

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D21474  
Y/hu

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Argued - October 31, 2008

ROBERT A. SPOLZINO, J.P.  
DANIEL D. ANGIOLILLO  
THOMAS A. DICKERSON  
ARIEL E. BELEN, JJ.

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2007-09556

DECISION & ORDER

Clifford Moore, appellant, v Middletown Enlarged  
City School District, respondent.

(Index No. 5583/05)

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Curan, Ahlers, Fiden & Norris, LLP, White Plains, N.Y. (William F. Costello of  
counsel), for appellant.

Lamb & Barnosky, LLP, Melville, N.Y. (Sharon N. Berlin of counsel), for  
respondent.

In an action, inter alia, to recover damages for employment retaliation in violation of  
Civil Service Law § 75-b and 42 USC § 1983, the plaintiff appeals, as limited by his brief, from so  
much of an order of the Supreme Court, Orange County (Alessandro, J.), dated August 22, 2007,  
as granted those branches of the defendant's motion which were to dismiss the cause of action  
pursuant to Civil Service Law § 75-b for failure to timely serve a notice of claim pursuant to  
Education Law § 3813 and to dismiss the cause of action pursuant to 42 USC § 1983 for failure to  
state a cause of action.

ORDERED that the order is modified, on the law, by deleting the provision thereof  
granting that branch of the motion which was to dismiss the cause of action pursuant to 42 USC §  
1983 for failure to state a cause of action and substituting therefor a provision denying that branch  
of the motion; as so modified, the order is affirmed insofar as appealed from, with costs to the  
plaintiff.

The plaintiff commenced this action asserting, inter alia, claims pursuant to Civil

December 16, 2008

Page 1.

MOORE v MIDDLETOWN ENLARGED CITY SCHOOL DISTRICT

Service Law § 75-b and 42 USC § 1983. Specifically, the plaintiff alleged that the defendant, Middletown Enlarged City School District (hereinafter the District), retaliated against him after he reported his concerns regarding the appearance of sexual misconduct between the then-Superintendent and a minor student, and after he subsequently spoke to the press about those concerns. The plaintiff alleged that, prior to the start of the 2004-2005 school year, the District retaliated against him by eliminating the position of High School Assistant Principal, which had he held for five years, subsequently creating an allegedly identical position entitled House Principal, and thereafter refusing to hire him for the newly-created position. The plaintiff further alleged that he was transferred to the position of Assistant Principal at a different school within the District and assigned tasks which were secretarial in nature. The plaintiff served a notice of claim on the District more than five months after being informed that his application for the House Principal position had been rejected, the last of the alleged retaliatory acts.

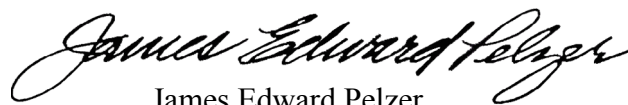
The Supreme Court properly granted that branch of the District's motion which was to dismiss the plaintiff's claim pursuant to Civil Service Law § 75-b because the plaintiff failed to serve a timely notice within three months of the last alleged retaliatory act (*see* Education Law § 3813; *Scherman v Board of Educ. of School Dist. No. 1, Town of Hempstead*, 44 AD2d 831, *aff'd* 37 NY2d 839; *see also State Div. of Human Rights v Burroughs Corp.*, 52 NY2d 748; *Selkirk v State of New York*, 249 AD2d 818, 819).

However, the Supreme Court erred in dismissing the plaintiff's claim pursuant to 42 USC § 1983 for failure to state a cause of action. The plaintiff alleged that he reported his concerns of sexual misconduct between the superintendent and a minor student and that the District thereafter retaliated against him by eliminating the position he held as Assistant Principal, refusing to hire him for a newly-created identical position, and transferring him to another school within the District to perform secretarial work. These allegations are sufficient to survive a motion to dismiss as they describe a retaliatory policy on the part of the District (*see Monell v New York City Dept. of Social Services*, 436 US 658, 694; *see also Cioffi v Averill Park Cent. School Dist. Bd. of Educ.*, 444 F3d 158, *cert denied* 549 US 953; *cf. Back v Hastings on Hudson Union Free School Dist.*, 365 F3d 107, 128).

In light of this determination, the plaintiff's remaining contention is academic.

SPOLZINO, J.P., ANGIOLILLO, DICKERSON and BELEN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court