

Browne v Board of Educ.
2015 NY Slip Op 32543(U)
May 19, 2015
Supreme Court, Nassau County
Docket Number: 008318/11
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

Justice

TRIAL/IAS PART 12

_____ X

ROBERT BROWNE,

Plaintiff,

-against-

Index No.: 008318/11
Motion Sequence...05
Motion Date...05/04/15

THE BOARD OF EDUCATION, OYSTER BAY
EAST NORWICH SCHOOL DISTRICT,
and PHYLLIS S. HARRINGTON,

Defendants.

_____ X

- Papers Submitted:
- Notice of Motion.....X
- Memorandum of Law.....X
- Declaration.....X
- Memorandum of Law.....X
- Affirmation.....X
- Reply Affidavit.....X

Upon the foregoing papers, the motion brought by the Defendants, The Board of Education, Oyster Bay East-Norwich Central School District and Phyllis S. Harrington, seeking an Order barring the Plaintiff from producing testimony or other evidence at trial relating to his service in the United States Army or various extracurricular assignments that the Plaintiff performed for the district, is determined as hereinafter provided.

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The Plaintiff commenced this action seeking damages as a result of an investigation regarding the grading of the 2006 Global History Regents Examination. All of the Plaintiff's claims were dismissed as a result of a prior motion, except for his claim of gender discrimination. As part of the damages sought on the gender discrimination claim, the Plaintiff seeks lost earnings stemming from lost promotions with the United States Army and loss of coaching and timekeeping assignments with the school district. The Defendants argue that such damages are specious, lack any evidence in support, and as such, the Plaintiff should not be permitted to introduce evidence regarding these damages at trial.

In support of their motion, the Defendants submit the Plaintiff's Response to Defendants' First Request for the Production of Documents, the Plaintiff's Response to Defendants' First Set of Interrogatories and the transcript from the Examination Before Trial ("EBT") of the Plaintiff. Specifically, the Defendants argue that the Plaintiff claims that his "Top Secret" clearance with the United States Army was revoked as a result of the Defendants' actions and that this resulted in him being denied entry into the War College, which deprived him of the opportunity to be promoted to Colonel and Brigadier General. However, in response to the Defendants' demand for documentary evidence to support this claim, the Plaintiff did not provide any evidence.

The Defendants argue that at no time did anyone from the Army War College state that the Plaintiff was denied entry due to his loss of security clearance. Furthermore, the Defendants contend that the Plaintiff was denied entry into the Army War College when

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he applied two times after reinstatement of his security clearance. They contend that the Plaintiff cannot establish beyond mere speculation that he suffered any damages relating to his army career as a result of the Defendants' actions.

The Defendants further contend that was not entitled to the coaching or timekeeping assignments and he was required to apply for them on an annual basis. They argue that the Plaintiff applied for, but was not given the assignments during the investigation, but he was never told that such decision was related to the investigation. The Defendants contend that the Plaintiff did not even apply for coaching or timekeeping assignments after his reinstatement.

In opposition, the Plaintiff contends that the Defendants' motion in limine should not be granted because it would have a concretely restrictive effect on the effort of the Plaintiff to recover damages. The Plaintiff contends that there is sufficient evidence from which a reasonable jury could infer that he is entitled to the damages sought. The Plaintiff contends that prior to the investigation and the subsequent 3020-a hearing, he had been accepted to four consecutive required army schools and came highly recommended for admission to the Army War College. (See Plaintiff's Affidavit annexed to the Declaration of Steven A. Morelli as Exhibit "A" at ¶ 6) The Plaintiff contends that he received numerous recommendations for promotion to Colonel, which would have been more likely with admission to the Army War College. (See Officer Evaluation Reports annexed to the Declaration of Steven A. Morelli as Exhibit "B") The Plaintiff contends that he has offered

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evidence that he was eligible for admission to the Army War College, he was highly recommended for a promotion to Colonel and that he was denied such admission and promotion following the investigation, and as such, it would not be merely speculative for a jury to conclude that such a denial was a result of the Defendants' actions.

Furthermore, the Plaintiff contends that he should not be barred from presenting evidence related to the damages incurred by loss of his extracurricular assignments with the district. The Plaintiff contends that he was the cross-country coach from 1992 through 2007 and the shot clock timekeeper for all varsity and junior varsity home games from 1992 through 2007. The Plaintiff attests that he applied annually for both assignments, that the Board of Education would evaluate applicants based upon their prior performance and that he was never selected again following the District's investigation. (*See* Portion of the Plaintiff's EBT transcript annexed to the Declaration of Steven A. Morelli as Exhibit "C")

The Plaintiff contends that the Defendants argument that he cannot seek damages because he never applied for the assignments after the investigation is without merit because he applied days before the Defendants brought disciplinary charges against him and again during his suspension. The Plaintiff contends that a reasonable jury could conclude that he was denied the extracurricular assignments as a result of the Defendants' discriminatory actions. Therefore, the Plaintiff argues that evidence of the damages incurred by such loss should not be precluded.

In their Reply in Further Support of their motion, the Defendants contend that the Plaintiff's opposition does not address the well established notion that a court should preclude evidence that would serve only to invite the jury to speculate as to whether recovery is available. The Defendants further argue that the Plaintiff seeks to confuse the issue by citing to cases that hold that the amount of damages can be approximated where an exact calculation is impracticable. The Defendants argue that the Plaintiff is not seeking to approximate the amount owed, but is speculating as to cause and effect. The Defendants argue that the Plaintiff has provided no evidence to support his assertion that he would have been admitted to the Army War College or promoted if it were not for the investigation. The Defendants argue that the Plaintiff actually testified that he does not know why he was not admitted.

The Defendants further argue that the Plaintiff cannot state with any certainty that he would have been given the extracurricular assignments with the District even if he were not suspended. They contend that the Plaintiff has failed to show that he was denied these assignments because of his gender and/or that he was legally entitled to such positions.

It is well settled that damages may not be recovered if they are speculative. (*Lloyd v. Town of Wheatfield*, 67 N.Y.2d 809 [1986]; see also *Rakylar v. Washington Mut. Bank*, 858 N.Y.S.2d 759 [2nd Dept. 2008]; *Neos v. Lacey*, 770 N.Y.S.2d 410 [2nd Dept. 2003]) Here, the Plaintiff has failed to set forth any evidence, other than his own Affidavit, to establish that he has suffered the damages he claims as a result of the Defendants' actions.

Although the Plaintiff claims to have been denied admittance into the Army War College due to his lack of security clearance, there is no evidence, other than his own assertions, to show that the denial was based on the investigation or by any way caused by the Defendants. Additionally, the Plaintiff failed to submit any evidence to show that he would be guaranteed a promotion if he were admitted to the Army War College. Furthermore, there is no evidence to establish that the Plaintiff was denied the extracurricular assignments due to the investigation or the Defendants' actions.

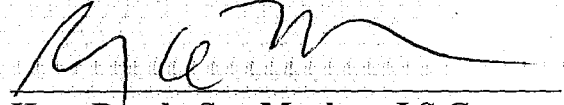
The Plaintiff argues that a reasonable jury could find that, due to the Defendants' actions, he was denied the extracurricular assignments and admittance into the Army War College, based on the fact that he had previously been accepted to Army schools and he had been given the extracurricular assignments for years prior. However, the Plaintiff is essentially requesting that the jury be allowed to speculate regarding the damages claimed. He offers no evidence other than his own testimony to support his claim for damages, and as such, if a jury were to award the damages sought, it would be based on mere speculation.

Accordingly, it is hereby

ORDERED, that the motion brought by the Defendants, The Board of Education, Oyster Bay-East Norwich Central School District and Phyllis S. Harrington, seeking an Order barring the Plaintiff from producing testimony or other evidence at trial relating to his service in the United States Army or various extracurricular assignments that the Plaintiff performed for the District, is **GRANTED**.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
May 19, 2015


Hon. Randy Sue Marber, J.S.C.

ENTERED
MAY 21 2015
NAASAU COUNTY
COUNTY CLERK'S OFFICE