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§1983 Specific Focus on Employment
REPUTATIONAL DUE PROCESS CLAIMS BY EMPLOYEES

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To state a claim for procedural due process, a plaintiff must allege that (1) she was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of "life, liberty, or property," and (2) the procedures available to her did not provide "due process of law." *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir.2000). In certain circumstances, an employee who is terminated from government employment or otherwise punished by the employer may assert a due process claim premised on the attendant injury to their reputation. The claim is premised on a liberty interest in the ability to earn a living and practice one's chosen profession.[1]

Practically speaking, given the procedural protections available to government employees, only a small subset of employees can assert such a claim. In the District of Columbia, the majority of these suits have been filed by upper level management employees, who are considered "at-will" and by probationary employees because these employees are provided with fewer pre-termination procedures.

Nature of a Reputational Due Process/Constitutional Defamation Claim:

To sustain a procedural due process claim, a plaintiff must first demonstrate the existence of a protected interest. *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). Injury to reputation alone is not sufficient to trigger the requirements of due process. *See Paul v. Davis*, 424 U.S. 693, 706 (1976); *Dee v. Borough of Dunmore*, 549 F.3d 225, 233 (3d Cir.2008). Nor is every defamation by a government official a constitutional violation. *See Paul* at 706 – 07. "The Constitution protects an individual's 'right to follow a chosen trade or profession' without governmental interference." *O'Donnell v. Barry*, 148 F.3d 1126, 1139 (D.C. 1998). "Government action that has the effect of 'seriously affecting, if not destroying' a plaintiff's ability to pursue his chosen profession, . . . or 'substantially reducing the value of his human capital, . . . thus infringes a liberty interest.'" *Id.* at 1142 (*internal citations omitted*).

The claims are often called stigma plus claims. In *Hinkle v. White*, 793 F.3d 764, 767 (7th Cir. 2015), the 7th Circuit found that an elected sheriff who could not get work after the end of his term after investigators had accused him of child molestation, had no claim because the alteration of his status – the loss of his job – was not attributable to the state actors. Although Plaintiff "showed a serious stigma, without the "plus," he cannot maintain a due process claim for the denial of a liberty interest." *Id*.

I. Elements of a Stigma Plus Claim:

A stigma plus claim is generally found to have the following elements: (1) the statements must impugn the employee's good name, reputation, honor, or integrity; (2) the statements must be false; (3) the statements must occur in the course of terminating the employee or must

[1] Whether a government employee has a property interest in his or her job is question of state law. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).

foreclose other employment opportunities; and (4) the statements must be published. *Sciolino v. City of Newport News, Va.*, 480 F.3d 642, 646 (4th Cir. 2007).

A. False and Defamatory Statements:

Defamatory statements must "call into serious question those personal characteristics that are central or enduring in nature . . ." and cannot amount to mere commentary concerning the person's job performance. *Alexis v. District of Columbia*, 44 F. Supp. 2d 331, 338 (D.D.C. 1999), *citing Harrison v. Bowen*, 815 F.2d 1505, 1518 (D.C. Cir. 1987). The statements must include accusations of dishonesty, the commission of a serious felony, manifest racism, serious mental illness, or lack of intellectual ability. *Harrison*, 815 F.2d at 1518. To satisfy the 'stigma' prong of the test, it must be alleged that the purportedly stigmatizing statements(s)(1) were made publicly and (2) were false." *Hill*, 455 F.3d at 236 (internal citations omitted). The 6th Circuit additionally requires that the public decimation was voluntary. *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 414 (6th Cir. 2002).

B. Type of Government Action:

Several circuits found that the defamed employee must be dismissed before she may state a reputation plus claim. *E.g., Oladeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir.1992), (A "discharge or more" is required in order to satisfy the "plus" element of the stigma-plus test.); *Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 690 n. 9 (8th Cir.1998); *Ludwig v. Bd. of Trs. of Ferris State Univ.*, 123 F.3d 404, 410 (6th Cir.1997). Others have found that although government action must be significant, it can be less than termination. E.*g. O'Donnell v. Barry*, 148 F.3d 1126, 1139 (D.C. 1998)(requires termination or "significant" demotion accompanied by a loss of pay – lateral transfer to "dumping ground" is not sufficient); *Klug v. Chicago Sch. Reform Bd. of Trs.*, 197 F.3d 853, 859–60 (7th Cir.1999)(demotion to a position "far beneath" prior job qualifies); *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 314 (4th Cir. 2006)(removal of coach from the athletic department is a "significant demotion" which supports a reputation plus claim); *but see Baden v. Koch*, 799 F.2d 825, 829-30 (2d Cir. 1986)(where Plaintiff is demoted, rather than fired, liberty interest is weak).

C. Connection between government action and statements:

The stigmatizing comments must occur "in the course of" the change of status. *Paul*, 424 U.S. at 710. Courts have found that this requires a close relationship between the defamatory statement and the status change. *Martz v. Inc. Vill. of Valley Stream*, 22 F.3d 26, 32 (2d Cir. 1994)("a concurrent temporal link between the defamation and the dismissal is necessary if the employee is to succeed upon a claim of liberty deprivation" so publication five months later does not support claim); *Campanelli v. Bockrath*, 100 F.3d 1476, 1482 (9th Cir. 1996)(statement must be "so closely related to discharge from employment that the discharge itself may become stigmatizing in the public eye"); *Wells v. Hico Indep. Sch. Dist.*, 736 F.2d 243, 256 n. 17 (5th Cir.1984) (stigmatizing charges must "occur in connection with, and be closely enough related to, the employee's nonrenewal or discharge so as to cause that action to be stigmatizing"). Some Courts have looked at this as an issue of timing. *See Hadley v. County of Du Page*, 715 F.2d 1238, 1246–47 (7th Cir.1983) (defamation "must occur at or near the time of ... termination";

referred to article published six days after termination as defamation "at the time of" termination); *Mertik v. Blalock,* 983 F.2d 1353, 1363 (6th Cir.1993) (allegations that defendants made statements "roughly contemporaneously" with deprivation of right satisfied pleading requirements for due process violation); *but see Ray v. Tennessee Valley Auth.,* 677 F.2d 818, 824 (11th Cir.1982) ("we hesitate to set a temporal limit on the relationship between the alleged defamation and the other deprivation action," in determining whether plaintiff stated a due process claim).

D. Publication:

Whether a statement is publically made is not always straightforward. Court have articulated different standard when confronted with cases where the alleged defamatory statement is made in an employee's personnel file. Some require actual dissemination. *See Johnson v. Martin,* 943 F.2d 15, 16–17 (7th Cir.1991) (statement must *actually* have been disseminated to a potential employer); *Burton v. Town of Littleton,* 426 F.3d 9, 15 n. 5 (1st Cir.2005) (to prove dissemination "plaintiff must marshal sufficient evidence to support a conclusion that any of the prospective employers requested, or that the defendants divulged, information regarding the circumstances surrounding [her] termination" (internal quotation marks omitted) (alteration in original));*Whiting v. Univ. of S. Mississippi,* 451 F.3d 339, 348 (5th Cir. 2006)(statements confined to tenure hearings and personnel file not publicly made). Others hold that the mere "presence" of information in a personnel file, without more, is insufficient to require due process. *Hughes v. City of Garland,* 204 F.3d 223, 228 (5th Cir.2000); *Copeland v. Philadelphia Police Dep't,* 840 F.2d 1139, 1148 (3d Cir.1988). Still others require only that the file "would be available to prospective employers," *Clark v. Mann,* 562 F.2d 1104, 1116 (8th Cir.1977); that there must be a "possibility" that potential employers will see the information, *Bailey v. Kirk,* 777 F.2d 567, 580 n. 18 (10th Cir.1985) (*citing Burris v. Willis Indep. Sch. Dist.,* 713 F.2d 1087, 1092 (5th Cir.1983)); or that the "presence of stigmatizing information" in a personnel file was part of the public record and so could be obtained by prospective employers, even though it had not been disseminated to any particular employer, *Buxton v. City of Plant City,* 871 F.2d 1037, 1045–46 (11th Cir.1989). The Second Circuit requires a likelihood that the files would be seen by potential employers. *See Brandt v. Bd. of Coop. Educ. Servs.,* 820 F.2d 41, 44–45 (2d Cir.1987) ("[T]he public disclosure requirement has been satisfied where the stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers.").

II. Stigma Only Claim?

In *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972), the Court discusses two scenarios where reputational injury in connection with the loss of government employment requires due process. In the first, the state actor makes a defamatory statement against the individual in connection with the employment action. *Id.* The second is where the termination itself results in a stigma that forecloses the individual's freedom to take advantage of other employment opportunities. *Id.* at 574.

The DC Circuit recognizes a separate claim when the government imposes "a stigma or other disability that foreclose[s] [a person's] freedom to take advantage of other employment

opportunities." *O'Donnell*, 148 F.3d at 1140. It "differs from the [stigma plus claim] in that it does not depend on official speech," but on a "stigma or disability arising from official action." *Id.* The 9th Circuit has recognized a substantive due process claim, a part from a reputation plus claim procedural due process claim limited to "government employer actions that foreclose access to a particular profession to the same degree as government regulation." *Engquist v. Oregon Dept. of Agric.*, 478 F.3d 985, 998 (9th Cir. 2007).

Calling this the "Roth dichotomy of reputation and stigma", Judge Jolly of the 5th Circuit opined that the two concepts have merged, creating a single tort which requires the damage to reputation to rise to the level of foreclosing the employee's ability to practice in his or her chosen field. *Rosenstein v. City of Dallas, Tex.*, 876 F.2d 392, 400 (5th Cir. 1989)(Jolly, J dissenting) opinion reinstated in part, 901 F.2d 61 (5th Cir. 1990). Most other Circuits seem to recognize only one type of claim.

III. Due Process:

The process due can be minimal. *See Baden v. Koch*, 799 F.2d 825, 829-30 (2d Cir. 1986)(an informal opportunity to rebut charges prior to removal was sufficient). It does not need to directly challenge the change in status. *See Hinkle v. White*, 793 F.3d 764, 767 (7th Cir. 2015)(criminal proceeding is sufficient); *Rosenstein v. City of Dallas, Tex.*, 876 F.2d 392, 395 (5th Cir. 1989) (the process due such an individual is merely a hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee). Nor does it need to be pre-deprivation. *Campbell v. Pierce County, Georgia*, 741 F.2d 1342, 1345 (11th Cir.1984)("Because it is provided simply to cleanse the reputation of the claimant, the hearing need not take place prior to his termination or to the publication of related information adverse to his interests").

III. Remedy:

The process itself is the presumptive remedy; the employer does not need to rehire the employee if the allegations are proven false. *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 633 (2d Cir. 1996). Some courts have allowed plaintiffs to recovery compensatory damages. *Rosenstein v. City of Dallas*, 876 F.2d 392, 397 (5th Cir. 1989).

IV. Municipal Liability under Section 1983:

To bring a claim, Plaintiff must meet the requirements for municipal liability under *Monell v. Dep't of Soc. Serv. of N.Y.*, 436 U.S. 658, 694 (1978). Liability may attach to a municipality only where the municipality itself causes the constitutional violation through "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.*

In reputational due process cases, the key question tends to be whether an official policy maker decided to terminate or demote plaintiff. *See Ulrich v. City & County of San Francisco*, 308 F.3d 968, 972 (9th Cir. 2002)(question of fact regarding whether the medical director of a public hospital was a policy maker); *Rosenstein v. City of Dallas, Tex.*, 876 F.2d 392, 395 (5th Cir. 1989)(municipal liability premised on the fact that both Mayor and City Manager ignored

plaintiff's request for a hearing). Municipal liability can also be premised on the government body's "policy" not to provide due process to this class of employees. *See Graham v. City of Philadelphia*, 402 F.3d 139 (3rd Cir. 2005)(Police department policy of not rehiring anyone tried for a crime, even if found not guilty).