CIVIL RIGHTS

Hostile Education Environment and Schools That Fail to Address the Warning Signs

By Victor John Yannacone Jr. and Cory Morris

At around the same time that students went back to school this year, United States District Court Judge Denis R. Hurley wrote a landmark decision about students who are threatened and schools, private or public, that do not act timely and appropriately.

The New York Law Journal, focusing on the characterization by Judge Hurley that this was a "Disturbing Racial Attack," and "[t]he pictures targeted the student's race and referenced the KKK, Nazis and suicide, according to copies included with the complaint." When white students sent pictures of, among other things, a gun to his head and a lynching noose to an African American/black student, school administrators should have acted but did not. As counsel for the family, we could not wait until our client was murdered.

From emojis to gun gestures, school administrators know that images convey physical threats and this case was no different. In Virginia v. Black, 538 U.S. 343 (2003), an appeal stemming from cross burning by Ku Klux Klan ("Klan") members, Justice Clarence Thomas dissented in the striking down of the statute banning cross burning, stating that "cross burning subjects its targets . . . to extreme emotional distress, and is virtually never viewed merely as 'unwanted communication,' but rather, as a physical threat." This lone dissent is a reminder of what every African American knows upon seeing images of the Ku Klux Klan, Hitler, and a noose addressed to them — a threat of imminent death if not serious physical harm.

Victor Yannacone, Jr.

Cory Morris

We live in an age where Klan members no longer need wood, matches and gasoline in front of someone's home to send their message — now all they have to do is click "send!"

As plaintiffs' counsel in Moore, we argued the position that tolerating and facilitating a racially hostile environment effectively prevents the infant Plaintiffs D.W.M. and D.D.M. from obtaining the Roman Catholic elementary school education their parents contracted for from the Defendant St. Mary School and Defendant Diocese of Rockville Centre. The plaintiffs in Moore had no other option but to sue in federal court after exhausting every civil and legal remedy, to obtain relief from these school children.

Unable to obtain an Order of Protection by means of Order to Show Cause, the plaintiff children had to leave St Mary School to remove themselves from the threats.

Of the claims that survived dismissal, the Hostile Educational Environment claim is extremely important in these unfortunate days of violent turmoil and regularly publicized school shootings. "The Second Circuit has indicated that discrimination claims un-

(Continued on page 33)

VETERANS

Have You Served? Aid and Attendance and Housebound Allowance for Veterans and Spouses

By Chad H. Lennon

Chad H. Lennon

Suffolk County has the highest population of veterans in New York state, thus, you will likely come across a veteran, or spouse of a veteran, in your practice. Veterans and spouses who are eligible for a Department of Veterans Affairs pension and require the aid and attendance of another person, or are housebound, may be eligible for an additional monthly tax-free monetary payment. The allowance is paid in addition to the monthly pension. Since Aid and Attendance and Housebound Allowances increase the pension amount, people who are not eligible for a basic pension due to excessive income, may be eligible for pension. However, a veteran or surviving spouse may not receive Aid and Attendance Allowance and Housebound Allowance at the same time.

It is important to remember that it is common to lump all VA assistance in the term "VA Benefit." However, not all entitlements are considered a benefit, thus, allowance for Aid & Attendance and Housebound. These are allowances that have medical ratings and additional amounts of money available with all VA disability income benefits to assist individuals receiving these benefits to cope with the added burden of dependency or being housebound. This allowance is utilized to assist veterans and spouses of veterans for long-term care, basically a person is confined to his or her living quarters. The tax-free payments will vary based on single, married, or a spouse that needs assistance.

Eligibility for the allowance is based upon 90 days of active duty service, or 1 day of service during wartime even if it was not in a combat zone. The veteran must not have a dishonorable discharge, be over 65 or permanently disabled, need assistance from another person and there is a net worth limit. Additional requirements include the need for assistance of daily living activities. These activities are bathing, dressing, toileting, feeding, transferring, personal hygiene, prosthetic adjustments, fall prevention, providing protected environment, and preventing harm to others. In some cases, the VA may require two of these activities requiring assistance.

To qualify for the benefit, the client must have unreimbursed medical expenses, a net worth limit (includes assets, but does not include primary residency and one vehicle) and assets that have not been transferred in the last three years otherwise there may be a penalty of up to five years.

Navigating the allowance can be confusing, so referring to the VA website for spe-

(Continued on page 32)

COMMERCIAL LITIGATION

An Alternative to Arbitration Via Commercial Division Rule 9

By Leo K. Barnes Jr.

Leo K. Barnes Jr.

In late 2018, the First Department's decision in Daesang Corporation v. The NutraSweet Company, 167 A.D.3d 1, 85 N.Y.S.2d 6 (1st Dep't 2018) refused to vacate a $100 million arbitration award premised upon a purported manifest disregard of law, confirming that:

"The potential for . . . mistakes [by the arbitrators] is the price for agreeing to arbitration" [] and, "however disappointing [an award] may be," parties that have bargained for arbitration "must abide by it" [] ["Errors, mistakes, departures from strict legal rules, are all included in the arbitration risk"] [internal citations omitted]).

With this caveat in mind, transactional counsel may consider an alternative to mandatory arbitration because in all likelihood, arbitration will limit a party's ability to obtain appellate-type review of findings of fact, conclusions of law and the ultimate arbitration award. Indeed, for transactional counsel interested in the putative expedited and less costly substitute to litigation, the Commercial Division offers a viable alternative, specifically Rule 9 Accelerated Adjudication.

Factual background

According to the decision, in 2002 petitioner Daesang Corporation and respondent The NutraSweet Company (the world's largest producer of the artificial sweetener aspartame) began to discuss NutraSweet's potential acquisition of Daesang's aspartame business. During 2003, Daesang and NutraSweet entered into an Asset Purchase Agreement wherein Daesang sold all of its aspartame assets to NutraSweet for $79,250,000, $5 million of which was to be paid at closing and the remainder in five annual installment payments. The APA, governed by New York law, provided that disputes were to be resolved through arbitration by a three-member tribunal in New York under the rules of the International Chamber of Commerce. After the May 2003 closing, NutraSweet made the 2004 and 2005 annual installment payments of the purchase price under the APA but failed to remit the third installment payment due in June 2006. In December 2006, after NutraSweet failed to cure the default, Daesang accelerated the $55 million balance of the purchase price. In June 2008, Daesang commenced an arbitration proceeding against NutraSweet, seeking about $80 million in damages, plus interest, while NutraSweet filed its answer, defenses and counterclaims seeking, inter alia, rescission.

Ultimately, after the submission of 20 declarations, hundreds of exhibits, and a nine-day hearing, the ICC panel awarded Daesang $100,766,258 in damages (which included, inter alia, the unpaid balance of the purchase price under the APA, plus interest through June 2016). The ICC panel dismissed all of NutraSweet's defenses and counterclaims. Daesang thereafter sought to confirm the

(Continued on page 34)

Civil Rights (Continued from page 11)

der Title II are subject to the same analysis as discrimination claims under 42 U.S.C. § 1981." "[T]he Second Circuit has made clear that there is no state action requirement to invoke the equal benefit clause of the section." Accordingly, both private and public schools must address threats of racial violence towards their students.

In Moore, plaintiffs alleged that both the Constitution of the United States and the New York State Constitution protect persons against the harm caused by racial threats and intimidation. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." The cyberassault images contained within Exhibits 2 through 9 of plaintiffs' Amended Complaint left no doubt that their purpose was intimidation by racial threats and the court agreed.

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." "A child, merely on account of his minority, is not beyond the protection of the Constitution." "Students in school as well as out of school are 'persons' under our Constitution no less than corporations attempting to influence elections through unlimited media campaigns. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state." "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."

While Judge Hurley held that the Hostile Educational Environment claim survived, finding that the threats in the complaint shock the conscience, he rejected plaintiffs' argument that private actors such as defendants St. Mary School and the Diocese of Rockville Centre which provide the compulsory schooling required by State Legislation act under color of state law. Nevertheless, Judge Hurley did hold that such private actors cannot be said to be entities independent of that high duty to serve as the protectors of our most valuable resources, the safety and education of children. The Due Process Clause affords those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The import of the decision is profound for students whom the school disregards; to every school that sees the signs and fails to act appropriately. On the heels of the Stoneman Douglas High School shooting and shortly after the Santa Fe High School Shooting in Texas, the Moore Family filed suit against defendant St. Mary School and the Diocese of Rockville Centre asking the court to craft a remedy in equity.

The seriousness of these threats were addressed in a United States District Court, historically the place where racism and violence spawned by the Klan and other white supremacy groups have been addressed.

The message Judge Hurley sent in Moore should resonate among all those responsible for the protection, education and safety of children: indifference and apathy to signs of imminent violence will not be tolerated.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. His civil rights practice began on his admission in 1959 defending indigents referred by the NAACP pro bono as Miranda, Legal Aid and 18-B were years away at that time. He can be reached at vyannacone@yannalaw.com, and through his website https://yannalaw.com.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

1 Memorandum and Order; 2:18-cv-3099 (DRH) (GRB) document 79, August 27, 2019.

2 Guichardo v. Langston Hughes Queens Library, No. 15-CV-2866 (MKB), 2015 WL 13227995, at *3 (E.D.N.Y. Nov. 20, 2015) (citing Stone v. N.Y. Pub. Library, No. 05-CV-10896, 2008 WL 1826485, at *3 (S.D.N.Y. Apr. 22, 2008)) (internal quotation marks omitted) (quoting Daniel v. Paul, 395 U.S. 298, 307–08 (1969).

3 Bishop v. Toys "R" Us-NY LLC, 414 F. Supp. 2d 385, 393 (S.D.N.Y. 2006), aff'd sub nom. Bishop v. Toys R Us, 385 F. App'x 38 (2d Cir. 2010).

4 In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967).

5 Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976).

6 Bellotti v. Baird, 443 U.S. 622, 633, 99 S.Ct. 3035, 3043, 61 L.Ed.2d 797 (1979).

7 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511, 89 S.Ct. 733, 739, 21 L.Ed.2d 731 (1969).

8 In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967).

9 See Marsh v. Alabama, 326 U.S. 501, 506–07, 66 S.Ct. 276, 278–79, 90 L.Ed.2d2 65 (1946); Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–25, 81 S.Ct. 856, 861–62, 6 L.Ed.2d 45 (1961); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974); Lugar v. Edmondson Oil Co., 457 U.S. 922, 941, 102 S.Ct. 2744, 2756, 73 L.Ed.2d 482 (1982).

10 See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177, 92 S.Ct. 1965, 1973, 32 L.Ed.2d 627 (1972); Wahba v. New York Univ., 492 F.2d 96, 100 (2d Cir.1974) (Friendly, J.); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir.1973).

11 Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed.2d 674 (1934) (Mr. Justice Cardozo).

Tax (Continued from page 14)

The question of Taxpayer's statutory residence, therefore, turned on whether he maintained a permanent place of abode in N.Y.

In fact, just prior to the years at issue, Taxpayer had purchased a house in Northville, New York, which is more than 200 miles from NYC, on a northern extension of Great Sacandaga Lake, in the Adirondack Park.[vii] The house had five bedrooms and three bathrooms, with year-round climate control.

It was undisputed that Taxpayer and his family used this house for vacation purposes[viii] only: Taxpayer enjoyed cross-country skiing in the winter months and attending the Saratoga Race Track in the summer. Taxpayer spent no more than two to three weeks at a time in Northville.

The issue is joined

Taxpayer filed New York State Nonresident Income Tax returns, on Form IT-203, for each of the years at issue.[ix] In response to a question on Form IT-203, Taxpayer responded that he did not maintain any living quarters within N.Y. state for either 2012 or 2013.[x]

After an audit conducted by the Department of Taxation, a notice of deficiency was issued to Taxpayer in 2016. The notice asserted additional N.Y. State Income Tax due in excess of $525,000 (plus interest and penalty) for the two years at issue.[xi]

The additional liability was based upon the department's finding that, because Taxpayer maintained a permanent place of abode in the N.Y. and was present within the state in excess of 183 days, he was liable as a statutory resident for income tax purposes for the years 2012 and 2013.[x]

Taxpayer protested the notice by filing a timely petition with the Division of Tax Appeals.

Unfortunately, Taxpayer didn't stand a chance of succeeding under the current state of the law relating to N.Y. statutory residence.

Statutory residence

The NY Tax Law sets forth the definition of a N.Y. state resident individual for income tax purposes. A resident individual means an individual: "(A) who is domiciled in this state, . . . or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, . . ." [xii]

As set forth above, there are two alternative bases upon which an individual taxpayer may be subjected to tax as a resident of N.Y. state, namely (A) the domicile basis, or (B) the statutory residence basis — i.e., the maintenance of a permanent place of abode in N.Y., and physical presence in the state on more than 183 days during a given taxable year.

Because Taxpayer was domiciled in New Jersey during the audit years, the issue for the Tribunal was whether Taxpayer was liable for N.Y. personal income tax on the basis of statutory residence. As there was no dispute that Taxpayer was physically present within N.Y. for more than 183 days — after all, he worked in the city, where his business was located — the sole issue in the case involved whether Taxpayer maintained a permanent place of abode in N.Y. during the years at issue.

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i "Carl Icahn Is Said to Be Heading to Florida for Lower Tax Rates," Bloomberg's Daily Tax Report, Dec. 12, 2019. Another article indicated that his employees were being offered a moving allowance to back their bags and head south with him. Clearly, he has been advised that it will not suffice for him to move from NY while leaving his business behind – the business must come along too if he is to successfully demonstrate that he has abandoned his NY domicile and has established Florida as his new domicile. https://www.taxlawforchb.com/2019/07/escape-from-new-york-it-will-cost-you/

ii The article could have added that New York City imposes a personal income tax on its residents at a rate of 3.876%; it also imposes a corporate tax at the rate of 8.85%, and a tax on unincorporated businesses of 4%. https://www.taxlawforchb.com/2017/03/an-overview-of-the-nyc-business-tax-environment/
The article also could have mentioned that Florida has no estate tax, whereas NY imposes an estate tax of 16%.

iii Nelson Obus and Eve Coulson, DTA NO. 827736 (August 22, 2019).

iv Yes, some hyperbole, but I'm making a point here.

v The opinion's reasoning applies equally in determining the NYC resident status of a NY State domiciliary – for example, an individual whose permanent home is in Westchester or Nassau County – who owns and operates a business in NYC, and who is considering the purchase of an apartment in the City.

vi This is important to note because NYC did not claim he was a resident of the City, though he worked there most of the time.

vii A car drive of almost 4 hours; a bus or train ride of almost 5 hours; almost 5 hours by plane and car (flying from Newark to Albany then to Saratoga Springs, then by car to Northville).

viii It was obvious that he hasn't going to commute to his office in NYC from Northville.

ix Taxpayer's share of the profits from his NYC-based business probably included NY-source income.

x This drives me crazy. Whether it is done inadvertently or intentionally, I cannot say; its effect is the same: the NY auditor is left with the impression that the taxpayer is looking to avoid having their return selected for a residency exam. Why start behind the eight ball?

xi This translates, roughly, into additional taxable income of approximately $6 million in each of the years at issue. This income would, for example, represent wages earned outside of NY, rental income sourced outside NY, and investment income.

xii Tax Law Sec. 605(b)(1)(A) and (B).