that Mr. Ceballos' "expressions were made pursuant to his [job] duties"—to advise his supervisor how to proceed with a case.[28] The Court stated:

> [r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.[29]

The Court also held the fact that Mr. Ceballos spoke from inside his office, through a memo, was instructive, but not dispositive.[30]

The *Garcetti* decision hones analysis of government employee free speech and to an extent narrows it. If an employee speaks as part of her / his official job duties, the speech is not protected. If the employee speaks on a matter which is not of public concern, the speech will not receive protection. Where *Pickering* and *Connick* focused on balancing interests, and certainly that is still required, *Garcetti* focuses on the manner and scope of the speech—whether it was part of official duties and whether it was on a matter of public concern. The Court (purposely) does not provide "a comprehensive framework for defining the scope of an employee's duties"[31] or define what constitutes a matter of public concern. This, the Court held, is a "practical inquiry."[32] Recent cases in the Second Circuit have made that inquiry and in so doing provide instructive guidance on the scope of public employee free speech rights.

"Practical Inquiry" after *Garcetti*

Sousa v. Roque[33]

Mr. Sousa was a Connecticut Department of Environmental Protection employee who, after a fight with a fellow worker, was suspended for three days.[34] Following the altercation, Mr. Sousa made numerous complaints focusing on the discipline he received due to the incident and more generally, workplace harassment.[35] Complaints were general in nature and also related to "mobbing"—the practice of abusive behaviors being inflicted over time.[36] He complained for himself and for others in the Department. Complaints were filed with the Department and the state attorney general.

Also following the altercation, Mr. Sousa was asked to take a fitness for work exam, ended up being out on leave for a period of time and ultimately, after not coming back to work, was terminated.[37] Mr. Sousa sued claiming the negative work actions and termination were retaliatory in response to his speaking out regarding harassment.[38] The trial court found Sousa had not engaged in speech on a matter of public concern and, therefore, his retaliation claim was not permitted.[39] The Second Circuit reversed.

The court closely examined whether Mr. Sousa's speech addressed a matter of public concern.[40] It held matters of public concern are those which "relate to any matter of political, social or other concern to the community."[41] The content, form, and context are critical, as is motive, but the latter is not dispositive.[42] According to the court, "it does not follow that a person *motivated by* a personal grievance cannot be speaking on a matter of public concern."[43]

Here, that appears to be the case. The Second Circuit ruled the lower court erred in finding no First Amendment protection for speech calculated to redress personal grievances in the employment context.[44] The fact that Mr. Sousa's speech arose through a grievance does not remove it from the ambit of public concern.[45] Rather, the context of the entire record must be considered.[46] It remanded the case back to district court for further proceedings.[47] Critically, Mr. Sousa's motivation was not dispositive of the nature of his speech.

Weintraub v. BOE of New York City[48]

Six months after *Sousa*, the Second Circuit again scrutinized speech born of an employee grievance. The court grappled with the threshold issue not present in *Sousa*—whether speech was made as part of an employee's official duties.

Mr. Weintraub was a fifth grade teacher in New York City public schools. Two months after starting work, he referred a student for discipline after the student threw a book at Mr. Weintraub.[49] The student was returned to Mr. Weintraub's class and soon thereafter, threw another book.[50] Mr. Weintraub again sent the student to the assistant principal and again the student was returned.[51] Mr. Weintraub was upset by the administrative response and felt if the student could do this he could put others at risk as well.[52] He demanded action and threatened to file a grievance.[53]

Mr. Weintraub alleged that due to his complaints, including the grievance, he was retaliated against. Specifically, Mr. Weintraub claims he received unfounded negative classroom evaluations, poor performance reviews and disciplinary reports, was wrongfully accused of sexually abusing a student and abandoning his class and had criminal charges filed against him.[54] Eventually Mr. Weintraub was terminated.[55]

Mr. Weintraub sued claiming retaliation and a First Amendment right to filing the grievance. This was claimed as protected speech having not been made as part of his duties or on a matter of private concern.[56] He argued there is no affirmative duty to file a grievance and, therefore, doing so could not be deemed part of his official duties.

The court rejected that argument. The court reasoned "if [we] determine[] that [Weintraub] either did not speak as a citizen or did not speak on a matter of public concern, [he] has no First Amendment cause of action based on his…employer's reaction to the speech."[57] Engaging *Garcetti's* practical inquiry, the court examined the public employee's professional responsibilities.[58] It found duties are not limited to tasks specifically designated[59] and concluded speech may be pursuant to a public employee's job duties even though it is not defined in a job description or a response to an employer request.[60]

Mr. Weintraub's grievance was "part-and-parcel of his concerns about his ability to properly execute his duties…namely to maintain classroom discipline."[61] The court noted the grievance process is one unique to public employees—there is no citizen analogue.[62] Though not dispositive, considerable weight was accorded to the fact that Mr. Weintraub chose a grievance rather than a channel available to the citizenry—a letter to the editor or to the inspector general. Doing so virtually ensured his speech would be afforded no constitutional protection.[63]

Conclusion

Garcetti and its progeny do not eliminate the complexity of fact patterns the Supreme Court openly recognized are prevalent in First Amendment free speech cases. However, this body of law offers instructive guidance. Just as *Garcetti* narrowed the inquiry relating to public employee free speech rights, the circuit cases following it develop an analytical framework for breaking down those facts.

Sousa, Weintraub and other precedent describe factors to determine whether government speech is protected. Job descriptions,[64] to whom speech is directed, whether speech is a result of special knowledge gained as part of employment, whether speech occurred at work or concerned the employee's job and whether the speech is the kind of activity engaged in by citizens who do not work for the government all become relevant to the 'practical inquiry' into a government employee's speech.[65] No single one of these, nor is the fact that speech occurred at work or was made pursuant to a grievance, is dispositive. The rule of *Connick* remains—the totality of circumstances surrounding the utterance must be considered.

Government employers are well advised to counsel employees that, while they have free speech rights at work, these are limited. Further, such rights ought to be exercised carefully and consistent with internal job descriptions, policies and local laws. Such advice will assist public employees and employers to understand the nature of speech protected and prohibited as a public employee.

Endnotes

1. *Connick v. Meyers*, 461 U.S. 138, 143 (1983) citing *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) and *Adler v. Board of Education*, 342 U.S. 485 (1952); *Garner v. Los Angeles Bd. of Public Works*, 341 U.S. 716 (1951); *Public Workers v. Mitchell*, 330 U.S. 75 (1947); *United States v. Wurzbach*, 280 U.S. 396 (1930); *Ex parte Curtis*, 106 U.S. 371 (1882).
2. *Id.* at 144.
3. *See generally, Pickering v. Board of Ed. of Township High School District*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138, 143 (1983).
4. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
5. *Id.* at 424.
6. *Pickering v. Board of Ed. of Township High School District*, 391 U.S. 563 (1968).
7. *Id.* at 572.
8. *Connick v. Meyers*, 461 U.S. 138 (1983).
9. *Id.*
10. *Id.* at 148.
11. *Id.*

12. *Id.* at 149 ("One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates.").
13. 483 U.S. 378 (1987).
14. *Id.* at 386.
15. *Id.* at 389.
16. 547 U.S. 410 (2006).
17. Due to the "practical" nature of the inquiry insisted upon by the Court, this article details salient facts of the cases at issue in order to provide context and frame of reference for the inquiries.
18. *Garcetti v. Ceballos* at 413. (All factual references are to the official Supreme Court decision cite.).
19. *Id.* at 414.
20. *Id.*
21. *Id.* (The trial court rejected Mr. Ceballos' findings.).
22. *Id.* at 415.
23. *Id.*
24. *Garcetti v. Ceballos*, 361 F.3d 1168, 1173 (9th Cir., 2009). The appellate court found Mr. Ceballos' memo contained evidence of government misconduct and, as such, addressed a matter of public concern.
25. *Id.* at 418.
26. *Id.* at 421.
27. *Id.* at 423.
28. *Id.* at 421.
29. *Id.*
30. *Id.* at 420.
31. *Id.* at 424.
32. *Id.*
33. *Sousa v. Roque*, 578 F.3d 164 (2d Cir. (2009).
34. *Id.* at 166.
35. *Id.* at 167.
36. *Id.*
37. *Id.* at 168.
38. *Id.*
39. *Id.* at 170.
40. This was the only matter brought to the court on appeal. The District Court determined Mr. Sousa was not acting in his official capacity when he brought the harassment complaints forward. Significantly, the holding allows the inference that a public employee raising issues of harassment in the workplace is not speaking in her / his official capacity.
41. *Id.* at 170 citing *Connick v. Meyers*, 461 U.S. 138 at 146 (1983).
42. *Id.* at 171 citing *Cioffi v. Averill Park CSD Board of Edcuation*, 444 F.3d 158 at 166 (2d Cir. 2006) and *Reuland v. Hynes*, 460 F.3d 409 (2d Cir. 2006).
43. *Id.* at 174 (emphasis in original).
44. *Id.* at 175.
45. *Id.*
46. *Id.* at 175 citing *Connick v. Meyers*, 461 U.S. at 147-48.
47. *Id.*
48. *Weintraub v. NYC Board of Education et al.*, 593 F.3d 196 (2d Cir., 2010) (hereinafter *Weintraub II).*
49. *Weintrab v. NYC Board of Edcuation*, 423 F.Supp.2d 38 (E.D.N.Y., 2006) (hereinafter *Weintraub I).*
50. *Weintraub II* at 198-199.
51. *Id.* at 199.
52. *Id.*
53. *Id.*
54. *Weintraub II* at 199.
55. *Id.*
56. *Id.*
57. *Id.* at 201 citing *Sousa v. Roque*, 578 F.3d 164, 170, quoting *Garcetti*, 547 U.S. at 418.
58. *Id.*
59. *Id.* at 202 citing *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1242 (11th Cir., 2007).
60. *Id.* at 203. The court notes this holding is consistent with five other circuits citing, *Williams v. Dallas Indep. SD*, 480 F.3d 689 (5th Cir., 2007); *Renken v. Gregory*, 541 F.3d 769 (7th Cir., 2008); *Phillips v. City of Dawsonville*, 499 F.3d 1239 (11th Cir., 2007); *Brammer–Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192 (10th Cir., 2007); *Freitag v. Ayers*, 468 F.3d 528 (9th Cir., 2006).
61. *Id.*
62. *Id.* at 203.
63. *Id.* at 204.
64. The *Garcetti* Court made clear Job Descriptions alone are not enough and these often bear little resemblance to the actual duties performed. *Garcetti v. Ceballos* at 424 (rebuking contentions contained in Justice Souter's dissent.).
65. *Kelly v. Huntington Union Free School Dist.*, 675 F.Supp.2d 283 (E.D.N.Y. Dec 23, 2009).

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Piercing the Veil of a Plaintiff's Factual Allegations

By Lalit K. Loomba

Municipalities spend substantial resources defending Section 1983 claims filed by *pro se* litigants. While many of these lawsuits contain patently frivolous allegations, municipalities have little choice but to defend them. Pre-trial motions are not always successful because of the existence, or claimed existence, of a factual issue. This is especially true in excessive force claims, where differing versions of the underlying incident will typically be resolved by a jury at trial, as opposed to by the court as a matter of law.

In a small category of cases filed in federal court, however, it is possible to attack a plaintiff's bare allegations—contained in a complaint or an affidavit submitted in opposition to a motion for summary judgment—on grounds of implausibility. Under this theory, a court may "pierce the veil" of the plaintiff's allegations and dismiss the action, notwithstanding the claimed existence of a factual dispute. This article reviews the legal grounds to defend a case under the theory of implausibility, and discusses a few illustrative cases. County attorneys, corporation counsel, and village and town attorneys may find the discussion interesting as it demonstrates an avenue of attack that might be utilized to defend against time-consuming and costly litigation. As will be seen, although implausibility is most commonly employed in *pro se* cases, it has been applied in represented actions as well.

28 U.S.C. § 1915(e)

Many, although not all, *pro se* cases are started on an *in forma pauperis* basis pursuant to 28 U.S.C. § 1915. Section 1915 allows an indigent litigant to commence a civil action in federal court without paying the filing fee, which is currently $350. But as the Supreme Court noted in *Nietze v. Williams*,[1] "a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits."[2] To protect against such abuse, the statute allows a district court to dismiss a case if it determines that the action is "frivolous or malicious."[3] In *Nietze*, the Supreme Court observed that the statute affords district courts "not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the *unusual power* to *pierce the veil* of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless."[4] Examples of such cases, the Court noted, "are claims describing fantastic or delusional scenarios, claims with which the federal district judges are all too familiar."[5] The Court in *Nietze* compared and contrasted the power afforded to judges under Section 1915(e) with that under Rule 12(b)(6), the latter of which "does not countenance…dismissals based on a judge's disbelief of a complaint's factual allegations."[6]

In *Denton v. Hernandez*,[7] the Supreme Court further explained that the power to "pierce the veil" of a plaintiff's allegations under Section 1915 "means that a court is not bound, as it usually is when making a determination solely on the pleadings, to accept without question the truth of the plaintiff's allegations."[8] The Court in *Denton* cautioned about dismissal of frivolous claims on this basis "without any factual development," but noted that "[s]ome improbable allegations might properly be disposed of on summary judgment."[9]

As many *pro se* cases filed against municipalities are initiated on an *in forma pauperis* basis, counsel defending such cases should consider Section 1915(e), and the theory of implausibility, as a defense of frivolous claims. Interestingly, some courts have adopted the rationale of Section 1915(e) and applied it to cases where the plaintiff is represented by counsel and not proceeding *in forma pauperis*, applying, in effect, a general theory of implausibility. What follows are brief summaries of decisions where claims have been dismissed on these various grounds.

Illustrative Cases

A representative case dismissing claims on grounds of implausibility is *Shabazz v. Pico*.[10] In *Shabazz*, the inmate plaintiff commenced a *pro se* action against correction officers, alleging excessive force in violation of the Eighth Amendment. Plaintiff alleged he was assaulted upon his transfer from one state prison to another, and further that the defendants conspired to do this in retaliation for plaintiff's repeated prior filing of civil actions against corrections officers. In support of their motion for summary judgment, defendants pointed to plaintiff's medical records, which showed that he suffered only a minor abrasion to his shoulder and a minor cut to one of his fingers as a result of the incident.

The court noted that the plaintiff had "changed his allegations regarding his injuries a number of times during the course of this litigation."[11] For example, in his complaint, plaintiff claimed to have suffered "serious physical injury," while in his deposition he stated he suffered only from "emotional and psychological scars."[12] Then in opposing defendants' summary judgment motion, plaintiff claimed, for the first time, that he suffered "a busted lip, head, swelling to [the] face, eye and numbness, [and] pain and swelling to other extremities."[13]

These alleged injuries, however, were not recorded in plaintiff's medical records from the day following the alleged assault. The court also noted that plaintiff's version of the assault had changed over the course of the litigation. In his complaint, plaintiff alleged he was beaten both outside the prison, in the vicinity of the transfer van, and inside the facility. In opposing the motion for summary judgment, plaintiff only referred to having been assaulted inside the van.[14]

Noting the plaintiff's changing account of the alleged assault and the alleged resulting injuries, the court (by then District Judge Sotomayor) stated that although a court should generally not make credibility determinations in ruling on a summary judgment motion, "*when the facts alleged are so contradictory that doubt is cast upon their plausibility, I am authorized to 'pierce the veil of the complaint's factual allegations,' dispose of 'some improbable allegations,' and dismiss the claim.*"[15] The court held that plaintiff's allegations were so replete with contradictory statements that the court could pierce the veil of those allegations and grant summary judgment on the claim for excessive force.

The court also pierced the veil of plaintiff's allegations with respect to his claim that he was subjected to certain verbal threats. In their summary judgment motion, defendants noted that a prisoner's claim of verbal harassment, unaccompanied by physical injury, was not actionable under Section 1983. In response to the motion, plaintiff alleged, for the first time, that he suffered both physical and psychological injury as a result of defendants' alleged verbal threats. Again citing *Denton,* and the "unusual power to pierce the veil of the complaint's factual allegations," the court found that "plaintiff's belated assertions of physical and psychological injuries to be insufficient to sustain his claim as a matter of law."[16]

While the court in *Shabazz* cited the Supreme Court's decision in *Denton,* which of course analyzed and applied Section 1915(e), the *Shabazz* court never expressly cited Section 1915(e) in its decision. This omission, arguably, has led other courts to apply *Denton's* analysis of implausibility under Section 1915(e) to cases where the plaintiff was represented by counsel and did not proceed *in forma pauperis*.

For example, in *Jeffreys v. The City of New York*,[17] a represented plaintiff brought a Section 1983 excessive force case against New York City police officers. Plaintiff had been suspected of being involved in a string of burglaries at public schools, and responding to a tip, the police set up a post inside an elementary school. The plaintiff broke into the school, shattered the window on the door outside a third-story classroom and entered. Inside the room, the plaintiff was confronted by a police officer. Plaintiff claimed that the officer hit him several times with a flashlight in the head, body and arms, after which other officers entered the room and joined in the "beating." Plaintiff claimed that he lost consciousness and woke up on the sidewalk outside the school directly below the open window of the third-story classroom. Plaintiff claimed he was thrown out of the window by the police.[18]

The police gave a substantially different account. They claimed to have found plaintiff inside the classroom and shouted "Police, don't move!" The plaintiff reacted by dropping what was in his hands, running to the opposite side of the room and then jumping out an open window. The police assumed the plaintiff had jumped onto a fire-escape or stairway reachable from the window.[19]

Following his arrest, plaintiff signed a written confession, but without mention of any police misconduct. Similarly, at his arraignment and plea, plaintiff failed to mention that he was beaten by police or forcibly thrown out of a window. In fact, the plaintiff first publicly claimed to have been thrown out of the window nine months after the arrest, when he met with a doctor. In opposition to defendants' motion for summary judgment, plaintiff also tried to introduce statements from the mother of his son and from his aunt to the effect that plaintiff had called them shortly after his arrest and told them he had been thrown out of the window by police. Plaintiff also claimed to have been struck on the head by a police flashlight, but medical evidence failed to demonstrate any injury consistent with that claim.

The District Court in *Jeffreys* granted summary judgment, notwithstanding the existence of a disputed issue of fact, reasoning that "permitting [plaintiff] to present such incredulous testimony at trial would be a terrible waste of judicial resources and a fraud on the court."[20] On appeal, the Second Circuit affirmed, finding that given plaintiff's unsubstantiated testimony, "no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in his complaint."[21]

As noted, the plaintiff in *Jeffreys* was represented by counsel, and there is no reference to the fact that he proceed *in forma pauperis.* In reaching its conclusion, both the district judge and Second Circuit cited *Shabazz*, a case in which then District Judge Sotomayor adopted the language of *Nietche* and *Denton* to the effect that a court may "pierce the veil of a complaint," but did not expressly cite Section 1915.

Plaintiff's Allegations Dismissed as Simply Farfetched

Tota v. Bentley[22] provides a good example of a case dismissed because the plaintiff's version of events was simply so farfetched as to be patently unbelievable. In *Tota,* the *pro se* plaintiff brought a Fourth Amendment excessive force claim against local police officers. The underlying incident started when firefighters responded to a report of a fire at the plaintiff's house. The plaintiff confronted the firefighters with a shotgun, and shot into

their fire truck. Thereafter, plaintiff threw something flammable out of his upstairs window, starting a fire on his neighbor's garage. The County Sheriff's SWAT team arrived and attempted to communicate with plaintiff. After a nine-hour standoff, they eventually entered the house, and were confronted by the plaintiff brandishing a tire iron. The plaintiff was subdued and placed under arrest.

The plaintiff denied any independent recollection or knowledge of the events preceding his arrest. Specifically, he did not recall setting fire to his house (or his neighbor's garage), shooting at the fire truck, the nine-hour standoff with the SWAT team, or attempting to attack the SWAT team with the tire iron. According to plaintiff, he was sitting at home, unarmed, perhaps sleeping, when he heard a loud noise and people breaking into the house. Someone fired a weapon, after which he was tackled, beaten with billy clubs, punched, kicked and maced. Plaintiff says he was also shocked with an electric cord, and then dragged outside where he was subjected to continued physical abuse. Although plaintiff eventually pled guilty to an arson charge for setting fire to the neighbor's garage, he contended he did so only to avoid being sent to a psychiatric center. In fact, plaintiff had a history of mental health problems, and had been hospitalized for such problems on prior occasions. The defendants denied using any force other than what was necessary to remove the tire iron from plaintiff and subdue him.

After his arrest, plaintiff was booked at the Chautauqua County Correctional Facility, where he filled out a section on the booking form that included health screening questions. Significantly, plaintiff indicated that he did not sustain any injuries during his arrest and was not currently in need of medical attention. Plaintiff also indicated that he had suffered prior injuries to his left shoulder and right thumb, and suffered from headaches.

Defendants moved for summary judgment dismissing plaintiff's excessive force claim. Citing *Jeffreys v. City of New York*,[23] the court held that this was "one of the 'rare circumstances' where the outlandish and unsubstantiated nature of plaintiff's account makes summary judgment in [d]efendants' favor appropriate."[24] The court was particularly swayed by the medical records, and plaintiff's own account of his medical condition, which did not support his version of the events, but rather was consistent with the defendants' version.[25] The court concluded: "Plaintiff's testimony is unsubstantiated by any direct evidence, and is so far-fetched that 'no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations in his complaint.'"[26] The court in *Tota* did not cite Section 1915(e), but instead relied on *Jeffreys*.

Additional Cases Citing Section 1915(e)

In *Brodeur v. The City of New York*,[27] the *pro se* plaintiff alleged violations of constitutional rights, contending that he had been repeatedly arrested, jailed and harassed for criticizing the police and the office of then Mayor Rudolph Giuliani. With respect to the Mayor, the plaintiff alleged a violation of the First Amendment, alleging that the Mayor "utilized the Department of Corrections, the NYPD, and his authority over criminal court judges…to harass [plaintiff] and get [him] to stop [his] public reporting about…corruption."[28] The defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the federal rules. The Court analyzed this claim as to whether the plaintiff had pled sufficient facts to demonstrate then Mayor Giuliani's personal participation in any alleged deprivation of a constitutional right, and whether the complaint alleged a policy or custom under which unconstitutional practices occurred. The Court found that the complaint's conclusory allegations related only to how he was treated, and not to any policy or custom, and that the conclusory allegations were of the sort that could be dismissed under 28 U.S.C. §1915(e)(2).[29]

In *Mahapatra v. Comstock*,[30] the plaintiff lost a state-court custody hearing, and then brought a federal civil rights action against the hearing officer, his wife's attorney, his wife and his wife's "paramour," alleging discrimination on the basis of national origin. The hearing officer, a social case worker and the attorney representing the wife at the custody hearing brought a motion for summary judgment which was granted on grounds of absolute and qualified immunity. Although the wife and her paramour did not join the motion, the court considered the sufficiency of the claims *sua sponte* under Section 1915(e). The court held that "there [was] absolutely no allegation or implication that [plaintiff's wife or her paramour] could be considered state actors, [and] that plaintiff [failed to identify] a constitutional or statutory right they allegedly violated."[31] The claims were dismissed pursuant to Section 1915(e).

In *Johnson v. Longtin*,[32] the plaintiff inmate filed a Section 1983 action alleging he had been falsely accused of assaulting the defendant corrections officer. Plaintiff further alleged that he was thereafter placed in administrative segregation where he was assaulted by an unknown corrections officer who threw a flammable liquid on plaintiff which was then ignited. Defendants moved for summary judgment, seeking dismissal of the complaint pursuant to Section 1915(e). Their motion was supported with (i) prison disciplinary records showing that plaintiff had pled guilty to the assault; (ii) a videotape of plaintiff's cell demonstrating that plaintiff himself had started a fire in his cell; and (iii) disciplinary records showing that plaintiff was charged with starting that fire, had subsequently admitted it and pled guilty to the charge. Faced with this evidence, which plaintiff did not controvert, the court dismissed the complaint,

finding that the plaintiff had fabricated the factual allegations in the complaint concerning the assault and fire.

Shifting Allegations as a Basis for an Implausibility Defense

As does the *Shabazz* case discussed above, *DeSilvis v. National Railroad Passenger Corp.*,[33] provides a good example of a court piercing the veil of the plaintiff's allegations when confronted with a plaintiff who shifts his story significantly over a period of time. In *DeSilvis,* plaintiff claimed to have been attacked and beaten by police officers in the vicinity of New York's Pennsylvania Station. The question arose as to which governmental authority employed the police officers. Plaintiff originally filed a complaint against the City of New York, but this proceeding was resolved against the plaintiff. Plaintiff then filed a complaint in federal court, alleging that the officers who attacked him worked for Amtrak. However, about four months later, plaintiff, who was represented by counsel, claimed to have been "disorientated" at the time of his alleged attack, and that new information showed that the officers worked for the United States Postal Service, not Amtrak. Hence, plaintiff signed a stipulation dismissing the case against Amtrak, and submitting an amended complaint against the United States Postal Service. Plaintiff soon learned, however, that a claim against the Postal Service was time-barred. Plaintiff responded by changing his position *again*, and filing a second-amended complaint which dropped the claim against the Postal Service, and restored the claim against Amtrak.

In response to a subpoena served on the Postal Service, it became clear that the officers who had detained the plaintiff were, in fact, employed by the Postal Service. Based on this information, Amtrak filed a motion for summary judgment. Plaintiff opposed the motion by attempting, in effect, to split the baby: he submitted an affidavit stating, "to the best of my knowledge, two of the officers who assaulted me were from the Postal Police and the other two were from Amtrack."[34] The court granted summary judgment, concluding that the "plaintiff can offer no reasonable explanation for the discrepancy" in his various versions of the event.[35] Quoting *Shabazz,* the court held: "'When the facts alleged are so contradictory that doubt is cast upon their plausibility, [a court] is authorized to 'pierce the veil of the complaint's factual allegation," and dismiss the claim."[36]

Conclusion

The cases discussed demonstrate that an implausibility defense can be used in both *pro se* cases commenced under Section 1915, as well as in represented cases. The defense tends to succeed when it can be shown that the plaintiff's story shifts over time, is inconsistent with objective evidence (e.g., medical records), or where the claim is simply so farfetched as to be patently unbelievable. An implausibility defense cannot be used in every case. However, it should be considered, especially when defending *pro se* litigation, as an argument which can hopefully achieve a cost-effective resolution of what could otherwise prove to be time-consuming and expensive litigation.

Endnotes

1. 490 U.S. 319 (1989).
2. *Id.* at 324.
3. 28 U.S.C. § 1915(e)(2)(B).
4. *Nietze*, 490 U.S. at 327 (emphasis added).
5. *Id.* at 327.
6. *Id.*
7. 504 U.S. 22 (1992).
8. *Id.* at 32.
9. *Id.* at 33; *see also Rodriguez v. Murphy*, 1994 U.S. Dist. LEXIS 19107, at *15-16 (W.D.N.Y. Jan. 3, 1995).
10. 994 F. Supp. 460 (S.D.N.Y. 1998), vacated in part on other grounds, 2000 U.S. App. LEXIS 3404 (2d Cir. Feb. 24, 2000).
11. *Shabazz*, 994 F. Supp. at 469.
12. *Id.*
13. *Id.* at 469-470.
14. *Id.* at 470.
15. *Shabazz*, 994 F. Supp. at 470 (emphasis added), citing *Denton v. Hernandez*, 504 U.S. 25, 32 (1992).
16. *Id.* at 475.
17. 426 F.3d 549 (2d Cir. 2005).
18. *Id*. at 551.
19. *Id.* at 552.
20. *Id.* (quoting *Jeffreys v. Rossi*, 275 F. Supp.2d 463, 477-78 (S.D.N.Y. 2003)).
21. *Id.* at 555.
22. 2009 U.S. Dist. LEXIS 91229 (W.D.N.Y. Sept. 30, 2009).
23. 426 F.3d 549, 554 (2d Cir. 2005).
24. *Tota*, 2009 U.S. Dist. LEXIS 91229, at *17.
25. *Id.* at *17-19.
26. *Id.* at *21, citing *Jeffreys*, 426 F.3d at 555.
27. 1998 U.S. Dist. LEXIS 1229 (S.D.N.Y. Aug. 10, 1988).
28. *Id.* at *21.
29. *Id.* at *22-23.
30. 1996 U.S. Dist. LEXIS 19842 (N.D.N.Y. Dec. 31, 1996).
31. *Id.* at *12.
32. 2003 U.S. App. LEXIS 6211 (2d Cir. March 28, 2003).
33. 97 F. Supp.2d 459 (S.D.N.Y. 2000).
34. *DeSilvis*, 97 F. Supp.2d at 462.
35. *Id.* at 463.
36. *Id.*

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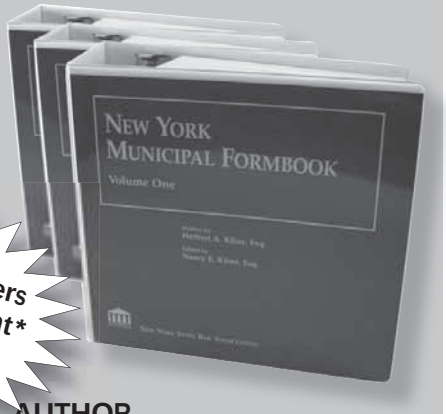

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