No 18-7092

IN THE SUPREME COURT OF THE UNITED STATES

Ileen Cain, Petitioner

V.

Atelier Esthetics Institute of Esthetics, Inc.

On writ of Certiorari to the United States Supreme Court

Petitioner, FOR REHEARING

Ileen Cain, Petitioner

Proceeding, Pro Se

66 Rockwell Place, 13H

Brooklyn, NY 11217

Council of Record for Respondent,

Nicole Feder, Esq.

L'Abbat, Balkan, Colavita, and Contini, LLP

1001 Franklin, Avenue 3rd Floor

Garden City, NY 11530

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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.

Article III section 2 of the US constitution

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Petitioner Ileen Cain proceeding pro se, respectfully asks this Court to grant rehearing of this Court's February 19, 2019 order, pursuant to Supreme Court Rule 44. Petitioner, has mailed a certified copy to Respondents council Nicole Feder, of L'Abbate Balkan, Colaviti and Contini, LLP 1001 Franklin, Avenue, 3rd Floor Garden City NY 11530. Attached, is appointed pro bono counsel, Joshua Seifert, Motion to withdraw as counsel, for purpose of Petitioner to proceed pro se in this court. Seifert, motion identifies he was appointed counsel from the Second Circuit pro bono panel to file briefs, on whether trade school students have an actionable claim for defamation per se on behalf of Petitioner, Cain. This petition references Seifert, brief and reply briefs.

I. BASIS FOR GRANTING REHEARING

The Eight Amendment of the United States prohibits Cruel and Unusual Punishment; the nexus to the Eight Amendment is the, Fourteenth Amendment [Section 1]. 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. Petitioners

Defamation claims were not litigated, during trial. The lower court erred in that Trade School Students do not have a profession to claim defamation per se.

II. ARGUMENT

The District Court Ruled on a threshold issue as to Petitioners defamation claims, pertaining to trade school students. The lower Court did not determine whether Respondent Agent Rochester Statements were true. Respondent argue, that Respondent Agent statements are not actionable because they were true. (DB 35-37). (DB refers to Defendant Appellate Brief) Because the District Court ruled on a threshold, the legal issue the genuineness of the statements were not tested at trial. Respondent concedes that the District Court did not rule on this fact intensive defense Siefert, Josh, Cain, appointed pro bono council Reply brief at p.7. Because, the District Court decided as a matter of law that a trade school student does not have a trade, Respondent, Agent defamatory statements were not resolved by the trier of fact. Respondent Agent Rochester statements were untrue and have not received proper judicial consideration. To leave their statements undetermined will commit Petitioner to a life time of public scrutiny in her pursuit of professional and personal advancement. "Any person diagnosed with a mental health issue forever after would be fair game for defamation Seifert, Joshua Reply Brief at p.7. That is neither, good law or good policy."

The Eight Amendment to the Constitution is meant to safeguard Americans against excessive punishments. The cruel and unusual punishments clause is the most important and the most controversial part of the eight amendment. This Court has established case law standards for which the cruel and unusual punishment clause have been raised. For example In *Hudson v McMillian* (1992) the Court considered whether the beating by prison guards of a handcuffed inmate at Louisiana's Angola prison violated the inmate's Eighth Amendment rights. Voting 7 to 2, the Court found a violation of the cruel and unusual punishment clause even though the inmate suffered no permanent injury injuries that required hospitalization. In so holding, the Court rejected the lower court's argument that only beatings that caused "significant injuries" (read as injuries that were permanent or required hospitalization) rose to the level of Eighth Amendment violations.

> "What exactly is a "cruel and unusual punishment" within the meaning of the Eighth Amendment? Did the framers intend only to ban punishments-- such as "drawing and quartering" a prisoner, or having him boiled in oil or burned at the stake--that were recognized as cruel at the time of the amendment's adoption? Or did they expect that the list of prohibited punishments would change over time as society's "sense of decency" evolved? The Supreme Court in the 1958 case of *Trop v Dulles*, expressly endorsed the view that what are prohibited "cruel and unusual punishments" should change over time, being those punishments which offend society's, "evolving sense of decency."

Ingraham v Wright Ingraham vs. Wright, 430 U.S. 651 (1977), was a United States Supreme Court case that upheld the disciplinary corporal punishment policy of Florida's public schools by a 5–4 vote. In the case under consideration, one students was subjected to such a severe beating with a wooden paddle as to cause hematoma requiring medical attention and another was deprived of the use of his arm for a week. By a 5 to 4 vote, however, the Court found that the punishment was not a violation of the Eighth Amendment because, it said, the framers were concerned solely with punishments in the criminal justice context and would not have intended the amendment's provisions to apply to discipline in the public schools. The four dissenters disagreed, arguing that nothing in the text of the amendment suggests the limitation found by the majority. This court in 2002, held it to be a violation of the Eighth Amendment to execute mentally retarded persons.

The doctrine of the eighth and fourteenth amendment clause is applicable to mental health in relation to one's trade, for most assuredly since the framing of the eight amendment, society has evolved, and corporal punishment is definitely outlawed and what constitutes cruel and unusual punishment has evolved in such that statements made in relation to one's trade and or profession is protected under Federal state and statutory laws. The punishment is the affect the statements will have on one's ability to earn a living and to maintain a livelihood within society. What is cruel is not to be afforded a remedy where the law and the Constitution

clearly provides for one. False statements in connection to one's trade will affect one's job marketability to earn a living and undoubtedly will affect one's ability to maintain a livelihood within society. Hence the fourteenth amendment clause prohibits that before a person is deprived of life or liberty, he or she is entitled to a Constitutional process which is usually a notice and hearing. To which Cain was never afforded one. The District Court recognized, the statements at issue are that Cain was hearing voices and acting paranoid and that defendant could not afford to have students who hallucinate in class, those statements imputed insanity, were made in connection with Cain's chosen trade.

III. STATEMENTS IMPUTING INSANTIY THAT ARE NOT TRUE ARE ACT IONABLE, Seifert, Josh, Cain, appointed Pro Bono Council Reply Brief p. 5

Respondent, Atelier argues that Mr. Rochester words, which imputed insanity, did not relate to Cain's profession. Arguing that Ateliers, defamatory statements did not relate to Cain's professional competence. Statements imputing insanity in relation to one's chosen trade are always actionable.

As the District Court recognized "spoken words imputing insanity are actionable per se when spoken of one in his trade or occupation". *Moore v. Francis 121 Peerless Pubs., Inc., 461 F. Supp. 1206, 1209 (E.D. Pa 1978) ("denying dismissal of defamation per se claim premised on statement to a prospective employer that plaintiff had some mental problems"); (Demers v.*

Meuret, 266 Ot, 252, 253-54) (1973) (reversing dismissal of defamation per se claim because the words "what kind of protection can you give us from this terrible mean demented old man He might come out and chop our airplanes up with an axe" prejudiced the plaintiff, an airline executive, in his profession or trade); Cavanagh v. Elliott, (270 ILL. App 21) (1933) (statement to plaintiff's employers that plaintiff had a decided complex" is actionable).

IV. PETITIONER CONTENDS DUE PROCEESS WAS NOT GRANTED

"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).*

Due process is found in the Fifth Amendment and the 14th Amendment and requires that before a person is deprived of life or liberty, he or she is entitled to a Constitutional process which is usually a notice and hearing. The ratification of the 14th Amendment allowed the federal government the right to enforce those rights against the states.

Respondent, Agent Rochester terminated, Cain without allowing Cain the opportunity to defend against the alleged statements. Cain was not aware of the allegations, against her until she filed her wrongful termination, disability complaint with OCR. Respondents Atelier and their agents, alternatively, negotiated an agreement with The Office of Civil Rights (OCR). Petitioner was not privy to the agreement. The Office of Civil Rights determined, Respondent was in violation of the Americans with Disability Act, therefore Respondent was mandated to attend OCR's Sec. 504 (Disability Rights Training).

V. Trade School Students Do Have a Trade for Purposes of Defamation Per Se,

Seifert, Josh Cain appointed pro bono counsel Reply Brief at pp. 3

The District Court erred when it held that a trade school student does not have a trade. The District Court held that it makes no sense to hold that a student has a "trade, business, or profession for defamation purposes because whether she would earn a living in her chosen profession was to speculative. (A –20). But courts have long held that the "trade, business or profession" category of defamation per se protects trade school students and other aspiring professionals, See, e.g. Cantrill v. *Herald Co. (87-CV-1 1992 U.S. Dist. LEXIS 7620 at *25) (N.D.N.Y., May 22, 1992); Vaile v. Willick (No. 607 cv 0001, 2008 U.S. Dist. LEXIS 53619 at * 17) (W.D. Va July 14t 2008) Golia v Karen (CV010094409S, 2002 Conn. Super LEXIS 3553) (Super Ct. Conn. Oct. 30 2002)* . Courts have so

held because disparaging statements about students undoubtedly affect their financial prospects related to their chosen trade, as the Court observed in Cantrill, if the purpose of the defamatory per se doctrine "is to discourage statements that might damage ones financial livelihood, then the student presumptively suffered such harm to the extent that one's job marketability is predicated on academic success and achievement". *(1992 U.S Dist. LEXIS 7620 at *25)*

VI. CASE BACKGROUND

Respectfully, Cain's Petition for rehearing is based on the premise that the lower court overlooked constitutional and procedural law. Constitutional law as it pertains to the eight and fourteenth amendments. Procedural law as they pertain to Federal Rules of Civil Procedure and Federal of Evidence.

This action arises out of Cain's assertion that she was wrongfully terminated from Atelier, Esthetic, Institute of Esthetics, by Respondent Agent Corey Rochester, based on her disability PTSD, after she confided in him that she received social security disability due to the murder of her son, and that she was terminated from another school after she complained she was a victim of cyberstalking/stalking. Respondents, Agent Corey Rochester, further made false statements to at least two people about Cain's sanity, while she was pursuing her chosen trade at Respondent Ateliers esthetics school: Mark Weinstein, Director, Adult Career and Continued Education Vocational Rehabilitation, (ACCESS VR),

and Paula Wolff, Director, Center for Independence of the Disabled (CIDNY). Rochester, claimed Petitioner was hallucinating, hearing voices, and interrupted class with comments unrelated to the course material; Cain was unable to keep up with the course material. Cain asserts Rochester statements were defamatory, and imputed insanity. At the time of Cain's termination she was not informed as to the reasons why she was being terminated. Cain filed suit with the Office of Civil Rights Department of Education, (OCR). Respondent Atelier entered into agreement with OCR. The agreement stipulated Respondent, offer Cain re-enrollment and issue Cain reimbursement of tuition; Respondent was mandated to attend OCR Sec. 504 training. (ADA Disability Rights Training).

SUMMARY of ARGUMENT

Consistent, with New York law and well-reasoned authorities the doctrine of presumed damages protects trade school students, who study theory and practice their trade such while studying such as an apprentice. Moreover, defamatory statements that disparage one's mental health in relation to one's chosen trade like those allegedly made in relation to Cain, affect one's job marketability and ability to earn a living. Thus, if the alleged statements were false they would be actionable. Second, Petitioner's Constitutional right to defend against the alleged statements were not deliberated; the opportunity to defend against said statements, made by Respondent Agent Rochester prior to or after her termination. Based on

the aforementioned, Petitioner, respectfully, submits this Petition for rehearing of this Court order dated February 19th 2019 and for reversal of the lower courts Order.

Petitioner,

Respectfully, Submitted,

Ileen Cain

Pro Se Litigant

CERTIFICATE OF COMPLIANCE

Ileen Cain, Petitioner, proceeding pro se, hereby submits this petition for rehearing. Petitioner Cain, respectfully believes this petition to be meritorious and hereby certify that this petition is presented in good faith and not for the purpose of delay

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ILEEN CAIN,

PLAINTIFF-APPELLANT,

-V-

ATELIER ESTHETIQUE INSTITUTE OF ESTHETICS INC.,

DEFENDANT-APPELLEE,

ATELIER ESTHETIQUE, ET AL.,

DEFENDANTS.

NO. 16-3750

AFFIRMATION OF JOSHUA L. SEIFERT IN SUPPORT OF MOTION FOR LEAVE TO WITHDRAW AS COUNSEL AND MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING

JOSHUA L. SEIFERT affirms under penalty of perjury as follows:

1. I am a member in good standing of the Bar of this Court and the founder and sole member of Joshua L. Seifert pllc.

2. I submit this affirmation in support of my motion for leave to withdraw as *pro bono* counsel for Plaintiff-Appellant Ileen Cain so that she may proceed *pro se*, and in support of Ms. Cain's request for an extension of time to file a petition for rehearing.

3. After the District Court held a bench trial and entered judgment in favor of Defendant-Appellee on October 25, 2016, Ms. Cain filed an appeal as of right on November 2, 2016. Docket Doc. No. 1.

4. Ms. Cain submitted an application for *in forma pauperis* status. Docket Doc. No. 22. The Court granted her application. Docket Doc. No. 38. Separately, the Court ordered that counsel "be appointed from this Court's pro bono panel to brief the following issue: whether a student has a trade, business, or profession for the purposes of defamation per se." *Id.*

5. Pursuant to the Order, I was appointed by the Court's *pro bono* panel to brief, on Ms. Cain's behalf, whether a student has a trade, business, or profession for purposes of defamation *per se*. Docket Doc. No. 44. Pursuant to my appointment, I filed briefs regarding that legal issue. Docket Doc. Nos. 68 & 127.

6. Separately, Ms. Cain filed briefs regarding the other issues raised in her appeal that related to the trial. Docket Doc. Nos. 95 & 123.

7. On April 20, 2018, oral arguments were held in this case. At that time, Ms. Cain was told she could not argue because I was her attorney of record.

8. On May 3, 2018, the Court issued a Summary Order and Judgment affirming the District Court's decision. Docket Doc. No. 144. The Court specifically held that it "need not decide the issue" I had briefed. *Id.* at 6.

9. Now, Ms. Cain intends to file a petition for panel rehearing or for rehearing *en banc* regarding the issues raised in her briefs, and she would like the opportunity to argue those issues.

10. To that end, I am requesting leave to withdraw so that she can file her own petition and briefs and argue on her own behalf. Ms. Cain has consented to my request.

11. In connection with my withdrawal, Ms. Cain seeks an additional four weeks to file her petition for rehearing.

12. Pursuant to Local Rule 27.1(b), on May 3, 2018, I emailed counsel for Defendant-Appellee about this motion and the relief sought. By email, Defendant-Appellee's counsel, Ms. Nicole Feder, replied that (a) Defendant-Appellee takes no position as to my motion for leave to withdraw, but (b) does not consent to the request for an extension of time to file a petition for panel rehearing or rehearing *en banc*.

Dated: New York, New York
May 9, 2018

/s/ Joshua L. Seifert
Joshua L. Seifert