

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

ALAN PLOFSKY,	:	CIVIL NO. 3:06CV0789(JCH)
<i>Plaintiff</i>	:	
	:	
ROSEMARY GIULIANO, ET AL.	:	
<i>Defendants</i>	:	JUNE 16, 2008

**DEFENDANTS’ REPLY TO PLAINTIFF’S MEMORANDUM IN OPPOSITION
TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Defendants in the above-entitled matter hereby reply to Plaintiff’s Memorandum in Opposition to Defendants’ Motion for Summary Judgment dated May 15, 2008 and Plaintiff’s Rule 56(a)2 Statement dated May 16, 2008. As further set forth below, Plaintiff’s Memorandum and 56(a)2 Statement fail to raise a single genuine issue of material fact based on evidence that would be admissible at trial. Moreover, plaintiff has failed to dispute defendants’ legal arguments as to each cause of action alleged in the Complaint. Accordingly, defendants are entitled to the entry of judgment as a matter of law.

At the onset, it is important to emphasize what this case is **not** about. Plaintiff goes to great lengths to criticize the actions of the three staff attorneys (Attorneys Duggan, Bergeron and Sexton) at the State Ethics Commission (“SEC”), the attorney from the Office of Labor Relations who guided the defendants throughout the disciplinary process (Linda Yelmini) and the investigator from the Department of Administrative Services (Alan Mazzola) who conducted the investigation of the

plaintiff's alleged misconduct. None of those individuals are defendants in this action. Rather, the defendants are eight individuals who were not even state employees, but who served as citizen members of the SEC at the time when plaintiff was dismissed. Nor is this case about whether there was just cause for the plaintiff's dismissal. That issue was submitted to and decided by the Employee Review Board and, contrary to plaintiff's suggestion, the fact that the ERB disagreed with the Commission's decision does not create a constitutional violation.¹ Rather, this case is about eight individuals who were faced with deciding appropriate disciplinary action for their Executive Director, the highest ranking employee of the SEC, following a finding by Mr. Mazzola that he had engaged in several incidents of serious misconduct. The undisputed facts demonstrate that at every step of the disciplinary proceeding, these defendants carefully considered the evidence before them and acted only after being assured that their actions were lawful. Those undisputed facts also demonstrate that the defendants did not violate the plaintiff's first amendment or due process rights or, at the very least, that they are entitled to qualified immunity. This case is really about the plaintiff's attempt to convert a personnel grievance into a constitutional matter.

Just this month, the United State Supreme Court in Engquist v Oregon Dept. of Agriculture, 2008 U.S. LEXIS 4705*, 553 U.S. ____ (June 9, 2008) reiterated a guiding principle that the Court articulated in Connick v Myers, 461 U.S. 138, 143 (1983), the "common-sense realization that government offices could not function if every

¹ The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions. Bishop v Wood, 426 U.S. 341, 350 (1976)

employment decision became a constitutional matter." In rejecting the plaintiff's equal protection class-of-one theory, the Court noted in Engquist that:

...any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim. Indeed, an allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful employment action--not only hiring and firing decisions, but any personnel action, such as promotion, salary, or work assignments--on the theory that other employees were not treated wrongfully.... The practical problem with allowing class-of-one claims to go forward in this context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack. The Equal Protection Clause does not require "[t]his displacement of managerial discretion by judicial supervision." *Garcetti v. Ceballos*, 547 U. S. 410, 423 (2006).... In short, ratifying a class-of-one theory of equal protection in the context of public employment would impermissibly "constitutionalize the employee grievance." *Connick*, 461 U. S., at 154. "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop, supra*, at 349. Public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains, but the Equal Protection Clause is not one of them.

Engquist, 2008 U.S. LEXIS 4705*. Likewise in Garcetti v Ceballos, 547 U.S. 410 (2006), the Court cautioned against allowing the First Amendment to "empower [public employees] to 'constitutionalize the employee grievance.'" Garcetti, 547 U.S. at 420, quoting Connick, 461 U.S. at 154. The Court declined to "...commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their supervisors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents." Garcetti, 547 U.S. at 423.

Likewise, this Court should decline the plaintiff's invitation to constitutionalize his own personnel grievance.

II. REPLY TO PLAINTIFF'S LOCAL RULE 56(a)2 STATEMENT OF MATERIAL FACTS.

Summary judgment is appropriate “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). It is the non-movant’s burden on summary judgment to submit *evidentiary support* establishing that a rational trier of fact could find in their favor and to raise genuine issues of material fact that require a trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Once a movant has demonstrated that no material facts are in dispute, the non-movant must set forth *specific facts* indicating a genuine issue for trial exists in order to avoid the granting of summary judgment.” Cifarelli v. Village of Babylon, 93 F.3d 47, 51 (1996) (citations omitted)(emphasis added).

Any inferences drawn in favor of the plaintiff must be supported by evidence. Silberberg v. Lynberg, 186 F. Supp. 2d 157, 165 (D. Conn. Feb. 20, 2002)(Thompson, J.). To survive a motion for summary judgment, the non-moving party may not simply rest on the pleadings or conclusory or speculative accusations or arguments, but must submit *specific, concrete* evidentiary support for any claims that a material issue of fact exists requiring trial. Alteri v. General Motors Corp., 919 F. Supp. 92, 94-95 (N.D.N.Y. 1996), *aff’d*, 116 F.3d 465 (2d Cir. 1997)(internal quotations omitted)(emphasis added). Here, Plaintiff fails to meet this burden as to any of the counts of his Complaint.

It is imperative for the Court to focus on the real factual basis of the plaintiff’s case and not on the many pages of briefs and documents presented by the plaintiff merely to distract the Court from the very basic factual issues.

A. Plaintiff Has Failed to Refute Defendants' Local Rule 56(a)(1) Statement.

It is important to note that the plaintiff has admitted nearly the entire “Defendants’ Statement of Material Facts that are not in Dispute.” In a more general sense, as to the portions of defendants’ Statements that plaintiff challenges, plaintiff offers nothing more than conclusory and/or “editorialized” denials and comments on documents that clearly “speak for themselves.” Plaintiff similarly, throughout his responses, questions defendants’ motives and/or good faith however provides virtually no evidence to otherwise contradict defendants’ facts and documentary evidence.

More specifically, and for example, plaintiffs’ comments and responses to defendants undisputed facts ¶¶ 58, 59 and 60 are clear admissions with inappropriate editorialized commentary regarding the sufficiency of evidence that plaintiff received during and prior to the Loudermill process. Similarly, plaintiff’s responses to ¶¶ 63 and 64 reiterate his claims that he was without certain evidence at his Loudermill hearing, and that he would have responded or “strategized” differently if he had different information. In short, the defendants rely upon their Statement of Undisputed Facts as originally submitted together with documentary evidence to support their claim that both plaintiff and plaintiff’s counsel, as demonstrated at the time by their own words, fully understood the disciplinary “charges” that were brought against him.

Additionally, it is inconceivable that plaintiff can deny defendants Statement of Undisputed Fact ¶ 66, especially in light of Exh. 44, pp. 9 – 16. The remaining pages, as properly cited by defendants, serve to support the underlying “charge” and continue to strengthen defendants’ position that plaintiff had more than sufficient notice of the “evidence” relied upon to support the charges against him at his Loudermill hearing.

Lastly, plaintiff's wholesale "denial" of defendants' ¶ 46 in its Statement of Facts Not in Dispute is simply inaccurate. A review of defendants' Exh. B, pp. 40 -52 and plaintiff's own exhibit CC (Response #12) demonstrates that Linda Yelmini had conversations with multiple individuals at the Attorney General's Office regarding the disclosure of whistleblower affidavits.

A careful review of the plaintiff's responses to defendants Statement of Material Facts Not in Dispute reveals that essentially every fact has been - or should be - admitted.

B. Plaintiff's Local Rule 56(a) 2 "Statement of Material Facts in Dispute" is Not Sufficient to Raise a Genuine Issue of Material Fact.

The plaintiff has provided the Court with a "Statement of Material Facts in Dispute" comprised of 86 paragraphs and 50 pages. It is submitted that these "facts" are not material ones and that they consist of conclusory and unsubstantiated claims. Generally, plaintiff relies largely upon his own, unsupported, uncorroborated affidavit and claims. He also makes uncorroborated claims of the falsity or conspiratorial motives of the defendants' words or actions (e.g. fn. 13, ¶ 47, ¶ 48, ¶ 51).

The crucial facts necessary to defeat summary judgment must demonstrate that defendants violated plaintiff's Due Process or First Amendment rights. It is respectfully submitted that the "facts" asserted by plaintiff that pertain to FOIC determinations and the issue of whether there was "Just Cause" for plaintiff's termination are not the "material" subjects of this lawsuit. It is also submitted that the political affiliations of the defendants and plaintiff's counsel's interpretation of the law are not sufficient "material facts" such as required to defeat summary judgment. Similarly, the motivations of non-defendants Linda Yelmini and/or Alan Mazzola are not relevant or material except insofar

as the named defendants may have known about and/or relied upon them. While relevant for background information, plaintiff's rambling and conclusory "factual" assertions do not create material factual disputes for purposes of this litigation.

More specifically, and by example, plaintiff claims that information about him appeared at various times in the Hartford Courant. (Plaintiff's Disputed Facts #20). He appears to attribute the dissemination of such information to the defendants and infers that they may have read these articles. Notwithstanding the irrelevance and unreliability of newspaper articles as "evidence" in a case such as this, the plaintiff has not offered a shred of evidence to demonstrate that any published information came from any defendant. On the other hand, there is factual evidence that the plaintiff himself, authorized the dissemination of information to the press. (Defendants Statement of Facts Not in Dispute ¶¶ 22 – 24).

With regard to this same information that was faxed to the Hartford Courant, plaintiff suggests in FN 10 on page 21 of his Material Facts in Dispute, that the document was not confidential despite the fax transmission cover sheet that clearly demonstrates otherwise. The defendants submit that a confidential fax cover sheet attached to a letter from the Office of the Attorney General to Rosemary Giuliano **IS** privileged and should not have been faxed to the press with or without plaintiff's authorization. Plaintiff's "excuses" and/or justification for such behavior reinforces his lack of judgment such that discipline was warranted by the commission.

In conclusion, and with regard to the "factual" portion of plaintiff's Opposition to Summary Judgment, the defendants submit that plaintiff's conclusory and uncorroborated

“Facts in Dispute” have failed to create a single material factual issue. Therefore, the defendants request that the Court enter judgment in their favor.

III. FIRST AMENDMENT CLAIM

Speech on a Matter of Public Concern

The plaintiff’s alleged protected speech or activity consists of “ exercis[ing] the right to retain counsel, and through that counsel, ... defend[ing] himself against the charges of improper conduct that had been made against him....” (Plaintiff’s brief at p. 21) In support of that claim, he cites Blue v Koren, 72 F.3d 1075 (2d. Cir. 1995). In that case, the plaintiff was the operator of a nursing home who alleged that employees of the New York State Department of Health’s inspections of the facility violated its First Amendment right by conducting “unreasonable, duplicative and retaliatory inspections” of the nursing home. Although the footnote cited by the plaintiff discusses the First Amendment rights associated with petitioning the government and defending against formal charges, neither Blue nor the cases cited in the footnote occurred in the employment context. Plaintiff’s reliance on those cases is thus misplaced. Rather, the proper analysis of the plaintiff’s claim must focus on the well established body of First Amendment case law that applies to public employment.

The plaintiff further claims that his speech was protected because “its content was directly related to an important issue of public concern.” Plaintiff’s brief at p. 21. Plaintiff alleges for the first time that his speech in connection with his defense of himself in potential disciplinary proceedings is deserving of First Amendment protection, in spite of the enormous body of case law to the contrary, because of his belief that accepting

disciplinary action would have had a chilling effect on all state agencies that regulate the conduct of public officials and diminished the effectiveness of the State Ethics Commission in fulfilling its mission. For several reasons, the plaintiff's argument is both factually and legally insufficient.

First, the plaintiff has admitted that his comments to the League of Women Voters (LWV) on June 3, 2004 were inappropriate, "ill-advised and a mistake", asserted that he would not engage in similar conduct in the future, and acknowledged that he was aware that any future conduct violating any rules of the Commission may subject him to more serious disciplinary action. Exh. 16. His comments were an obvious violation of the Commission's January 2004 directive that Chairperson of the Commission was the sole spokesperson related to Governor Rowland and the Ethics Code's gift provisions. Exh. 4. In his June 7, 2004 memo to the Commissioners the plaintiff "noted the publication of these articles [newspaper articles regarding the speech] with regret and informed the Commission that he had "privately communicated [his] apologies to the Impeachment Committee." Exh. 5. In his deposition, the plaintiff admitted that the Commission had the authority to adopt the policy designating the Chairperson as its sole spokesperson on those matters. Exh. 54 at p. 21. He further admitted that he "...regretted the fact that [he] was making public comments at a very sensitive time when there was an impeachment investigation going on and in fact, wrapping up....I would not have made those remarks if I knew they would be in the media...." Exh. 54 at pp. 60-61. His newfound claim regarding his motivation for challenging the proposed disciplinary action that stemmed from his admitted misconduct is illogical and misguided. The plaintiff was not even challenging the fact that he had engaged in serious wrongdoing or that his speech to the

LWV was protected by the First Amendment . Exh. 54 at pp. 61-62. Thus, although the plaintiff now attempts to portray himself as the wrongly accused victim, the issue in the days immediately following the LWV incident was not whether the plaintiff would be disciplined, but the extent of the discipline that was appropriate to address the plaintiff's admitted misconduct.

In addition, the record is devoid of any evidence suggesting that the plaintiff had previously articulated such motivation for challenging the proposed disciplinary action. No such claim can be found in his testimony before the ERB, his deposition in this lawsuit or elsewhere, prior to the submission of his self-serving affidavit in his opposition papers. The plaintiff's assertion is clearly an attempt to bring his complaints about his own personnel grievances within the purview of the First Amendment, an approach that has firmly and repeatedly been rejected by the courts. ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." *Ezekwo v NYC Health & Hospitals, Corporation*, 940 F.2d 775, 781 (2d Cir. 1991)) In *Connick v Myers*, the Court referred to an employee's expressed dissatisfaction with a transfer as "an attempt to turn that displeasure into a cause célèbre." The Court should likewise reject the plaintiff's attempt to characterize his challenge of proposed disciplinary action into such a cause célèbre.

Causation

The plaintiff's argument that a reasonable jury could find that the plaintiff's alleged protected activity was a motivating factor in the defendants' decision to terminate his employment is likewise without merit. The plaintiff's brief discusses at length the

alleged misdeeds of the Commission's three principle attorneys (Bergeron, Sexton and Regula (now Duggan)), who are not parties to this lawsuit, and in a completely speculative and conclusory fashion, concludes that the defendant Giuliano, and possibly the defendant Vitarelli, conspired with them to set the plaintiff up for disciplinary action.² He even goes so far as to allege that the defendant Giuliano had knowledge that the anonymous letter that was referred to the State Auditors was written by Attorney Regula. The fatal flaw in his theory is that it is utterly unsupported by any admissible evidence. On the contrary, Attorney Duggan (formerly Regula) testified in her deposition, when she first admitted to drafting the letter, that she had not told anyone, other than her attorneys, that she had done so. She specifically denied that she had told any of the members of the Commission that she had written the letter. Exh. 58 at pp. 40, 46.

The plaintiff's suggestion that his discipline was politically motivated because of his criticism of then-Governor Rowland is likewise misguided. It is undisputed that the disciplinary action was unanimously supported by the Commission members, without regard to party affiliation. No reasonable jury could find that the plaintiff's dismissal was the result of his challenging his proposed discipline related to the LWV speech and the defendants are entitled to summary judgment on that basis.

IV. DUE PROCESS CLAIM

The plaintiff opposes the defendants' summary judgment motion on his due process claim primarily on the basis of his claim that the defendants failed to provide him an explanation of the evidence upon which the findings of misconduct were based. His

² The fact that the plaintiff does not claim that defendants other than Giuliano and Vitarelli were involved in this "conspiracy" should be construed to mean that he has abandoned his First Amendment claim as to the other defendants.

objection is without merit because the record demonstrates that the defendants did provide the plaintiff with sufficient notice and an explanation of the evidence to satisfy the minimal pre-termination due process requirements.

The plaintiff's initial Loudermill hearing took place during the SEC's September 10, 2004 meeting. At the beginning of that meeting, the SEC, Attorney Yelmini and Alan Mazzola engaged in a lengthy discussion about the process that was being utilized to address the disciplinary charges and the difficulties presented by the need to protect the identity of the whistleblowers, who (through their counsel) had instructed the defendants that their affidavits were not to be disclosed. Exh. 34, pp. 1-30.

Both prior to and during the course of the hearing, the plaintiff was provided with information regarding to the charges. For example, in response to Attorney Adler's request for additional information regarding the charge pertaining to the plaintiff's use of compensatory time, Mr. Mazzola provided such explanation and Attorney Adler responded, "...that clarification is all I asked for...and I appreciate that, because that's very different from what the *Courant* reported this morning." Exh. 34 at pp. 30-31. During that hearing the plaintiff admitted that when he met with the DAS investigator, Alan Mazzola, Mr. Mazzolo provided him with an explanation of some of the evidence. ("On September 2nd, when we met with Mr. Mazzola for the first time, I was advised that in fact there was an issue that Attorney Sexton had apparently read Governor Roland's [sic] confidential addendum for an investigation she was conducting and that I was directing Cindy to lie to cover up for Attorney Sexton. Exh. 34 at p. 38)

In addition, the transcript of that hearing (Exhibit 34) demonstrates that the plaintiff was well aware of the nature of the charges, since he was able to respond to each

of the four charges in great detail. Exhibit 34, pp. 33-53. The plaintiff's objection is further undermined by the fact that on several occasions during the September 10, 2004 hearing the defendants' offer to provide him with a more detailed explanation of the evidence and his counsel repeatedly declined these offers. For example, when Mr. Mazzola attempted to "speak specifically" about the charges and discuss his interview with certain witnesses and his findings, Attorney Adler strenuously objected and insisted that the witnesses be required to personally testify and that he be allowed to cross-examine them. Exh. 34 at pp. 53-56. Likewise, the plaintiff's counsel objected when defendant Collins requested that Mr. Mazzola "...walk us through the four allegations...and give us a sense...how other persons' recollections of the incidents that we're discussing may have been different from Mr. Plofsky's....give us a sense of whether the witnesses you interviewed had a recollection of these events that's inconsistent with what we heard this morning." Exh. 34 at p. 57. Attorney Adler stated "[y]ou know very well where he thinks there are inconsistencies. It's your job to decide the credibility issues...Having Mr. Mazola reiterate whatever he already told you in closed session so that it can be on the public record is outrageous....If you are going to talk about what the specific witnesses said in these confidential statements...[l]et them testify. Let us cross-examine. Have a real hearing. But don't have him talk about hearsay stuff that he's already said to you." Exh. 34 at pp. 57-58. Later in the hearing, the defendant Giuliano asked Attorney Adler for clarification regarding his objection: "In your initial statement you expressed concern about the fact that Attorney Plofsky did not have specifics with respect to the allegations. In order to resolve that issue, Commissioner Collins then was requesting Mr. Mazzola to elicit specific facts. And I

understand you objected to that. Is that correct?" Attorney Adler reiterated that he was "...not asking for it now unless he's going to give us copies of the statements and allow the witnesses to testify....And without the opportunity to actually see the evidence, talk to the people involved, do discovery, cross-examine them....but as a due-process issue, no, I don't want a speech about that right now." Exh. 34 at pp. 70-72. Thus, plaintiff's counsel put the defendants in an impossible situation. Having insisted that any of the proceedings regarding the plaintiff's discipline be held in open, public session, plaintiff's counsel then refused to allow the defendants to provide him with the very information that he was seeking because he did not want it in the public record. The plaintiff's claim that such action violated his due process rights simply defies logic.

In addition, plaintiff's counsel's insistence on a full evidentiary hearing at the pre-disciplinary stage is clearly inconsistent with the well-established law. In response to defendant Gary Collins' invitation that Attorney Adler explain to the SEC how the process that was being utilized did not comply with the *Loudermill* requirements, Adler stated: "But if you're asking me, like, legally am I asking you to do something specific now? I mean, the only think [sic] I could ask is that, you know, he not be fired without getting a full evidentiary hearing.... I understand—I don't think that *Loudermill* requires that in general. I think it might require it in a circumstance like this where the normal pre-disciplinary process has run awry and can't function the way it's supposed to function. That's my particular point of view. I can't cite a case for that, but I think that would be a better process." Exh. 34 at p. 19, 20. Plaintiff's counsel's argument is simply contrary to the U.S. Supreme Court's decision in *Cleveland Board of Education v Loudermill*, 470 U.S. 532, 546 (1985) ([T]he pretermination "hearing," though

necessary, need not be elaborate.... the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.... In general, something less" than a full evidentiary hearing is sufficient prior to adverse administrative action....To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.) (citations omitted). This is especially true when, as here, a post-termination appeal process is provided by law. Adams v Suozzi, 517 F.3d 124 (2d Cir. 2008)

Plaintiff further claims that a factual issue exists with regard to the dates and frequency of Attorney Yelmini's contact with the Attorney General's Office for advice on the disclosure of the whistleblower affidavits. In fact, no such factual dispute exists. Attorney Yelmini consistently testified that she advised the defendants that the affidavits could not be disclosed to the plaintiff or his attorney because doing so would violate the confidentiality provisions of the whistleblower statute. Attorney Yelmini testified in her deposition as follows:

"I had had a variety of conversations with staff of the Attorney General's office regarding whether or not we could -- 'we' meaning the Commission and me representing them -- could disclose either a redacted version or the full version of the whistle-blower complaints. I must have spoken with five or six people, and they instructed me that they could not be disclosed.... We had a discussion regarding what I believed to be uncharted waters regarding at what point do the rights of an individual that is being accused become superior to the rights of the whistle-blower. And because I believed that -- and still do believe that the whistle-blower statute is the statute of the Attorney General, specifically Richard Blumenthal, I went to them for interpretation of that statute."

Exh. 59 (Yelmini depo) at p. 41, 42. In response to plaintiff's counsel question regarding "these discussions that you had regarding, you know, at what point the employee's rights are more important than the whistle-blower rights, do you recall having a discussion with representatives of the Attorney General's office after the Hartford Courant revealed the names of the whistle-blowers?", Attorney Yelmini testified that:

"Yeah. At some point -- well, there are two things I remember. One is being asked by Will [Gundling, Associate Attorney General] and others if I would call their attorney to see if they would waive the right to disclose, which I did.... I spoke with, at various times, both Eileen Duggan and Hope Seeley. And they refused to allow me to disclose the material either in a redacted form or an unredacted form.... I remember a specific discussion with Will Gundling, who we had a discussion regarding the issue of the redacted version; and I said that if you redacted the information it would still be clear who the individuals were, and was that sufficient protection under their statute? He said, no, you cannot disclose the information. And I relayed that information to the members of the Commission in that session.

Exh. 59 (Yelmini depo) at pp. 41-46, . During the September 10, 2004 SEC meeting, Attorney Yelmini stated, in the presence of the defendants who were present at that meeting, that "...the fact that you have been not given copies of whistleblower complaints, this is pursuant to direction that we have received from the Attorney General's Office." Exh. 34 at p. 14. The responses of the Attorney General's Office cited by the plaintiff do not contradict Attorney Yelmini's testimony. Rather, the responses state that "[b]ased upon available records, it appears that the first communication...was a telephone call by Yelmini to Assistant Attorney General Thomas Clifford on or about September 8, 2004." Emphasis added. It is neither surprising nor significant that the recollections and/or records of the parties involved do not

conclusively establish the exact dates of these conversation. However, even assuming that a factual dispute exists with respect to the dates of Attorney Yelmini's communications with the Attorney General's Office, it is immaterial to the issue of the advice that that Attorney Yelmini communicated to the defendants. There is no evidence in the record suggesting the defendants were aware of any such alleged discrepancy. Nor does the record contain any evidence disputing that Attorney Yelmini clearly and unequivocally advised the defendants that they could not release the whistleblower affidavits to plaintiff and the defendants relied on that advice.

Plaintiff's claim that the defendants had decided to discuss the plaintiff during their September 8, 2004 meeting, prior to his Loudermill hearing, is likewise without merit. Plaintiff is unable to point to any evidence to support this conclusory allegation. Further, this claim is actually contradicted by the testimony of the plaintiff, who stated at his Loudermill hearing that, "I disagree with my attorney. I don't feel that I've been prejudged by this commission, and I feel that justice and fairness will prevail today. And I trust you've kept an open mind on these charges till you hear from me." Exh. 34 at pp. 33-34. In addition, at least one of the defendants affirmatively stated that during the September 8 meeting, there was no discussion "whatsoever about whether or not we should sustain the allegations, let alone if we did what the penalty would be." Thus, no reasonable jury could agree with plaintiff's unsupported assertion.

The plaintiff has described in great deal the ways in which his presentation to the Commission would have been different if he had been provided with access to the "whistleblower" affidavits prior to his September 10, 2004 Loudermill hearing. However, this argument is undermined by his own admission that when he testified

before the Employee Review Board on November 1, 2005, some 10 months after he was provided with redacted copies of the “whistleblower” affidavits, his ERB testimony was essentially the same as his testimony at the September 10 Loudermill hearing. The plaintiff testified at the hearing before the Employee Review Board on November 1, 2005 that the statements that he made at the Loudermill hearing “were not materially different from [his] testimony on Direct...in these proceedings.” Exh. 60 (ERB Tr. 11/1/05) at pp. 1945-46.

With respect to that claim, it is also important to note that the Commission did reconsider its decision to dismiss the plaintiff at its September 29, 2004 meeting, after the three staff attorneys had agreed to allow public disclosure of their “whistleblower affidavits”. Exh. 44. At that meeting the Commission members also discussed the new affidavits that had been submitted by two SEC staff members, Cannata and Mathieu, and allowed plaintiff’s counsel to comment on the bearing of the new affidavits on their decision regarding the plaintiff’s dismissal. Exh. 44 at p. 4-6. After discussing the new affidavits, Professor MacGill invited the Commissioners to raise “further questions or concerns with respect to the fairness of the investigation.” Exh. 44 at p. 55. The Commissioners then engaged in an exhaustive discussion of all of the evidence, including a chart that had been prepared by Attorney Yelmini, which summarized the statements provided by the witnesses and highlighted any inconsistencies in these statements. Exh. 44 at pp. 59-68. Even a cursory review of the transcripts of the meetings of September 10 and September 29, 2004 leads to the inescapable conclusion that the defendants considered all of the evidence in excruciating detail and are entitled to summary judgment on the plaintiff’s due process claim.

V. SPOILATION

The Plaintiff argues that he is entitled to an adverse evidentiary inference as a result of spoliation of evidence by four of the eight Defendants. District courts are to apply a "case-by-case approach to the failure to produce relevant evidence . . . because such failures occur along a continuum of fault - ranging from innocence through the degrees of negligence to intentionality." Dupee v. Klaff's, Inc., 462 F. Supp. 2d 244, 248 (D. Conn. 2006). "A party seeking an adverse inference instruction for spoliation or non-production of evidence must show that (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed 'with a culpable state of mind,' and (3) that the destroyed evidence was 'relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.'" Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 ((2d Cir. 2002)(quoting Byrnie v. Town of Cromwell, 243 F.3d 93, 107-12 (2d Cir. 2001).

As to the first prong, the plaintiff has not demonstrated that the four defendants were in possession of any evidence that they had a duty to preserve. Rather, the defendants may have disposed of copies of the voluminous documents that they received in connection with their service on the Commission, some of which may have contained notes taken during various proceedings. Plaintiff is unable to point to any specific relevant information that may have been contained in those documents or demonstrate any prejudice that may have resulted from their disposal. Indeed, there is little or no factual dispute regarding what occurred in any meetings involving the plaintiff and some,

including the September 10 and 29, 2004 meetings were transcribed. In addition, the defendants have provided the plaintiff with the minutes of all Commission meetings that were requested and with copies of the notes that were retained by the other defendants. There is simply no basis to support a conclusion that the defendants were in possession of any evidence relevant to plaintiff's claims that has not been previously produced.

As to the second prong and third prongs, the plaintiff argues that the defendants acted with gross negligence and recklessness in destroying their personal notes and documents. "[W]here a party seeking an adverse inference adduces evidence that its opponent destroyed potential evidence (or otherwise rendered it unavailable) in bad faith or through gross negligence (satisfying the "culpable state of mind" factor), that same evidence of the opponent's state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence is favorable to the party (satisfying the "relevance" factor)." *Id.* Where, however, the plaintiff can only demonstrate that the defendants acted with mere negligence in destroying potential evidence, the plaintiff must then go on to establish that the evidence would have been relevant to his or her claim. See *Doe v. Norwalk Community College*, 2007 U.S. Dist. LEXIS 51084 (D. Conn., July 16, 2007).

In this instance, the Plaintiff has not offered any evidence that shows that the defendants were negligent or acted in bad faith when they disposed of documents in accordance with their routine practice as members of the Commission. Rather, the Plaintiff merely makes the bold conclusory assertion that since Smith, MacGill and Collins are attorneys, they acted in gross negligence when they destroyed their personal notes and documents. The plaintiff cites to no legal authority that supports this argument.

In addition, since none of these commissioners were serving on the SEC in their capacity as attorneys, the plaintiff's argument fails.

Further, the plaintiff is not entitled to an adverse inference because he cannot establish that the documents that were destroyed would have been relevant to the subject lawsuit. "[O]ur cases make clear that 'relevant' in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. . . . Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction." (Citations omitted; internal quotation marks omitted.) Residential Funding Corp., 306 F.3d at 108-09. The duty is on the plaintiff "to produce some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files." (Internal quotations marks omitted.) Dupee, 462 F. Supp. 2d at 250.

Here, the plaintiff fails to demonstrate that any of the documents that were allegedly destroyed would have been relevant to his claim. Although four of the defendants may have disposed of the voluminous documents they they accumulated while serving on the Commission, the other four defendants retained their documents and produced them during discovery in this case. The plaintiff does not refer to any of these documents or rely on any of these documents in his Objection. Thus, there is nothing to suggest that any of the documents that were disposed of would have been relevant to the plaintiff's claims. Therefore, the plaintiff's claim of spoliation fails.

VI. CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the Memorandum of Law In Support of Defendants' Motion For Summary Judgment, the defendants respectfully request that the Court grant their Motion for Summary Judgment.

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CERTIFICATION

I hereby certify that on June 16, 2008 a copy of the foregoing Defendants' Reply To Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment was filed electronically. Notice of this filing was sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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