

Adverse employment action + Damage to employee's reputation (can) = Liability for municipal employers

The Vermont Supreme Court has held that if a former government employee has experienced the stigma of defamatory statements made by an employer in the context of an adverse employment action, the former employee may sue the employer for due process violations if not afforded an adequate "name-clearing" hearing. *Herrera v. Union 39 School District*, 2009 VT 35.

The *Herrera* case involved former Black River Union High School principal Ebaristo Herrera. Mr. Herrera was hired by Black River in the spring of 2000 under a two-year contract. In the spring of 2001, the district superintendent recommended that the school board terminate Mr. Herrera's employment for performance issues. After holding a public hearing, the school board retained Mr. Herrera as principal but also initiated its own investigation, which took place in the fall of 2001.

After a second negative performance evaluation by the superintendent, the board met with Mr. Herrera in executive session in November 2001. During the meeting, the board offered Mr. Herrera the option to resign with full pay or be terminated. When he rejected both options, the school board placed Mr. Herrera on paid administrative leave. During a subsequent December meeting, the board voted in executive session to place the principal on administrative leave for the remainder of the school year. The board also voted not to renew his contract with the district. Mr. Herrera then brought suit against the school district, alleging among other things that statements made by board members at the December meeting were defamatory and that the stigma of these defamatory statements plus the adverse employment action of the school board combined to violate his due process rights.

At issue were statements allegedly made by board members at the December meeting and later reported in the local newspaper. After review of the newspaper article and a videotape of the meeting, the Vermont Supreme Court concluded that the board members' statements amounted to no more than "vague allegations of unspecified incompetence" that were insufficient to establish stigma. Whatever negative inference that might be drawn from the termination was also insufficient to establish stigma. Thus, Mr. Herrera could not prevail on his due process claim.

Though a victory for the school district, the *Herrera* case has an important lesson for municipal employers and their attorneys: when taking an adverse action against an employee, whether it be termination or paid administrative suspension, selectboard members and other municipal officials must refrain from making defamatory statements that might damage the employee's reputation and impinge upon the employee's future employment opportunities. If such statements are made during or subsequent to the adverse employment action, the employer must provide the employee an opportunity to clear his name. If no name-clearing hearing is provided, or if the hearing is inadequate, the municipal employer may be liable for violating the employee's due process rights. You can read the *Herrera* decision in full at <http://info.libraries.vermont.gov/supct/current/op2007-416.html>.

Jim Barlow, Senior Staff Attorney
VLCT Municipal Assistance Center

VLCT News, July 2009