UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Christine C. Anderson,

Plaintiff-Appellant,

v.

The State of New York

Defendants-Appellees.

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Case No.: 07cv9599 (SAS) (AJP)
2d Cir. No. 09-5059-cv

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the accompanying affirmation, Plaintiff-Appellant Christine C. Anderson will move this Honorable Court, at the United States Courthouse, 500 Pearl Street, New York, New York 10007, at a date and time to be determined by the Court, for an order:

(1) **DISQUALIFYING** the Office of the New York State Attorney General from representation of defendants; and

(2) for such other and further relief as the Court may find just and proper.

Dated: New York, New York
September 14, 2010

Christine C. Anderson, *plaintiff, pro se*
227 Riverside Drive – Suite 2N
New York, New York 10025
917-817-7170 tel

To: Monica Wagner, Esq.
Assistant Attorney General
Office of the NYS Attorney General
120 Broadway, 24th floor
New York, New York 10271

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AFFIRMATION IN SUPPORT OF MOTION

I, Christine C. Anderson, make the following affirmation under penalties of perjury:

I, Christine C. Anderson, am the plaintiff-appellant in the above entitled action, and respectfully move this court to issue an order disqualifying the Office of the New York State Attorney General from representing defendant-employees of the State of New York in any legal proceeding involving the herein matter before any federal or state court, agency or any other tribunal. The reasons why I am entitled to the relief I seek, and pending remand to the district court for a new trial as herein explained, are the following:

I. Introduction

1. The trial court abused its discretion in denying my request for a new trial, a reversible error, *inter alia*. That error continues before this appellate body and requires immediate correction. Because of the unique perspective of the trial judge, the decision as to whether to grant a new trial is committed to the district court's sound discretion and will be reversed only for a clear abuse of that discretion. *Kempner Mobile Electronics, Inc. v. Southwestern Bell Mobile Systems*, 428 F.3d 706, 716 (7th Cir. 2005); *Latino v. Kaizer*, 58

F.3d 310, 314 (7th Cir.1995). The trial judge advanced a miscarriage of justice by denying the application for a new trial. Remand is clearly indicated in this matter.

2. Fed.R.Civ.P. 59 does not list the grounds for which a new trial may be granted. (Wright § 95). In federal courts, common law must be looked to in determining the available grounds. Of the numerous grounds justifying a grant of new trial, one is that the "interests of justice" require a new trial. See e.g., *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1379 (7th Cir. 1990) (affirming grant of new trial after a three-week jury trial). Among the grounds cited for seeking new trials are the following:

(1) Irregularity of the proceedings;
(2) Misconduct of jury;
(3) Accident or surprise;
(4) Newly discovered evidence;
(5) Insufficient evidence;
(6) Verdict against law;
(7) Error in law;
(8) Excessive or inadequate damages.

3. A court has broad discretion in considering a Rule 59(e) motion. *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir.), cert. denied, 488 U.S. 820 (1988). Rule 59(e) was adopted to clarify that "the district court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982) (internal quotations omitted). A Rule 59(e) motion may be granted to correct a manifest error of law or fact, or to consider newly-discovered evidence. See *Hagerman*, 890 F.2d at 414.

II. The Attorney General's Representation of the Defendants Constitutes A Clear Conflict of Interest, and Violates Plaintiff's Right to Due Process

4. In this action, plaintiff Anderson was confronted with an unquestionably unfair set of circumstances. She brought her complaint against three individuals, who, although employed by the State of New York, were also sued in their individual capacities. These defendants in turn were at all times represented by the New York State Attorney General. Thus, while the plaintiff charged the defendants with serious violations of law, the Attorney General stood before the jury defending these very same actions as proper and within the law. This arrangement seriously prejudiced the plaintiff, as jurors could and likely did conclude that the State of New York supported fully the conduct of the defendants.

Ongoing Conflict of Interest

5. Representation by the New York Attorney General's office in the pending appeal continues the improper prejudice against plaintiff. Furthermore, not only did the Attorney General's representation of the defendants unduly prejudice the plaintiff, but it also raised serious conflict of interest issues with respect to the defendants themselves. To protect their own rights, each of the defendants had to have their own attorneys in order to permit them to cross claim or make admissions, including their own right to protect their own individual rights in this appeal. Under New York State and federal conflict of interest rules, each of the defendants must be free to undertake these independent actions. To do so, they must have their own counsel. (See NYS Code of Professional Conduct Cannon 5 Conflict of Interest Rules.[1]) The Attorney General as a state attorney is bound by these rules as well. [2]

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[1] http://www.law.cornell.edu/ethics/ny/code/NY_CODE.HTM ; Conflict of Interest Disciplinary Rule 5 http://www.law.cornell.edu/ethics/ny/code/

[2] As head of the Department of Law, the Attorney General is both the "People's Lawyer" and the State's chief legal

6. This constitutes New York State law, and the attorney who violates these safeguards must be immediately removed from the case. Further, should the defendants seek to waive the conflict- they would have to submit an affidavit to that effect to the court. Notwithstanding a defendant's attempt to waive his right to independent counsel, the court can deny the waiver, based on a finding that ultimately this conflict cannot properly be waived. The trail court improperly ignored the obligation to address the inherent conflict up to and including the trial. This court, however, must now disqualify the Attorney General from any representation of the defendants.

7. As a result of these conflict of interest issues, the Attorney General cannot properly represent the defendants, either as a group or individually, in these appellate proceedings. Each defendant must have the right to advance his or her own position on appeal, to cross claim against the others, and to bring a counterclaim against the State. These actions most certainly could not be undertaken in a case where the Attorney General represents all the named defendants. All defendants clearly are in conflict with each other, especially in their individual capacities. Without question, the Attorney General violated its ethical rules and the public trust in undertaking to represent all of the defendants. The Attorney General continues to violate its ethical rules by appearing before this appellate body. This would be the case, even were it established that the defendants had sought to consent to such representation.

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officer. As the "People's Lawyer," the Attorney General serves as the guardian of the legal rights of the citizens of New York, its organizations and its natural resources. In his role as the State's chief legal counsel, the Attorney General not only advises the Executive branch of State government, but also defends actions and proceedings on behalf of the State. http://www.oag.state.ny.us/our_office.html

The Clear Need For Remand

8. The involvement of the New York Attorney General in refuting plaintiff's allegations, which involved serious violations of federal and state law and ethical standards, and in presenting the case of each defendants, denied plaintiff's due process and equal protection guarantees, and right to a fair and impartial trial. See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") and *Eldridge v. Williams*, 424 U.S. 319 335 (1974) [3]

9. The conflict here is particularly acute given the nature of the claims brought by plaintiff Anderson. Plaintiff's charges warranted an independent investigation by the New York State Attorney General's Office to review the basic claims given that Anderson was formerly a Departmental Disciplinary Committee staff attorney with considerable experience and over the years received excellent evaluations. The fact is that these are not allegations from a lay person.

10. While at the DDC, Plaintiff Anderson was charged with investigating cases involving possible criminal and civil misconduct by attorneys. She carried out her duties as a duly authorized officer of the Court. The New York State Attorney General's Office was therefore obligated to protect her and to investigate her claims of serious misconduct against

[3] **The Supreme Court set out the following balancing test for applying procedural due process protections: "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."**

the named parties. To the Contrary, the New York State Attorney General's Office failed to do so.

11. The Attorney General is a publicly funded arm of the State. It was conflicted from the outset of this case because it could not possibly defend any of the defendants, while simultaneously investigating plaintiff's claims of serious ongoing misconduct by the defendants. Indeed, no explanation has ever been provided as to why the Attorney General did not represent plaintiff Anderson *against* any of the original defendants. This was itself a misappropriation of public funds by a state investigative agency with prosecution powers.

12. Federal law mandates that a special prosecutor be substituted into the case, and this was not done. The actions of the Attorney General here confused, misled and confounded the jury, by creating a false impression that the acts were officially sanctioned by the state.

13. Furthermore, Christine Anderson's allegations have substantial impact on the public, the bench and bar, and cannot be ignored by the New York State Attorney General's Office merely because they were motivated to defend this lawsuit. This serious conflict demanded independent counsel for the defendants as a matter of fairness and high ethical conduct to all involved, particularly to Christine Anderson. Having denied independent counsel to the defendants, the Attorney General prejudiced plaintiff by making it appear to the jury that the State of New York and the New York State Attorney General's Office supported defendants' conduct. This was a burden Christine Anderson could never overcome and, at a minimum, warrants a new trial. The unfair burden continues before this appellate court.

14. Additionally, Remand is also certain as the trial Court was concerned about the aforestated conflict of interest and in one of its last instructions to the jury, the Court warned the jury not to draw a negative inference adverse to the defendants for their joint representation by the New York State Attorney General's Office. That instruction was injurious to the plaintiff, Christine Anderson, in that it prejudiced the jury against her and in and of itself warrants a new trial for the following reasons:

a. It was one of the last instructions to the jury and thus was ingrained in the minds of the jury as a lasting impression. Furthermore, as one of the last instructions to the jury, it elevated its importance over and above all prior instructions as something that had to be considered superior to all other instructions.

b. There was no countervailing instruction to the jury that it could find a negative inference of the representation by the New York State Attorney General's Office favorable to the plaintiff. This failure prejudiced the jury against the plaintiff by implying at a minimum, that the state supported all of the defendants' conduct and found that it was within the bounds of the law.

c. Had the Court even given the jury an instruction not to draw a negative inference of the representation of the defendants by the New York State Attorney General's Office as against either or both the plaintiff and the defendants, such an instruction only demonstrates the proof that there is an impermissible conflict of interest in the manner in which this case was conducted, that can only hurt one party over another. Further, the representation by the New York State Attorney General's Office made it appear New York State supported the defendants' conduct and that it was within the bounds of the law.

d. By the Court issuing the jury instruction not to draw a negative inference adverse to the defendants for their representation by the New York State Attorney General's Office, the court preserved the argument to be raised in this motion and appeal.

e. Allowing all of the defendants to be represented by the same counsel and by the New York State Attorney General's Office created an impermissible conflict of interest. Indeed, the conflict was so strong, that had the jury ruled against any one or all of the defendants, they would have been entitled to seek a new trial for impermissible conflict of interest as they would be entitled to their own independent counsel. This court is thus faced with the fact that any unsuccessful litigant in this case could be expected to move for and would be entitled to a new trial because of the impermissible conflict of interest, as all of the defendants are required to have their own independent counsel, and to be represented by their own counsel.

15. The American Bar Association's Code of Professional Responsibility elaborates on the duty of a public prosecutor such as the New York Attorney General to seek justice as follows:

> "This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and *those affecting the public interest should be fair to all* ...." (ABA Code of Prof. Responsibility, EC 7-13, emphasis added.)

16. Therefore, a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, the prosecutor, in this case the Attorney General, is a representative of the sovereign, and consequently must act with the impartiality required of those who govern. Second, the Attorney General can at all times call upon the vast power of the government, by utilizing public funds, and therefore must refrain from abusing that power by failing to act evenhandedly.

17. These key duties are not limited to criminal prosecutions, but must also be observed in civil cases as well. These safeguards are included in the ABA Code. "A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, *and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.*" (Id., EC 7-14, emphasis added.)

18. In the present case, the Attorney General was under the ethical duty to withdraw in order to preserve plaintiff's right to a fair and impartial trial. In a case such as this, not only

is the Attorney General's neutrality essential to a fair outcome for the plaintiff, it is critical to the proper function of the judicial process as a whole. Our system of justice relies for its validity on the confidence of society. Without a continuing belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. (See id., EC 9-1, 9-2.)

19. The New York State Attorney General is a public official elected by statewide ballot [4]. The American Bar Association's Code of Professional Responsibility addresses the special considerations applicable to a lawyer who is also a public official as follows: "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." (ABA Code of Prof. Responsibility, EC 8-8.) "[A]n attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." (ABA Committee on Prof. Ethics, opn. No. 192 (1939); see also *People v. Conner*, 34 Cal.3d 141, 146.)

20. The government's investigative and prosecutorial interests must be balanced against the public interest in insuring that the individuals and organizations receive effective representation, and are accorded their full constitutional rights and protections.

21. There are at least two reasons why a court should satisfy itself that no conflict exists or at least provide notice to the affected party if one does. **First,** a court is under a continuing obligation to supervise the members of its Bar. E.g., *In re Taylor,* 567 F.2d at 1191; see *Musicus v. Westinghouse Electric Corp.*, 621 F.2d 742, 744 (5th Cir.1980) (per curiam)

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4 The fact that the Attorney General is elected by the voters of New York State raises a question with respect to the qualification of the jurors. No juror in the present case was asked whether he or she had voted for Attorney General Andrew Cuomo at the last election, or, for that matter, whether they supported the actions undertaken by him since assuming office, or further. whether they, as a general matter, agree with the general or specific policies of or initiatives undertaken and/or advocated by his office.

(district court obligated to take measures against unethical conduct occurring in proceedings before it). **Second**, trial courts have a duty "to exercise that degree of control required by the facts and circumstances of each case to assure the litigants of a fair trial." *Koufakis v. Carvel*, 425 F.2d 892, 900-01 (2d Cir.1970); see ABA Code of Judicial Conduct, Canon 3(A)(4).

22. For example, when a litigant's statutorily appointed counsel is acting against that person's interests because of a conflict that the party has not been informed of and cannot be expected to understand on his own, it can be concluded that the litigant is not receiving a fair trial. Cf. *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) (divided loyalties of counsel may create due process violation).

23. Attorneys are officers of the court, *Clark v. United States*, 289 U.S. 1, 12, 53 S.Ct. 465, 468, 77 L.Ed. 993 (1933), and are obligated to adhere to all applicable disciplinary rules, and to report incidents of which they have unprivileged knowledge involving violations of a disciplinary rule. ABA Code of Professional Responsibility, DR 1-102(A), 1-103(A); see *In re Walker*, 87 A.D.2d 555, 560, 448 N.Y.S.2d 474, 479 (1st Dep't 1982) (as officers of the court, attorneys are required to notify parties and the court of errors including conflicts of interest).

24. Occupying a position of public trust, the Attorney General, as any public prosecutor is 'possessed ... of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' (Professional Responsibility: Report of the Joint Conference (1958) 44 A.B.A.J. 1159, 1218.) The duty of a government attorney has been characterized as 'a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner,' is of high order." (Id. at p. 871.)

25. Canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," has been invoked by this Court in attorney conflict cases. See, e.g., *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 234-35 (2d Cir.1977). The Model Rules of Professional Conduct, adopted by the ABA House of Delegates on August 2, 1983 contain similar provisions and language. See Rules 1.7, 8.4.

26. Furthermore, and central to the issue of preventing prejudicial influence of government attorneys on court proceedings, it is common for states to adopt statutes or regulations that prohibit those holding the office of Attorney General, as well as their deputies and staff attorneys, from participating as attorneys in private litigation matters. (see e.g. Arizona Revised Statutes §41-191[5] Attorney general; Florida Statutes, Section

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[5] **B. The attorney general and his assistants shall devote full time to the duties of the office and shall not directly or indirectly engage in the private practice of law or in an occupation conflicting with such duties, except:**
1. Such prohibition shall not apply to special assistants, except that in no instance shall special assistants engage in any private litigation in which the state or an officer thereof in his official capacity is a party.
2. Assistant attorney general may, but in no circumstances shall be required to, represent private clients in pro bono, private civil matters under the following circumstances:
(a) The representation will be conducted exclusively during off hours or while on leave and the attorney will not receive any compensation for such services.
(b) The client is not seeking an award of attorney fees for the services.
(c) The services are for an individual in need of personal legal services who does not have the financial resources to pay for the professional services or for a nonprofit, tax exempt charitable organization formed for the purpose of providing social services to individuals and families.
(d) The representation will not interfere with the performance of any official duties.
(e) The subject matter of pro bono representation is outside of the area of practice to which the attorney is assigned in the attorney general's office and the activity will not appear to create a conflict of interest.
(f) The activity will not reflect adversely on this state or any of its agencies.
(g) *The assistant attorney general's position will not influence or appear to influence the outcome of any matter.*
(h) The activity will not involve assertions that are contrary to the interest or position of this state or any of its agencies.
(i) The activity does not involve a criminal matter or proceeding or any matter in which this state is a party or has a direct or substantial interest.
(j) The activity will not utilize resources that will result in a cost to this state or any of its agencies.
(k) The attorney's supervisor may require the attorney to submit a prior written request to engage in pro bono work which includes a provision holding the agency harmless from any of the work undertaken by the attorney.

27.51(3), [6] Maryland Statutes and Procedures Governing Pro Bono Services of Attorney General Office[7] .)

27. The reason for adopting these restrictions is most obvious. For the Attorney General or any member of the staff to participate in a civil trial involving a private litigant will create the prejudicial inference that the state has reviewed and approved the position advocated by the government attorney. Such an inference can and likely will influence the outcome of the matter to the detriment of the opposing party.

28. It is for the above stated reasons that no Attorney General or staff member should be permitted to represent a private litigant in any adversarial proceeding. Only such an outright prohibition will properly preserve the standards of fairness and impartiality guaranteed to all litigants under federal and state constitutions. The present lack of statutory and/or ethical policy guidelines barring the participation of state law officers from representing private litigants in civil proceedings must be addressed by courts even if not by policy makers.

III. The Attorney General's Office Cannot Ethically Continue Any Representation

29. The irregularity of the proceedings below were confusing, misleading and prejudicial to the plaintiff enough without the involvement of the Attorney General. Indeed, remand will result after review of the Instructions to the jury, the court marked-up Verdict Sheet after a written jury question to the court concerning the whitewashing of attorney ethics complaints and wide-practiced corruption that, in fact, counsel for the defendants- The New York State Attorney General's Office- had an obligation to investigate, *inter alia.*

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[6] Florida Statutes,Section 27.51 provides:"Each public defender shall serve on a full-time basis and is prohibited from engaging in the private practice of law while holding office. *Assistant public defenders* shall give priority and preference to their duties as assistant public defenders and *shall not otherwise engage in the practice of criminal law*." (e.s.)

[7] Private practice of Law and Pro Bono Representation.

30. Improperly, the top law enforcement officer of the state was silent and action was, and is, absent. This cannot be condoned by this appellate court.

31. The involvement of the Attorney General's office improperly left the jury, and proceeding itself, in an unclear, puzzling and convoluted condition. This confusion resulted in a proceeding which is in a word repugnant.

32. The mere presence of the Attorney General has at all times been prejudicial to the plaintiff and, at best, confusing to the jury. It has been established that both inconsistent or equivocal instructions and incorrect statements of the law may be prejudicially erroneous, *Bollenbach v. United States*, 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350 (1946); *United States v. Neilson*, 471 F.2d 905, 908 (9th Cir. 1973); *Bolden v. Kansas City Southern Ry. Co*, 468 F.2d 580; *Ratay v. Lincoln National Life Ins. Co.*, 378 F.2d 209 (3d Cir.), cert. denied, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967), and that comments made by the court shortly before the jury retires are critical, *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362 (2d Cir. 1966).

33. The lower court improperly allowed representation of the defendants by the Attorney General. In fact, the court below improperly condoned the Attorney General's presence, accordingly directing the jury that the Attorney General's representation was proper when it was not. It is generally assumed that juries "act in accordance with the instructions given them...and that they do not consider and base their decisions on legal questions with respect to which they are not charged." *Dist. Council 37 v. New York City Dept. of Parks and Recreation* 113 F3d 347,356 (2d Cir. 1997).

34. It was never up to the jury to consider the ethical failings of the Attorney General's representation. It was the obligation of the Attorney General's office, and upon the failure of that duty, the obligation of the court.

35. There is also no record that the role of the Attorney General as defense counsel was properly and adequately explained to the jury. While this also constitutes another reversible error by the Court which will be addressed by the appeal itself, representation of the Attorney General's office improperly remains.

IV. Newly Discovered Evidence At Trial Required Immediate Disqualification

36. The court gave the jury above-referenced instructions and its members adjourned to the jury room to deliberate at approximately 1:25 pm on Thursday, October 29, 2009. After the jury left the courtroom, the court first announced that she had denied the defendants' pending motion for a directed verdict. She next stated words to the effect that she found that , "....Cahill was aware of the whitewashing allegations..." (**Exhibit "A"**, pages 808-810) The judge read this statement related to defendant Cahill's conduct into the record as part of her order denying defendant's directed verdict. This fact alone requires a new trial, and should have resulted in the Attorney General's office immediately withdrawing from the case.

37. In addition, Courts have an obligation to report and order investigation into official and at times criminal misconduct. This is a duty of the Court. There is no record to date as to any action having been undertaken by the Court regarding this central question. (See also recent decisions on spoliation of evidence which are state and federal crimes. *Acorn v. Nassau County* - cv052301 (2009 USDistLEXIS 19459) and *Gutman v. Klein*, 03cv1570. 2008 WL 5084182, 2008 WL 4682208.

38. The Court's finding of culpability on the part of Defendant Cahill constitutes newly discovered evidence, which directly supports the fundamental allegations of Plaintiff.

Remand to the District Court for a new trial is highly likely as the trial court abused its discretion in denying a new trial. The Attorney General's failure to withdraw is, in fact, sanctionable and worthy of referral to the attorney ethics committee.

39. Clearly the newly discovered fact that defendant Cahill, as the head of the DDC and supervisor of the other named defendants, had full knowledge of whitewashing activities would in all likelihood have changed the outcome of the case. This central fact establishing the liability of all named defendants could not have been discovered earlier and is not merely cumulative or impeaching. (See *Farragher v. Boca Raton* , 524 U.S. 775, 18 S. Ct. 2275 (1998) which imputes liability to supervisors in any event. In *Farragher*, the Supreme Court held that an employer is vicariously liable for actionable discrimination caused by a supervisor. All defendants are jointly and severally liable here. In fact, the State of New York is liable under *Faragher*, all while representation of the Attorney General's office improperly continued.

JUDICIAL FINDING KEPT FROM A DELIBERATING JURY

40. Here, the new evidence establishes that in the view of the Court, Defendant Cahill, the head officer of the DDC and the supervisor of the other defendants, had full knowledge of the practice of whitewashing as alleged by Plaintiff, leading to the parallel conclusion that whitewashing was accepted as a common practice by the defendants, and presumably other staff members of the DDC. Had such facts been confirmed during the trial stage, the jury would have come to know and understand the illegal activities that were accepted as everyday practice by the DDC staff, a finding totally consistent with a main element of Plaintiff's case. At all times relevant, however, the Attorney General's office

improperly continued their representation of the very people the Court found had acted illegally.

41. The Court's statement after the close of trial accepting the establishing the whitewashing activities by Defendant Cahill will demand remand for a new trial. Meanwhile, the damage to the rule of law and ethics by the Attorney General's office must be dealt with by this appellate court.

V. Witness Tampering – Threat on Witness in a Federal Proceeding

42. The Attorney General and the trial court were aware that in August of 2008, one of the plaintiff's witnesses, DDC staff attorney Nicole Corrado, was threatened. Two days prior to her deposition testimony, state employee, and DDC Deputy Chief Counsel, Andral N. Bratton, and who had been her immediate supervisor for approximately 5 years, confronted Corrado. Bratton advised Corrado that in 2007 he had admitted himself into a psychiatric hospital for serious emotional problems, that he had "suicidal tendencies," and that he was "warning" her accordingly. When Corrado asked Bratton why he was warning her, Bratton simply repeated several times in a very serious and stern tone by saying, "I'm just warning you."

43. Following Corrado's deposition testimony on August 21, 2008, Bratton's behavior toward Corrado became more harassing, troubling, frightening and threatening as he began to follow her inside and outside of the state office where they both worked. Corrado subsequently reported these serious issues to DDC chief counsel Allan Friedberg, Deputy chief Counsel Sherry Cohen, a defendant in the current proceeding, and DDC Chief Investigator Vincent Raniere- none of whom who took the required action.

44. Plaintiff's former counsel, John Beranbaum, advised the court, and by copy, the Attorney General, of this incident in a letter to the court dated October 24, 2008. In the Beranbaum submission, it was made clear to the court and the Attorney General that Ms. Corrado was given a "'warning' about the testimony she was to gave at the deposition[,]" and further advised that "Ms. Corrado is very upset about the entire experience."

45. Mr. Beranbaum again raised the issue on the record four days later on October 30, 2008. (See **Exhibit, "B"** – Transcript of October 30, 2008 hearing, Page 26 (lines 17-25), and page 27 (lines 1-8). The court, in responding to the letter advising of the threat on plaintiff's witness, commented, "You [Mr. Beranbaum] seem to want to tell me something or report it to me. Okay. You report it to me."

46. It is plaintiff's belief that the court had an obligation to report the matter to federal agents and, further, to interview Ms. Corrado concerning the incident. In addition, the Attorney General also had an obligation as the state's top enforcer of the law.

47. Plaintiff believes she has been severely prejudiced by the threat upon her witness, Ms. Corrado, and, as the lower court and Attorney General were aware, Ms. Corrado did not appear as a witness in this proceeding.

48. While plaintiff is aware that counsel within the Office of the New York Attorney General's office offered to "fully" compensate Mr. Beranbaum for ALL of his legal fees, expenses, etc., if plaintiff settled her case, she is unaware of the exact timing of when the compensation offer, believed to be between $120,000.00 and $150,000.00, was actually made.

VI. Conclusion

49. For the reasons set forth, Moving respectfully requests that this Court in the interest of justice issue an order restraining the Office of the New York State Attorney General's office from representing employees of the State of New York in any legal proceeding involving the herein matter before any federal or state court, agency or any other tribunal and grant a new trial.

50. As noted, the participation of the Attorney General in failing to investigate the charges submitted by plaintiff against the defendants, and subsequently representing these same persons in the instant court proceedings, denied plaintiff's constitutionally protected right to a fair and impartial trial. This denial of basic rights was compounded by unclear, confusing and convoluted instructions to the jury, discovery of new evidence and serious allegations of intimidation of witnesses, which all support the de novo pending appeal and granting of the instant motion for disqualification.

51. Wherefore, Moving respectfully requests that the court grant the within Motion, as well as such other and further relief that may be just and proper. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 14, 2010
New York, New York

Christine C. Anderson
Plaintiff, Pro Se

I think I should read that sentence again because it was long. You may not have gotten it. For example, Second Circuit found in Cioffi v Averill Park that an athletic director's comments in a letter to the school board and in a press conference about a single football team hazing incident and his criticisms of the school district's handling of that incident were protected speech for purposes of his First Amendment retaliation claim which arose when the school board abolished his position. Similarly, in Konits v. Valley Stream Central High School District, a 2005 case, Second Circuit concluded that a public school teacher's speech was protected for purposes of her First Amendment retaliation claim where she complained that a single janitorial staff member was subject to gender discrimination. Plaintiff, too, alleges retaliation for speech related to specific incidents, and, like the plaintiffs in Cioffi and Konits, is not required to prove by a preponderance of the evidence that she made statements of systemic misconduct. Therefore, given that the law is clearly established that a public employee's speech is protected under the First Amendment where it implicates matters of public concern, defendants are not entitled to qualified immunity.

Now, I turn to the proximate cause and supervisor liability.

Defendants assert that plaintiff failed to proffer evidence on the proximate cause as to Cahill for purposes of

Exhibit "A"

direct liability under Section 1983 and failed to establish that Cahill participated directly in the alleged constitutional violation, or created a policy or a custom under which unconstitutional practices occurred, for purposes of supervisor liability.

However, plaintiff has provided such evidence. Cahill was a policy maker for the DDC, testifying that his "responsibility was to be in charge of the DDC and to make sure that it complied with the conduct of lawyers and the rules promulgated by the First Department for proceedings and disciplinary proceedings, and made comments and recommendations regarding work product." That's a quote from the trial transcript at page 509.

In addition, Cahill was aware of plaintiff's whitewashing allegations and the growing animosity between plaintiff and her direct supervisor, Cohen, including the alleged assault and plaintiff's resulting fear of Cohen. And that comes from Mr. Cahill's testimony at pages 510 through 517.

In fact, it was Mr. Cahill who informed plaintiff that she would need to reestablish the professional relationship between herself and Cohen instead of granting plaintiff's request for a new supervisor. Plaintiff testified that she told Cahill on at least one occasion that she believed the admonition recommendation in one particular case was wrong

because you cannot skew a report to achieve a certain outcome. And plaintiff complained to Cahill in February 2007 that the DDC was giving preferential treatment to assistant district attorneys, assistant United States attorneys, and former DDC employees. And that comes from Ms. Anderson's trial testimony at 139 through 40. That's the original note and then later at 155 through 58.

Although Cahill testified that he was not involved in the decision to terminate plaintiff, he was informed of her termination that same day. Viewing all the evidence in the light most favorable to plaintiff, a question of fact exists such that a reasonable jury could conclude that Cahill's conduct was a proximate cause of plaintiff's injuries and that he participated directly in the alleged constitutional violation, or that he created a policy or a custom under which unconstitutional practices occurred.

Accordingly, defendants' motion for judgment as a matter of law is denied and their request in accordance with that to modify the jury charge and verdict sheet is denied as moot.

Now you have that decision on the record.

As far as the break now, I'm starting a very large matter at 2:30, so the courtroom will be very crowded. But on top of that, we need your telephone numbers, cell phone, something we can reach you within ten minutes of any note. Can

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CHRISTINE ANDERSON,

Plaintiff,

v. 07 Civ. 9599 (SAS)

THE STATE OF NEW YORK, et al.,

Defendants.

----------x

October 30, 2008

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

JOHN BERANBAUM
Attorney for Plaintiff

ANDREW M. CUOMO
Attorney General of the State of New York
BY: LEE ADLERSTEIN
WESLEY BAUMAN
Assistant Attorney General

Exhibit "B"

(Case called)
THE COURT: Good morning, Mr. Beranbaum.
MR. BERANBAUM: Yes, your Honor.
THE COURT: That's you.
And Mr. Adlerstein?
MR. ADLERSTEIN: Yes, your Honor.
THE COURT: And Mr. Bauman.

say so, Judge Peck is in my eyes is great but we've had some sort of discovery run ins. My client feels a little weary and I don't think it would be productive in that case.

THE COURT: I don't know. I have to speak to the, I

guess, the chief magistrate judge whether they can assign it to a different one for settlement purposes only. So, I will fill out the form and then I will look into that but I do want to make sure it gets done. So, I will put down November. If you are going to talk settlement you might as well talk. Discovery is pretty well known so I will put down November and we will see who it will be.

MR. ADLERSTEIN: Your Honor, perhaps if -- no, that's okay.

THE COURT: I want to get you a schedule for the summary judgment so I can move on to the remaining cases and get out on time.

MR. ADLERSTEIN: Your Honor, may I make a suggestion about the schedule?

THE COURT: All right.

MR. ADLERSTEIN: We were going to ask your Honor for a January date for submission of the motion. There is a couple of things going on. First, my hours have been curtailed because of the fact that I haven't been feeling well, I'm under some medication with what I have been dealing with; and secondly, both Mr. Bauman and I have a trial in front of Judge Sifton scheduled for December the 8th, and so we think that we would be able to get a motion in by the early part of January.

THE COURT: Today is October 30th. I thought you meant that that would be fully submitted by then. Moving

papers would be before and the response papers and reply papers.

MR. ADLERSTEIN: I respectfully request that for those factors, my hours have been curtailed and also we do have that trial that we need to concentrate on. In that case there is a fair amount of pretrial activity that judge Sifton has ordered, and it just happens that Mr. Bauman and I are both involved in that trial. And so, I would respectfully request that the Court allow us to see clear to --

THE COURT: But you have a big, big, big office. In other words, are you not the only two people there. To ask basically that the case go on hold for two and a half months is what you are saying. You know, once the papers are filed in summary judgment from the moment the first person files and then the next response and then reply and then waiting for the Court, it almost always takes half a year. That's my experience from beginning to end and that's a long time so I

just wanted to start the process. I'm not saying it has to be filed in a week or 10 days, but to ask for two and a half months to file papers, I understand the reasons that you two are but you have a big, big office.

MR. ADLERSTEIN: Well, the fact is, your Honor that --

THE COURT: And your case before Judge Sifton may settle. That happens all the time.

MR. ADLERSTEIN: I don't expect that case is going to

settle. That hasn't been successful before and also there is a fair amount of ground to cover here and I'm just looking to try to be realistic and not have the kind of pressure which I think would be very difficult to deal with under the circumstances.

THE COURT: What is your view?

MR. ADLERSTEIN: I had mentioned that to Mr. Beranbaum.

THE COURT: Mr. Beranbaum, what is your view?

MR. BERANBAUM: I'm certainly going to accommodate Mr. Adlerstein's not feeling well and he's always extended me courtesies and so I don't feel like I'm going to object to his needs and trust what he has to say.

THE COURT: But, Mr. Adlerstein, since I'm not a great fan of this proposal in the first place I'm not going to give any adjournment. I don't see how you are better off putting it the day after your trial.

MR. ADLERSTEIN: No, the trial is December 8.

THE COURT: I know.

MR. ADLERSTEIN: So if your Honor gave us --

THE COURT: How long is it supposed to last?

MR. ADLERSTEIN: Probably a week or a little bit more. If your Honor gave us an early January date it would be my expectation -- I'm not going away in the holiday period.

THE COURT: Okay. But, I'm telling you now I'm not going to adjourn it, it is a no adjournment schedule. January

7th for the moving papers.

MR. ADLERSTEIN: Thank you.

THE COURT: No adjournments.

Mr. Beranbaum, how long do you need to respond to it?

MR. BERANBAUM: I would like four weeks, please.

THE COURT: February 4th.

How long do you need to reply, Mr. Adlerstein?

MR. ADLERSTEIN: Three weeks, your Honor.

THE COURT: See my point? February 25th.

MR. BERANBAUM: I think two weeks is the ordinary.

THE COURT: There is no ordinary. February 25th is it. This is a no adjournment schedule: January 7th, February 4th, February 25th, all page limits apply. Exhibit limits, don't tinker with them they're out there in the rules. They're out there in the internet. That's it. Or you can get them off the court website. Thank you.

MR. BERANBAUM: Your Honor, would you want to address my second letter?

THE COURT: Oh, right. Your second letter.

You know, I don't think there is much to address. I read the letter. I'm not sure that you are asking me anything. You just seem to want to tell me something or report it to me. Okay. You reported it to me. You are not really asking me to do anything, are you? If so, your letter didn't make that clear. Do you want me to do anything? We don't need names, I

know you are concerned about privacy. What do you want me to do?

MR. BERANBAUM: As an officer of the court I wanted to apprise the Court of it and, if the Court felt necessary, to refer it to anybody.

THE COURT: I don't.

MR. BERANBAUM: Thank you.

THE COURT: Thank you.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 09-5059-cv

Caption [use short title]
Anderson v. The State of New York

Motion for: Disqualification of Attorney General as Counsel

Set forth below precise, complete statement of relief sought:
An order disqualifying the NYS Attorney Gereral from representing defendants due to Conflict of Interest.

MOVING PARTY:
- [x] Plaintiff
- [x] Appellant/Petitioner
- [ ] Defendant
- [ ] Appellee/Respondent

OPPOSING PARTY: Cahill, Cohen, Spokony

MOVING ATTORNEY: [name of attorney, with firm, address, phone number and e-mail]
Christine C. Anderson
227 Riverside Drive, #2N, NYC, NY 10025
917-817-7170

OPPOSING ATTORNEY:
~~Lee Alan Adlerstein, Esq.~~ Monica Wagner, Esq.
Office of the NYS Attorney General
120 Broadway- 24th fl, NYC, NY 10271
212-416-8576

Court-Judge/Agency appealed from: SDNY - Hon. Shira A. Scheindlin

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
- [x] Yes
- [ ] No (explain):

Opposing counsel's position on motion:
- [ ] Unopposed
- [ ] Opposed
- [x] Don't Know

Does opposing counsel intend to file a response:
- [ ] Yes
- [ ] No
- [x] Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? [ ] Yes [ ] No
Has this relief been previously sought in this Court? [ ] Yes [x] No
Requested return date and explanation of emergency:

Is oral argument on motion requested? [x] Yes [ ] No (requests for oral argument will not necessarily be granted)

Has argument/date of appeal been set? [ ] Yes [x] No If yes, enter date:

Signature of Moving Attorney: Pro Se **Date:** 9/14/2010

Has service been effected? [x] Yes [ ] No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

Anderson v.

The State of New York

CERTIFICATE OF SERVICE

Docket Number: 09-5059-cv

I, Christine C. Anderson (name), hereby certify under penalty of perjury that on September 14, 2010 (date), I served a copy of the September 14, 2010 dated Notice of Motion and Affirmation in Support to Disqualify the NYS Attorney General (list all documents)

by (select all applicable)*

- [x] United States Mail
- [ ] Federal Express
- [ ] Overnight Mail
- [ ] Facsimile
- [ ] E-mail
- [ ] Hand delivery

U.S. Mail DEL. Conf. #0310 0480 0000 3292 9393

upon the following parties (complete all information and add additional pages as necessary):

Name	Address	City	State	Zip Code
Monica Wagner, Esq. NYS Attorney General	120 Broadway-24th floor	New York	NY	10271

9/14/2010
Today's Date

Signature

*If different methods of service have been used on different parties, please indicate on a separate page, the type of service used for each respective party.