No. 18-7098

ORIGINAL

FILED
DEC 15 2018
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Ileen Cain
— PETITIONER
(Your Name)

vs.

Atelier Esthetic Inc.
— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Second Circuit Court of Appeals NY
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ileen Cain
(Your Name)

66 Rockwell Place, Apt. 13H
(Address)

Brooklyn, NY 11217
(City, State, Zip Code)

718 596-3975
(Phone Number)

Questions Presented

1. Courts have held disparaging statements about students undoubtedly affect their financial prospects related to their chosen trade. As the court observed in Cantrill v. Herald Co., 87-cv-1, 1992 U.S. Dist. LEXIS 7620 at *25 (N.D.NY. May 22, 1992): **Question Presented**: Whether a trade school student have a trade for purposes of defamation per se

2. Threatening terrorism is a class C felony punishable by 10 years imprisonment under 18 U.S.C. § 2332b(c)(1)(g). Laws governing such threats were passed after the September 11, 2001 attacks. **Question Presented**: Without due process, whether the Second Circuit Court of Appeals Summary Order is in conflict with this courts preceding case law.

3. **Question presented**: Whether a Plaintiff must prove actual injury by a deprivation of due process before he may recover substantial non-punitive and punitive damages under the ADA, Section 504 of the Rehabilitation ACT? Americans With Disability ACT

4. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct. (Federal Rule of Evidence Rule 405). **Question Presented**: Whether the District Court is in conflict with Federal Rule of Evidence.

5. When a hearsay statement or a statement described in Rule 801(d)(2)(C),(D),or(E) has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. **Question Presented**: Whether the admittance of hearsay is creditable testimony absent testimony of the declarant prior to trial during trial or an administrative hearing.

6. Preservation of error is fundamental prior to and after trial. **Question presented**: Whether the Second Circuit Court of Appeals is in conflict with the 2003 amendment to §90.104,

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☑ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

INDEX TO APPENDICIES

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ileen Cain, proceeding pros se, respectfully submits this petition for writ of certiorari

CITATIONS TO THE PRIOR OPINIONS AND ORDERS IN THIS CASE

The Summary Order of the Court of Appeals for the Second Circuit of New York is not published

The opinion of the Southern District of New York is published is published and the citation is (Cain v. Atelier Esthetique Institute of Esthetics, Inc. 2016) WL 6915764 *5(S.D.N.Y Oct. 21, 2016) (Pet. App. B)

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit, affirmed the District Courts ruling on May 3rd

The Judgement of the United States Court of Appeals denied Petitioners petition for Rehearing and En banc review July 18th 2018

The Second Circuit Court of Appeals of New York is the highest Federal Appellate Court with jurisdiction to hear civil cases on appeal from the Southern District of New YorkT. This petition for writ of certiorari is timely because it is filed with the Clerk of this Court within 90 days of the refusal of Rehearing and En banc review. Petitioner 's case was presented to Justice Ginsburg who on September 12th 2018 extended to and December 15th 2018 to file a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. 2101 Section 1253

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☑ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☑ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☑ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was MAY 3 2018.

☐ No petition for rehearing was timely filed in my case.

☑ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☑ An extension of time to file the petition for a writ of certiorari was granted to and including 12/15/2018 (date) on 9/12/2018 (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATUTES AND RULES

The United States Constitution, Amendment XIV 5

Federal Rule of Civil Procedure 2072
1291 of this title. (Added Pub. L. 100–702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648, eff. Dec. 1, 1988; amended Pub. L. 101–650, title III, §§ 315, 321, Dec. 1, 1990, 104 Stat. 5115, 5117.

Federal Rule of Civil Procedure Article III, Exclusions from Hearsay

Judicial ACT of 1789

Article III section 2 of the US constitution

Federal Rule 608 Witness's Character for Truthfulness or Untruthfulness

The Federal Rule of Civil Procedure Interrogatories Rule 31(a)(2) Rule 45

Federal Rule of Civil Procedure provides for Preserving a Claim of Error

Duty to Disclose; Provisions Governing Discovery Rule 26

Section 504 of the Rehabilitation Act 29 U.S.C. § 701,

Title III of the Americans with Disabilities Act ("ADA") 43 U.S.C § 12182

New York Human Rights Law

New York Human Rights Law N.Y. Executive Law, Article 15

New York City Human Rights Law ("NYCHRL")

New York City Human Rights Law

Cyberstalking Violence Against Women's Act

CASES CITED

RELEVANT CONSTITUINAL AND STATUTORY PROVISIONS

The United States Constitution, Amendment XIV provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Federal Local Rules provides:

United States district courts and courts of appeals often prescribe local rules governing practice and procedure. Such rules must be consistent with both Acts of Congress and the Federal Rules of Practice and Procedure, and may only be prescribed after notice and an opportunity for public comment. A court's authority to prescribe local rules is governed by both statute and the Federal Rules of Practice and Procedure. See 28 U.S.C. §§ 2071(a)-(b); Fed. R. App. P. 47; Fed. R. C. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57.

Federal Rule of Civil Procedure 2072 provides:

The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district

courts (including proceedings before magistrate judges thereof) and courts of appeals. (2) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (3) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title. (Added Pub. L. 100–702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648, eff. Dec. 1, 1988; amended Pub. L. 101–650, title III, §§ 315, 321, Dec. 1, 1990, 104 Stat. 5115, 5117.)

Federal Rule of Civil Procedure Article III provides:

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Definitions that apply to this Article; Exclusions from Hearsay:

1. Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
2. Declarant "Declarant" means the person who made the statement.

3. Hearsay, "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
4. Hearsay is not admissible unless any of the following provides otherwise:
5. (1) A federal statute; (2) these rules; or (3) other rules prescribed by the Supreme Court.

Federal Rule 608 Provides:

A Witness's Character for Truthfulness or Untruthfulness provide:

Specific instances of conduct except for a criminal conviction under extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

The Federal Rule of Civil Procedure Interrogatories Provides:

a) Without Leave. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45

Federal Rule of Civil Procedure provides for Preserving a Claim of Error:

1. Timeliness is the most important consideration in assignment of error: the complaining party must object at the time the error occurs. Federal Rule of Civil Procedure 46 states the general principle that "[w]hen the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection."
2. Objections must also be specific. Trial judges cannot rule intelligently on an objection—and a judge's ruling cannot be meaningfully reviewed by an appellate court—unless trial counsel states the exact basis of the objection. For this reason, the objecting party must state with specificity both the legal basis for the objection and the target of the objection.
3. The basis for the objection raised at trial must be identical to the issue presented on appeal: even if an objection is timely and specific, it does not preserve appeal of the assigned error on any and all possible legal grounds. Rather, the legal bases for an objection that may be considered by an appellate court are limited to those raised at trial.3 Likewise, if there are multiple grounds for objection, each one must be specifically recited to the trial judge.
4. Any assignment of error must appear in the record of the proceedings so that it can be reviewed on appeal.5 Likewise, the ruling of the trial court must be

reflected in the record. The record must include a definitive ruling by the trial judge

Duty to Disclose; Provisions Governing Discovery Rule 26 provide:

In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

1. the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

2. a copy or a description by category and location of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

STATEMENT OF THE CASE

Students who practice what they are learning in a hands-on environment are more likely to have a greater retention of the program material. Some studies have suggested that the rate of retention can be up to three and a half times higher for students who get involved physically with the course material than those who sit in a classroom with a lecturer regaling them with an endless stream of facts and figures. When dealing with an area of study that works with people, it is absolutely essential.

Respondent Atelier Esthetic Institute of Esthetics, Inc. is a vocational training school that specializes in the area of skin care. In accordance with studying esthetics theory, Atelier students provide high end treatments (facials) to the public at a discounted rate. All services are performed solely by Atelier students. Monies for all services are paid directly to the school. Students are allowed to accept tips for services rendered.

Respondent (Atelier) school director Corey Rochester on December 14th 2012, terminated Petitioner, after, she on December 13th in confidence informed Rochester she receives SSD due to the murder of her son, she is a victim of cyber stalking; she was terminated from a prior school, after she complained students were participating in cyberstalking her. Petitioner informed Rochester, the cyberstalking had followed her to Respondent Atelier. Rochester informed Petitioner he would investigate, and it's not like this hásn't happened here before. Rochester, the following day December 14th summoned Petitioner to the financial aid office and terminated Petitioner in the presence of Respondent financial Aid officer Ann Marie Pandullo. Petitioner was not given the reasons for her termination, nor was Plaintiff issued a termination letter describing the reasons for her termination.

Rochester informed Petitioner, he contacted and spoke to Director, Mark Weinstein of Adult Career & Continuing Education Services Vocational Rehabilitation Brooklyn, office (ACCESS VR) the day he terminated her. Rochester described Petitioner as having hallucinations and inquired about Petitioners mental status. Petitioner was a former consumer of ACCESS VR and did not receive tuition assistance from ACCESS VR to attend Respondent Atelier esthetics course. Respondent does accept tuition assistance from ACCESS VR. ACCESS VR provides services and tuition assistance for disabled individuals.

Petitioner received TAP and PEL grants, which were approved, by Respondent financial aid advisor Ann Marie Pandulo.

On December 17th 2012, Petitioner filed a discrimination and or perceived disability, discrimination and retaliation complaint with the Office of Civil Rights, Department of Education (OCR). Petitioner was enrolled in Respondent Atelier Esthetique program for five days.

The Office of Civil Rights opened, and accepted Petitioner wrongful termination, disability discrimination complaint, retaliation claim. OCR started preliminary proceedings for an OCR investigation. Respondent refused to go through with OCR's quasi-judicial proceedings. Respondent opted for OCR Early Complaint Resolution agreement. The agreement stipulated: [1] Respondent Atelier issue a letter offering Petitioner re enrollment to Respondent esthetics' program [2] reimburse Petitioner tuition 1,286.00 [3] Respondent must attend OCR disability training, (Sec. 504 training). OCR did not interview or conduct an OCR investigation of Respondent employees or students. The Early Complaint Resolution Agreement was between OCR and Respondent. Petitioner was not privy to the agreement.

OCR issued Petitioner a disposition letter informing her, Respondent chose OCR Early Complaint Resolution. OCR disposition determination letter informed

Petitioner, Respondent described Petitioner as having outbursts, talking to walls, unable to keep up with course material, unable to read the course material, talking to herself, and was hostile towards, staff and students. Pre-trial Discovery proceedings informed Petitioner, Respondent furthered their allegations of Petitioner, by stating Petitioner claimed she wanted to exact the Sandy Hook Massacre, but she could do it better.

Petitioner's research show the Sandy Hook Massacre occurred the morning of December 14th the same day Petitioner was terminated. Petitioner was not aware of the Sandy Hook Massacre at the time of her termination. Petitioner disputes Respondents allegations of her. She was shocked and afraid when she learned of Respondent allegations. Petitioner, could not return to Respondent Atelier esthetics, program. It is fear that lead Petitioner to decline Respondent reenrollment offer.

After, reading OCR disposition determination letter, Petitioner commenced a civil suit against, against Respondent Atelier for Violation of Due Process under the Fourteenth Amendment, Violation of Section 504 of the Rehabilitation Act 29 U.S.C. § 701, Violation of Title III of the Americans with Disabilities Act ("ADA") 43 U.S.C § 12182 Retaliation Violation of the Americans with Disabilities Act ("ADA") Disability Discrimination Violation of the New York Human Rights Law Aiding and Abetting Discrimination on the Basis of

Disability, Harassment on the Basis of Disability Violation of the New York Human Rights Law N.Y. Executive Law, Article 15 Retaliation Violation of New York Human Rights Law ("NYHRL") N.Y. Executive Law, Article 15 Discrimination on the Basis of Disability Violation of New York City Human Rights Law ("NYCHRL") Aiding and Abetting Discrimination on the Basis of Disability Violation of New York City Human Rights Law ("NYCHRL") Aiding and Abetting Retaliation Violation of New York City Human Rights Law ("NYCHRL") Disability Discrimination Violation of the New York Civil Rights Law ("NYCRL") Cyberstalking Violence Against Women's Act Cain v. Atelier Institute of Esthetiques, Inc. 13 cv. 07834.

CASE ESSENCE

Magistrate, Francis, did not allow opening statements from Appellant. Judge Francis directed Appellant to testify in narrative form; "that is simply tell your story". "He would rather proceed with the evidence". TR. p.2 Ln. 19. In short narrative, Petitioner told her story TR p. 4 thru TR. p. 7. Petitioner narrative began with her termination from Respondent Atelier, and ended with Petitioner, filing a wrongful termination disability discrimination, defamation of character, and retaliation claim with the Office of Civil Rights Department of Education.

Petitioner's, opening statement allows this Court to hear the case essence. For, instance, the essence of Petitioner's case: The murder of Petitioner's only

child was devastating and unconceivable. It was a staggering blow; the hurt and pain is unimaginable. Petitioner, had but one child, he was murdered on June 15th 2005, he was buried five days later on his eighteenth birthday he was six feet three inches tall. In present day he would be thirty one years old. Prior to the murder of her son Petitioner was doing very well, Petitioner had a good career, and life was good.

The eve of 2004 Petitioner moved to a new community and new apartment. Petitioner new neighbors began harassing coercing her trying to involve Petitioner to perform sexual acts. Petitioner refused to get involved with her new neighbors sexual exploits. Petitioner sought the advocacy of Council Member Leticia James, and made reports to the NYPD. Petitioner moved because of the repeated harassment, from her new neighbors and the murder of her son.

In 2008 Petitioner was diagnosed with PTSD. In an effort to regain purpose, perspective, and order in her life, Petitioner decided to return to school. In 2008, Petitioner applied for tuition assistance from the State run agency, Adult Career & Continuing Education Services Vocational Rehabilitation. ACCESS VR provides housing assistance, employment training and tuition assistance to individuals with disabilities. **Only** individuals with a prior diagnosis of a disability are able to receive ACCESS VR services and **must** provide ACCESS VR with a doctor's

diagnosis of a disability. Petitioner, provided ACCESS VR counselor Ruby Jackman with the Department of Social Services PTSD diagnosis of her. Ruby Jackman ACCESS VR counselor refused to provide services to Petitioner.

Jackman wanted Petitioner to see ACCESS VR doctors. Petitioner was a novice to the workings of the system at the time, and had no idea she could have requested a hearing, challenging ACCESS VR counselor Ruby Jackman refusal to provide ACCESS VR services to her. Nevertheless, Petitioner, conceded and attended a session with ACCESS VR contracted doctors. During the session Petitioner discussed the murder of her son the days before he was murdered and the effect his murder has had on her and what was taking place in her current residence.

Prior to the murder of Respond's sons Petitioner, did not have PTSD and had no history of any form of mental illness. Petitioner has never been diagnosed as having any psychosocial character identity disorder. Petitioner, has always been a productive part of society. Petitioner son, health, education, and career were important factors in her life.

CASE FACTS

The Second Circuit reviewed *de novo* the District Court's Judgment, Opinion and Order dated, October 21st entering Judgement favorable to

Respondent Atelier Esthetique, Institute of Esthetics, Inc. dismissing Petitioner remaining claims drawing all reasonable inferences in the plaintiff's favor. Darnell v. Pineiro, 849 F.3d 17, 22 (2d Cir. 2017).

Upon the completion of trial Petitioner closing arguments, upheld Respondent trial witnesses were riddled with contradictions, inconsistencies, and discrepancies. Respondent suggests this court would have reviewed evidentiary rulings of a bench trial for abuse of discretion. On September 27th 2016 Petitioner submitted a motion letter, to Magistrate Francis affirming, Respondent witnesses committed perjury for the purpose of trial, Docket 178. Magistrate, Judge Francis, did not endorse or issue an Opinion and Recommendation as to Respondent, perjury, motion letter.

Respondent, imply Rochester and Anderson, testimony was an exception to the hearsay rule. Their testimony was not used to establish truth of the statements, made by other students, but rather were background information about Petitioner. Magistrate Francis order p. 20 par.4. Ln. 1. Magistrate Francis opinion and order dated October 21, 2016 expresses his opinion delineated. "Magistrate Francis, Opinion and Order p. 4: "the credible evidence, clearly demonstrates that Ms. Cain was expelled because she was not qualified to continue in the program. Mr. Rochester testified, students complained to him; they were having difficulty

concentrating because, Ms. Cain was making distracting comments, and was apparently having trouble keeping up with class material. She would ask questions after the class had moved on and would interject material that was not germane to the topic".

Respondent state "there were very little inconsistencies in Respondent employees' testimony, Respondent brief p.14. Ln. 7. Petitioner has found more than a little contradictions discrepancies, and inconsistencies' for instance: Rochester contradiction, he observed Petitioner class, and did not view any of the alleged behavior described. TR 204 Ln. 19-23. TR. 215 Ln. 3-7, TR 182 Ln. 13-20. Rochester contradiction interrogatory question at TR 191 Ln. 15-25. Petitioner, Cross, Rochester testified Petitioner started classes five days late, she was supposed to start on November 28th 2012, but did not start until December 5th 2012 TR. 200 Ln. 7-15 Rochester contradiction and discrepancy TR 201-Ln 11-TR 202 Ln.1-11, Contradiction, TR 205 Ln. 7-8 discrepancy TR 211 Ln.10-12, discrepancy TR. 225 Ln. 14- TR. 226 Ln.1-12.

In respect to Rochester testimony as to Petitioner; conduct at the time he terminated her; financial aid advisor Ann Marie Pandulo on Direct, contradicts Rochester Cross TR 237 Ln.1- TR 239. Rochester identified Ann Marie Pandullo as being present during the time, Petitioner threatened him yelled and screamed at

him became irate put her face in his face, and made him fear physical violence from Petitioner. Pandullo testified, Petitioner repeatedly asked why is, she being terminated. Rochester, gave no response other than, your being terminated.

Petitioner had two instructors Michelle Racioppi, and Christine Anderson. Racioppi, was the lead instructor because she is a licensed teacher. Racioppi spent most of the time instructing Petitioner esthetics class. Racioppi testified she had very little recollection of Petitioner and, did not recall any bizarre behavior, exhibited by Petitioner as described by teaching assistant Christine Anderson, and Corey Rochester. TR 243 Ln.19-23, TR 244 Ln. 1-6 TR 256 Ln.4-13

Christine Anderson, unequivocally, did not want to take the witness stand. Respondent's, counsel made excuse after excuse for her. Respondent counsel suggested reading Anderson interrogatory answers on to the record. Petitioner objected. Magistrate Francis, threatened there would be harsh penalties for Anderson if she did not appear and Magistrate Francis made clear Respondent should inform Anderson he said there would be. Anderson took the stand on September 16th the last day of trial. Anderson testified she is a teachers' assistant, and that she and Racioppi conducted the esthetics theory class Respondent attended. TR 263 Ln. 1-5,.

Anderson testified she could not recall specifics of any student having outbursts in class TR 263 Ln. 6 -11, Anderson, testified students stated, Petitioner wanted to exact the Sandy Hook Massacre. Anderson stated she and the students informed Rochester that morning TR 263 Ln 15-25 TR 264 Ln1-4, Anderson testified she did not recall which students spoke to her. Anderson testified she did not hear Petitioner make comments regarding the Sandy Hook Massacre TR 265 Ln. 17-19 TR 266 Ln 19-21. Anderson testified during her time as an instructor she had never witnessed any outburst by students nor bizarre behavior TR 267 Ln. 2-4 TR 267 Ln 5-17.

Anderson testified she was Racioppi teacher assistant TR 270 Ln 24-25 Anderson testified she has not obtained a teachers license TR 272 Ln 1-5 Anderson testified her testimony is to defend Respondent Atelier, owner and CEO Annette Hanson TR 273 Ln 13-17 Anderson testified she had seen Petitioner picture TR 277 Ln. 3 Anderson testified she recalls teaching one class in December 2012, while Petitioner was in attendance. TR 280 Ln 4-6 Anderson testified, Respondent, Atelier, owner and CEO Hanson displayed Appellant picture to her for identification purposes TR 289 Ln. 24.

Annette Hanson, owner and CEO of Respondent Atelier testified, Respondent were mandated by OCR to offer Petitioner re enrollment to

Respondent esthetics course TR 91 Ln 16, Hanson, testified, she hoped Petitioner would not return and would go to another school TR 91Ln 18, Hanson contradiction TR 92 Ln 23 Hanson testified she spoke to instructors Racioppi and Anderson, and both instructors reported outbursts exhibited by Petitioner, Hanson later testified she did not know which teacher reported bizarre behavior exhibited by Petitioner TR 93 Ln. 3-5 Hanson testified she did not know which instructor said what, so she just put it all together TR 93 Ln 7-9.

Hanson testified she did not interview any students to corroborate bizarre behavior exhibited by Petitioner TR 93 Ln 24 TR 94 Ln 1-3 Hanson testified there was a third student that was terminated for exhibiting threatening and bizarre behavior and that she interviewed students and staff that corroborated the students behavior TR 95 Ln 4-25 TR 96 LN1-3, Hanson testified this incident happened recently. Hanson testified Rochester did not conduct an investigation as to the allegations against Petitioner TR 97 Ln 22, Hanson later testified she does not involve students in a decision to terminate a student from school TR 105 Ln. 8 Hanson Cross, by counsel identified Hanson testimony as contradictory TR 106 Ln. 18 Ln19-25 TR 107 Ln 1-4 Hanson testified the allegations against Petitioner were not substantiated TR 107 Ln. 18 -23 and there was no need to call the police.

The aforementioned facts taken from the trial record demonstrate a pattern of inconsistency and contradiction. "Attorneys and their assistants are trained to pore through witness statements to recognize inconsistencies (Pozner & Dodd, 1993). Introducing statements from a secondary source, the law looks askance at such extra-event witness knowledge and will often use the hearsay rule and personal knowledges rules to limit the ability of the witness to testify about facts learned after the event".

The burden of proof also referred to as the elements of persuasion in a civil case can be and often are suspect, depending, on the nature of precise issue at stake. Petitioner's psychosocial character identity is at stake. Psychosocial character identity is the core of human interaction. Respondent allegations against Petitioner grossly alter and defame Petitioner's identity. Respondent identified these identity alterations and defamation as Affirmative Defenses. It is within this nexus the burden of proof shifted to the Respondent. The Supreme Court has held the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses See, e.g., FTC v. Morton Salt Co., 334 U.S. 37, 44-45 (1948). Chevron v. Echazabal 536 U.S. 73, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (2002) focus on the term, "reasonable medical judgment." True, under those cases, an actual threat is

not necessary, but the determination that a threat exists must be based upon a reasonable medical judgment based upon the individual facts.

Therefore, the question is not whether the employer's belief is reasonable, but rather, whether they relied upon a reasonable medical judgment in making their direct threat determination. It may be a fine line between the two concepts, but the distinction is there. The burden of proof can shift between Plaintiff and Defendant. It is clear the burden of proof laid with Respondent proving Petitioner was not medically qualified to be a student enrolled in Respondent esthetics program.

Respondent, brief at p. 10-12 reference Petitioner treatment sessions at Brooklyn Center for Psycho Therapy and International Center for the Disabled. Respondent attempted to establish a "reasonable medical judgment." However, Brooklyn Center for Psycho Therapy and International Center for the Disabled case notes does not indicate Petitioner was a direct threat to herself or to anyone else. Petitioner does not have a history of violence. Anderson, and Rochester tailored affirmative defenses for the purpose of trial in the matter of Cain v. Atelier, to portray Petitioner as "medically unqualified" to be a student enrolled in Respondent esthetics program.

RESPNDENT STUDENTS AS TRIAL WITNESSES

Respondent, imply, it was Petitioner duty to produce Respondent former classmates for testimony. Respondent filed a motion to prevent Petitioner from issuing interrogatories to her former classmates District Court Docket 70. Petitioner's request for judicial intervention. District Court Docket 72 leave to file interrogatories. Petitioner filed a counter motion and was granted leave to propound interrogatories, on all of her former classmates. Only **one** student answered the interrogatories. For the purpose of trial testimony Petitioner submitted a motion to serve subpoenas on Petitioner former classmates, District Court Docket 134.

Magistrate, Francis denied the motion without prejudice stating: "The Court will, consider issuing subpoenas for former classmates only if Petitioner can show the relevance of their testimony; "their responses to the written interrogatories indicates this is unlikely, District Court Docket 137". District Court Docket 139 Petitioner, informs the Court she believes it is necessary that her former classmates are subpoenaed. The Court ordered Respondent to identify witnesses whom they are going to actually subpoena. Respondent did not subpoena any student to testify at trial. Petitioner persistently advocated for the subpoena of Respondent students.

Respondent, Brief p. 23 paragraph 2, imply the, judgement should not be reversed because complaints made by Respondent former students did not effect

the outcome of the trial. Magistrate Judge Francis recognized "that deference must be paid to the evaluation made by the institution itself (Cain v. Atelier Esthetique Institute of Esthetics, Inc. 2016) WL 6915764 *5(S.D.N.Y Oct. 21, 2016) Magistrate, Francis October 21st Opinion and Order states "Based on the personal observation of Rochester and the credible information he had received from others, Rochesters' decision to terminate Petitioner from Respondent esthetic class was a rational one and was not based on discriminatory animus. P. A6 Opinion and Order dated October 21st 2016.

REASON FOR GRANTING THE WRIT

The land mark case of Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803) established the principles of judicial review. Justice John Marshall implied that the Supreme Court was the supreme interpreter of the U.S. Constitution resolving the case of Marbury v. Madison. Quite the contrary. The essence of the case is nestled in the right of judicial review. Did the Supreme Court have the authority to hear Marbury case? Chief Justice Marshall answered three questions. (1), did Marbury have a right to the writ for which he petitioned? (2), did the laws of the United States allow the courts to grant Marbury such a writ? (3), if they did, could the Supreme Court issue such a writ? With regard to the first question, Marshall ruled that Marbury had been properly appointed in accordance with procedures

established by law, and that he therefore had a right to the writ. Secondly, because Marbury had a legal right to his commission, the law must afford him a remedy.

Marbury believed that under Article III section 2 of the US Constitution he was entitled to the writ of mandamus issued by the Supreme Court. The significance and distinction of original jurisdiction and appellate jurisdiction, Justice Marshall explains: original jurisdiction is within the power of a court to be the first to hear and decide a case; and appellate jurisdiction, is which a party to a decision appeals to a higher court which has the power to review the previous decision and then either affirm or overturn it. Justice Marshall willingly entertained Marbury's legal standing as it applied to Article III section 2 of the US constitution. However, Justice Marshall's, explanation of original jurisdiction did not apply to Marbury and his entertaining the idea of a writ was simply a ploy. At the time of Marbury appointment, The Judicial ACT of 1789 as it pertains to a writ of mandamus applied to appellate jurisdiction. Had Marbury first filed his claim with the appellate court, he would have had legal standing before the Supreme Court to file his Petition for a writ of mandamus.

ON APPEAL FROM THE SOUTHERN DISTRICT OF NEW YORK

In the case at bar Cain v. Atelier Esthetics, Institute of Esthetics, Inc. 16 3750 Petitioner appealed to the Second Circuit Court of Appeals, APPENDIX A. Petitioner cites from the District Court Opinion and Order APPENDIX B

Petitioner Petitioner cites from the Office of Civil Rights Department of Education disposition letter at APPENDIX C. This petition is filed without the trial transcript. However, Petitioner cites from the trial transcript in the matter of Cain v. Atelier. During trial and post- trial, for the purpose of preserving error on appeal, Petitioner raised issues and objected to Respondent deliberately excluding students as trial witnesses and objected to Respondent introducing hearsay statements during trial without the declarant testimony prior to trial or during trial as they pertain to Petitioners conduct.

It is clear from the District court's trial record in the matter of Cain v Atelier, Petitioner was not tried and convicted of threatening to exact the Sandy Hook Massacre on Respondent Atelier property (school grounds) and is irrelevant at this juncture; What is relevant is that Respondent did not afford Petitioner the right to defend against the alleged statement, or confront the persons that made the allegations, accordingly Petitioner due process rights were violated. Relevant, is the fact Respondent was allowed to introduce as evidence alleged statement without identifying the declarant and or presenting the declarant prior to trial and during trial. Whether the sixth or fourteenth amendments of the constitution will or can protect an individual in a civil case where the Petitioner is falsely accused of threatening terrorism has not been reviewed by this court.

The spate of home grown terrorism on school property and other places of public accommodation in America today can render anyone the opportunity to be falsely accused. The opportunity for this court to establish case law on the merits of this case are ripe. The relevance of Petitioner's case to this court and the American nation lie within the merits of this case as it pertains to vocational trade school students, and individuals with disabilities, specifically those with PTSD due to trauma, in the case of Petitioner the PTSD is a result of the murder of her only child.

In a majority opinion by Justices Stevens, O'Connor, Souter, Ginsburg and Breyer, the Supreme Court noted that "public entities" include state and local programs or activities and therefore fall under the gambit of ADA protection (42 U.S.C. § 12131(2)). They further observed that enforcement of Title II derives from § 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, which permits damages actions (42 U.S.C. § 12133).

GOSS V. LOPEZ 419 US 565 – SUPREME COURT 1975

Nine named appellees, each of whom alleged that he or she had been suspended from public high school in Columbus for up to 10 days without a hearing pursuant to § 3313.66, filed an action under 42 U. S. C. § 1983 against the

Columbus Board of Education and various administrators of the CPSS. The complaint sought a declaration that § 3313.66 was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their rights to an education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment. It also sought to enjoin the public school officials from issuing future suspensions pursuant to § 3313.66 and to require them to remove references to the past suspensions from the records of the students in question.

Two named plaintiffs, Dwight Lopez and Betty Crome, were students at the Central High School and McGuffey Junior High School, respectively. The former was suspended in connection with a disturbance in the lunchroom which involved some physical damage to school property. Lopez testified that at least 75 other students were suspended from his school on the same day. He also testified that he was not a party to the destructive conduct but was instead an innocent bystander. Because no one from the school testified with regard to this incident, there is no evidence in the record indicating the official basis for concluding otherwise. Lopez never had a hearing.

Betty Crome was present at a demonstration at a high school other than the one she was attending. There she was arrested together with others, taken to the

police station, and released without being formally charged. Before she went to school on the following day, she was notified that she had been suspended for a 10-day period. Because no one from the school testified with respect to this incident, the record does not disclose how the McGuffey Junior High School principal went about making the decision to suspend Crome, nor does it disclose on what information the decision was based. It is clear from the record that no hearing was ever held.

In the case of student discipline, the Supreme Court has ruled that students have a "legitimate entitlement to a public education as a property right." Goss v. Lopez. The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied. Wisconsin v. Constantineau, 400 U. S. 433, 437 (1971); Board of Regents v. Roth, supra, at 573.

"Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U. S., at 481. This Court turned to that question, fully of Gross v Lopez realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that "[t]he very nature of due process negates any concept of inflexible

procedures universally applicable to every imaginable situation." Cafeteria Workers v. McElroy, 367 U. S. 886, 895 (1961).

There are certain bench marks to guide us, however. Mullane v. Central Hanover Trust Co., 339 U. S. 306 579*579 (1950), a case often invoked by later opinions, said that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.,* at 313. "The fundamental requisite of due process of law is the opportunity to be heard," Grannis v. Ordean, 234 U. S. 385, 394 (1914), a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to contest." Mullane v. Central Hanover Trust Co., supra, at 314. See also Armstrong v. Manzo, 380 U. S. 545, 550 (1965); Anti-Fascist Committee v. McGrath, 341 U. S. 123, 168-169 (1951) (Frankfurter, J., concurring).

At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 1 Wall. 223, 233 (1864).

The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing.

GOSS V. LOPEZ 419 US 565 – SUPREME COURT 1975
MR. JUSTICE POWELL, THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST JOIN DISSENTING

"Whether *any* procedural protections are due depends on the extent to which an individual will be `condemned to suffer *grievous* loss.' Joint Anti-Fascist Refugee Committee v. McGrath,_341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelly, 397 U. S._254, 263 (1970)." *Morrissey* v. *Brewer,* 408 U. S. 471, 481 (1972) (emphasis supplied).

NEW YORK TEERRORIST THREAT STATUTE

New York has a terroristic threat statute that punishes threats to commit specified crimes intending to intimidate a civilian population or influence a government unit when it is likely to cause reasonable expectation or fear of the offense occurring.

New York has three levels of false reporting crimes that provide higher penalties based on the type of threat or the place affected by the threat. The third degree crime addresses false reports of crimes, catastrophes, or emergencies that cause public alarm or inconvenience. The second-degree crime addresses false reports of fires, explosions, or the release of hazardous substances (certain types of

chemical, biological, or radioactive substances). The first-degree crime addresses false warnings at sports stadiums, mass transportation facilities, enclosed shopping malls, public places and buildings, and school grounds.

The judicial fabric is the United States Constitution, and all of its ordinances encompassed. In order to uphold the Constitution and the prior rulings of this court as they pertain to the most basic of fundamental rights "the right to defend oneself from false allegations whether they be applied in civil or criminal proceedings are supreme to the American judicial fabric.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully, submitted,

Ileen Cain

Ileen Cain, Pro Se Litigant
Petitioner
66 Rockwell Place, Apt. 13H
Brooklyn, NY 11217
LL. 718 596-3975
CP. 347 881-5922