No. : 19-562

In The

Supreme Court of the United States

Brian Burke, *Petitioner*

v.

New York City Transit Authority, Kristen Nolan, *esq.*, Leonard Akselrod, NYP Holdings, DBA New York Post, Kathianne Boniello, *Respondents*

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Date 06/26/2019

QUESTIONS PRESENTED

1. Pleading standards generally and/or for Title VII and/or 42 U.S.C. 1983 and/or ADA, with regards to *pro se* parties
2. If a Defamation *per se* claim is blocked by First Amendment opinion status when the anonymous source holds facts unknown to reader.
3. How false can a 'fair and true report' be under NYS Civil Rights Law 74.
4. The pleading standards for Fair Labor Standards Act.
5. The requirements to grant leave to amend.
6. The requirements/pleading standards to get recognition of a claim of unconstitutionality for a state statute and/or requirements for leave to amend in that circumstance.

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OPINIONS BELOW

On March 29, 2019 the following Order was entered into the record by the Second Circuit "Appellant, Brian Burke, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc. IT IS HEREBY ORDERED that the petition is denied." with regard to the timely Petition for Rehearing, filed and served on February 26, 2019.

2. On February 12, 2019 a Summary Order was Entered upholding the Memorandum and Order of the EDNY, with the Mandate Entered on April 5, 2019.

3. On May 18, 2018 a Memorandum and Order was Entered and filed "granting the motion to dismiss; dismissing all federal claims in their entirety with prejudice; declining to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(c)(3), over any remaining state law claims; certifying pursuant to 28 U.S.C. § 1915(a), that any appeal would not be taken in good faith; and denying *in forma pauperis* status for the purpose of any appeal. See *Coppedge v. United States*, 369 U.S. 438 (1962); it is ORDERED and ADJUDGED that the motion to dismiss is granted; that all federal claims are dismissed in their entirety with prejudice; that pursuant to 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over any remaining state law claims; that 28 U.S.C. § 1915(a), any appeal would not be taken in good faith; and that i*n forma*

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pauperis status is denied for the purpose of any appeal. See *Coppedge v. United States*, 369 U.S. 438 (1962." See Judgement dated May 21, 2019.

4. On January 30, 2017 the EDNY Entered a Memorandum and Order Denying Petitioner's Motion for Reconsideration.

5. On September 21, 2016 in a Memorandum and Order (Entered/Filed 09/23/2016) the EDNY Dismissed case, albeit allowing a Second Amended Complaint.

5. On January 25, 2017 the EDNY Entered the following "**Full docket text:** The proposed briefing schedule [39] is approved and adopted. Defendants' motion to dismiss will be served on or before March 3, 2017; any opposition by plaintiff will be served on or before April 14, 2017; any reply by defendants will be served on or before April 28, 2017.Once fully briefed, the motion papers shall be filed pursuant to the Court's Individual Rule III.D. Ordered by Judge Eric N. Vitaliano on 1/25/2017. (Simeone, Julie)"

JURISDICTION

On January 12, 2019 a Summary Order was Entered upholding the District Court's Memorandum and Order. On January 26, 2019 a timely Motion for Rehearing was Filed and Served, and this was Denied on March 29, 2019.

The Jurisdiction of this Court is invoked under 28 U.S. Code §□1254. Courts of appeals; certiorari; certified questions, and Rule 10 of Part III of The Rules of The Supreme Court "(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts

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with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

STATUTORY PROVISIONS INVOLVED

1. Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII),
2 Title 42, Chapter 21, § 1983. Civil action for deprivation of rights
3 Fed. R. Civ. P. 12(b)6 : (6) failure to state a claim upon which relief can be granted
4 Fair Labor Standards Act of 1938 29 U.S.C. § 2035
5 Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101

STATEMENT OF CASE

On February 26, 2001, Petitioner was hired off a Civil Service list for the title of Train Operator. On April 14 and 15, 2014 while operating trains full of passengers, Petitioner was serially assaulted and harassed by five different supervisors, at the behest of the NYCT Department of Law, as Retaliation for engaging in Protected Activity. These highly dangerous acts, potentially injurious to perfectly innocent, unknowing passengers, resulted in a diagnosed injury to Petitioner (PTSD, etc.) for which both treatment and substantiation (NYS Workers Compensation case #G1278038) occurred. On March 29, 2015, as pure Retaliation[1] a highly defamatory,

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[1] Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (1994) states in relevant part: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has

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knowingly false (at least by the NYCT attorney(s) who were the New York Post's anonymous source(s) as acknowledged in their pleadings) defamatory *per se*, malicious, mendacious hit piece was published, disseminated at Petitioner's workplace and online, resulting in additional (and intended) injury. Despite the EDNY finding that the article, as least as far as concerning the New York Post, was either not defamatory, or alternatively granted absolute immunity for being a "fair and true report[2]" and/or covered under opinion under the First Amendment, different findings after actual hearings, cross-examination of witnesses and a search for truth and granting of Due Process, two Administrative Law Judges, a WCB panel[3] and the full NYS Workers

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made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[2] New York Civil Rights Law Section 74 - Privileges in action for libel. 74. Privileges in action for libel. A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published. This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

[3] Re: unanimous signed Workers Compensation Board Decision "The instant matter involves a claimant that was the subject of a newspaper article that named him by name. The employer put the article up on its website and left it in the common area so that it was made available. The employer's own witness, the safety instructor, indicated that the way the article was made available for all to see could be considered

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Compensation Board, ruled in favor of Petitioner granting that an injury (or injuries) on duty occurred, caused by said defamatory article.

> On November 27, 2017 a Decision by New York State Administrative Law Judge Donald Gill under WCL 120[4] after performing/allowing numerous hearings, testimony, cross-examinations and discovery which the federal courts have so far not, ruled[5] "Now with all that said, it's hard for the court not to note that in my personal opinion that the Transit Authority's treatment of the employee, of Mr. Burke, in this case appears to be poor, to say the very least. If I were a Labor Law Judge or

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harassment. The Board Panel finds that the claimant was exposed to stress greater than that which other similarly situated workers experienced in the normal work environment. Therefore the Board Panel finds, upon review of the record and based upon a preponderance of evidence, the claimant had an accident arising in and out of the course of employment."

[4] New York Workers' Compensation Law Section 120 - Discrimination against employees. 120. Discrimination against employees. It shall be unlawful for any employer or his or her duly authorized agent to discharge or fail to reinstate pursuant to section two hundred three-b of this chapter, or in any other manner discriminate against an employee as to his or her employment because such employee has claimed or attempted to claim compensation from such employer, or claimed or attempted to claim any benefits provided under this chapter or because he or she has testified or is about to testify in a proceeding under this chapter and no other valid reason is shown to exist for such action by the employer.

[5] The case file for NYS WCL 120 *Burke v. NYCTA* (Case #xxx-xx-xxxx (Petitioners Social Security number) is 2035 pages, available in full for the Court, ideally by electronic submission.

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> Arbitrator[6] at the Transit Authority, I could make a different decision than I am doing here today. The problem is that I'm limited by section 120." and "So once again, though I am hard pressed to find an explanation for what appears to be a constant pattern of mistreatment by the Transit Authority of Mr. Burke in this matter, ..., Once again, I am dismayed by – at the actions taken against him that the Transit Authority allowed to occur to Mr. Burke in this matter, ... I do encourage Mr. Burke to take whatever other legal actions he can if he believes there's a breach of contract. There are other Courts to take it up with and numerous other actions here. I encourage Mr. Burke to take those actions as well." pages 52-53 and 58-59 of Certified November 27, 2017 Hearing Transcript for WCL 120 case Burke v. NYCT, please take Judicial Notice.

It is as if ALJ Gill is speaking directly to the Supreme Court and himself requesting this Petition be granted. To be clear, this was the only case wherein there was actual Discovery, witnesses, testimony, *etc.*. Unfortunately, as ALJ Gill himself expressed in his Decision, he could only rule on if the NYCT committed these clear, unambiguous, unprecedented, acts of Retaliation (ongoing as we

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[6] NYCT has blocked any hearing for the four (4) grievances filed in this matter from going before the Binding Contract Arbitrator at NYCT for four years for one, three years for two and two and a half for the fourth, without reason or cause, other than Retaliation under Section 704 and to violate Petitioner's First Amendment Right to Petition the Government for Redress of Grievances.

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speak) as Retaliation for filing a WC case. He found they did not[7]. Is that because, clearly and unambiguously, the acts ALJ Gill clearly ruled as Retaliatory and Harassing, albeit not for WC filings, are due strictly to the filing of the instant case? There is no alternate explanation.

There are primarily three tranches of overt, notorious, unprecedented acts of Retaliation, committed, in this case, intentionally, concertedly, injuriously, upon this Whistle-Blower engaged in Protected Activity. 1) The assaults and harassments while operating trains in passenger service in April of 2014, resulting in diagnosed, and treated injuries (PTSD, etc.) loss of income, after running out of, and using up, accumulated sick time, full loss of seniority benefits, and requirements that a job title never applied for, with entirely different requirements, was the only option to continue in employment at NYCT. 2) The intentionally, concertedly, anonymously, unprecedented Defamatory *per se,* injurious as a matter of record, admittedly untruthful, hit piece published by the New York Post, resulting in a substantiated WC claim. 3) The ongoing wage and benefit theft/conversion/Retaliation for filing the instant case. The vast majority of the back wages/benefits owed are contractual 'Differential' monies to cover the difference between Workers Compensation payments/awards and the injured workers full pay. NYCTA also owes two weeks (80 hours at full time, five days a week, 8 hour days, as per contract and as performed) and three hours of OT the Friday of the first week (March 23-27, 2015) and

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[7] That finding is being appealed to the Third Judicial Department.

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3.5 hours, the following week (March 30-April 3) .5 hours on that Wednesday and three hours on that Friday. Three hours, in addition, were worked on the following Monday, April 6 2015 prior to reporting the now substantiated on duty (and caused by NYCT) injury. For that IOD Petitioner signed a contractual 'Waiver and Election' that requires the NYCT to pay out any accumulated sick and/or vacation pay. This was paid out for the prior 2014 IOD but not the 2015 post filing of instant case filing, without any reason/pretext, other than Retaliation under Section 704. In addition, contractual '60% sick pay' at 60 days would have been due and payable, on the contractual biweekly basis. This was paid for the 2014 injury, but not the substantiated 2015 injury they caused, Retaliation under Section 704 again. Finally, as far as pay anyway, is the owed contractual 'Differential' (merely the difference between any paid WC payments and full (40 hours per week) wages. Again unpaid. Contractual Grievances were filed and remain moribund/ blocked by NYCT, in a perfect violation of both the contract and the First Amendment[8] that so well shielded NYP Holdings, Inc. Defamation *per se* ("and to petition the Government for a redress of grievances").

REASONS FOR GRANTING THE WRIT

So why would this concern the Supreme Court? First, Rule 10 "or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's

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[8] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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supervisory power;". 1) We now have case law[9] wherein an employer, for reasons of Retaliation, Discrimination, Racism, *etc.,* can now brutally, dangerously, assault a Safety Sensitive Civil Servant, or any other Employee, in the lawful performance of their duties, and there is no Remedy, at least under Title VII of the Civil Rights Act[10]. 2) In addition an Employer may now brutally, anonymously, concertedly, intentionally, Defame (*per se*) an Employee, to the point of injury, strictly as Retaliation for Protected Activity. 3) What may be the most corrupt and egregious, striking at the heart of our economy, an Employer may now completely halt the payments of any back wages, overtime, sick, vacation and/or any and all promised, previously paid contractual and/or statutory benefits, at least in the Second Circuit catchment. While no doubt the law abiding, respectable employers in, for example, the Judicial Branch, Federal, State, or Local, or the Legislative

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[9] The Second Circuit stated in their Summary Order "RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT." Please see Unpublished Opinions: A Convenient Means to an Unconstitutional End ERICA S.WEISGERBER "

[10] SEC. 2000e-3. *[Section 704]* (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

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Branch, would never think to commit these crimes against their own workers, but clearly, at least one Employer (NYCT) in the Executive Branch of New York State, and/or any other Employer(s) Public or Private[11], with the schadenfreude/aptitude to commit these acts of Retaliation, is/are now free to do so (see for example the Equal Protection Clause[12]). There are several procedural issues the Supreme Court may want to consider addressing. There seems to be reviewable issues of incorrect 'gotcha' by the lower Courts with regard to the Fair Labor Standards Act. Apparently it is now mooted or unable to be used unless an unknown formulaic recital is employed, with no ability for a Plaintiff to Amend any Complaint to conform with same. Petitioner informed

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[11] Admittedly, private employers, and their employees, in NYS are covered under NYS Labor Law 190, wherein a private employer who committed the crimes of wage/benefit theft would be liable for up to treble damages. Of course this is a great disincentive for (private) employers in New York State to commit these acts. In what Petitioner contends is facially and as applied unconstitutional (clear violation of Equal Protection Clause), and after NYCT quoted this law in their papers to deny remedy under that law, standing was/is unambiguously established, and Petitioner repeatedly requested the right to add the NYS Attorney General as a party, to properly challenge the law. Neither the District or the Circuit Court addressed this request, or ruled on the law's constitutionality. See ***Marbury v. Madison***, 5 U.S. (1 Cranch) 137 (1803).

[12] 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.* [emphasis added]

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the Court (The EDNY) of the (ongoing as of today) Wage Theft, strictly for reason(s) of Retaliation for filing the instant case, as soon as it occurred, after the filing of the Complaint, in the as of right Amended Complaint. In that document Wage Theft and the inextricably related Fraud (i.e. Wage/Benefit Fraud) were added, and within enumerated paragraph 81 "The NYCTA has not paid Burke for the two weeks at PS248 or the 12 sick days, 3 vacation weeks or 9 hours overtime work this year." NYCTA, contractually, since prior to Petitioner's employment, has paid on a biweekly basis. All jobs for Station Agent, and Train Operator, are scheduled, and paid, on a minimum 8 hour a day basis, with many having built in overtime. All jobs are scheduled for 5 days a week, with various days off. In later pleadings, such as the Second Amended Complaint Opposition to NYCTAS's MTD and the Second Circuit Briefs, it was clarified that for the only two week pay period worked (also two calendar weeks) Petitioner worked the full 80[13] hours plus the 6.5 hours of OT (divided into 3 hours the Friday of the first week and .5 on Wednesday of the second week and 3 on the Friday of the second week, payable at time and a half, i.e 9.75 hours pay at Train Operator top pay). There is no construction wherein Petitioner

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[13] Within Petitioner's Opposition to NYCTA's (second) Motion to Dismiss document 42 dated 04/14/2017 page 16 "Please see Decision by Unemployment Insurance Appeal Board (att.) page 2 pg6 "The issue is the nearly two weeks of work he performed during the first and second quarters of 2015, for which he did not receive his wages. The employer's witness produced time records reflecting the days that the claimant worked. She also conceded that the claimant had not received his pay check and had no explanation for why a check had not been issued to him."

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did not work 40 hours, plus the overtime, each of those two weeks. Since Defendant has affirmatively chosen to Defraud the Petitioner they intentionally injured and they have paid none of the monies owed (other than Workers Compensation) by paying none of the 80 hours plus 9.75 hours OT with bonus, how is it possible to state, or believe, that at least 40 hours in one of the weeks was not worked? The Second Circuit quoted case law[14] to justify their evisceration/mooting of **Fair Labor Standards Act of 1938** 29 U.S.C. § 203, which they chose to not follow in any aspect. In *Lundy* "The district court granted leave to replead the FLSA overtime claims that were dismissed without prejudice but cautioned that any future complaint "should contain significantly more factual detail concerning who the named Plaintiffs are where they worked in what capacity they worked the types of schedules they typically or periodically worked and any collective bargaining agreements they may have been subject to Special App. 18. The district court said that it would not be impressed if the Third Amended Complaint prattle on for another 217 paragraphs" solely for the sake of repeating various conclusory allegations many times over" *Id.* at 19." Which gets to the still on the table request for Leave to Amend the Second Amended Complaint, within the opposition to NYCTA's Motion to Dismiss and the Principle Brief

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[14] "Given that Burke did not allege "a single workweek in which [he] worked at least 40 hours and also worked uncompensated time in excess of 40 hours," his claims in this regard are insufficient. See *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 114 14 (2d Cir. 2013); see also *Nakahata v. New York-Presbyterian Healthcare Sys.*, 723 F.3d 15 192, 201 (2d Cir. 2013)."Second Circuit Mandate page 7

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page 27[15]. In *Lundy* Plaintiff was granted two forms of relief, additional Leave to Amend, denied this Petitioner, and a specific demand for specific facts. None occurred in the instant case. In Petitioner's Opposition to NYCTA's Motion to Dismiss "Petitioner believes there may be a need for a Third Amended Complaint, in order to comport with any new Order and to properly notice Defendant NYCTA of claims, incorporating WCB Decision on issues of fact regarding workplace harassment/defamation/hostile workplace,..." page 9. This request was ignored, with no reason given, like the similar request to add the NYS Attorney General "17 Petitioner requests to be allowed to add NY Attorney General as Defendant/Required Party, in order to challenge the constitutionality of LL 190 under the Equal Protection Clause of the 14th Amendment. Petitioner does not believe an Authority (i.e. not an 'agency') was intended to be covered in this provision, as well." on page 22 of the same document. The Second Circuit alleged that Petitioner did not include Constructive Termination/Discharge until Briefs. This is false, see

So how did this 'non-precedential' Summary Order change the case law for all New Yorkers? Well, for all New York Public Employees, there is now no access to (Federal) Court(s) for a Whistle-Blower who is having his, or her wages/benefits stolen strictly as Retaliation for Protected Activity. No protection under Title VII or FLSA. No entitlement to even the minimum wage for hours worked, no OT, no vacation, sick, differential, etc., due to NYS Labor Law 190.

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[15] "Petitioner requests the Panel consider allowing the Transport Workers Union Local 100 as a necessary party in any Third Amended Complaint."