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Date: Thursday, December 13, 2012 05:15 pm

Subject: Misconduct Complaint against the US Att'y for SDNY & Assts: Misrepresentations in Brief for Defs-Appellees, Kalderon v Finkelstein 11-1227-cv

Attachments:
- Misconduct Complaint to the Grievance Committee.pdf (60KB)
- 11-1227 Docket dec-11-12.pdf (83KB)
- 244. Motion to Strike Misleading Sections from Defs. Brief.pdf (1MB)
- 150. Defendants' Brief.pdf (613KB)
- 194. Reply Brief.pdf (247KB)
- 210. Motion for Oral Argument.pdf (1MB)
- 259. Motion to Strike Judgment & Appoint New Panel.pdf (1MB)
- 286. Letter to Chief Judge & Clerk.pdf (1MB)
- US Attorneys email intent to oppose motion jun-15-12.pdf (268KB)

Note, this email is sent twice, with and without the attachmentS

Misconduct Complaint against the US Attorney for the SDNY & Two Assistants: Misrepresentations and Fabrications in their Brief for Defendants-Appellees in *Kalderon v Finkelstein et al.*, 11-1227-cv

Dear Ms. White and Members of the Committee on Attorney Grievance and Discipline:

I am Dr. Nurit Kalderon, Plaintiff-Appellant, proceeding *pro se* in the appeal *Kalderon v Finkelstein et al.*, No. 11-1227-cv, in the United States Court of Appeal for the Second Circuit. I was represented by counsel in the district court; in the appeal, I have proceeded *pro se* because I ran out of funds to compensate him. Preet Bharara, the United States Attorney for the Southern District of New York, and Alicia M. Simmons and Sarah S. Normand, the Assistant United States Attorneys (collectively, "US Attorneys") represent the Defendants-Appellees, Dr. Finkelstein *et al.*, in the above mentioned appeal.

Here, I am submitting to the Committee on Attorney Grievance and Discipline for the United States Court of Appeals for the Second Circuit ("Committee") a Misconduct Complaint against Preet Bharara, Alicia M. Simmons and Sarah S. Normand, arising from the extensive and deliberate misrepresentations and false statements of fact and law in the brief for Defendants-Appellees these US Attorneys filed in *Kalderon v Finkelstein et al.*, No. 11-1227-cv.

The misconduct complaint is submitted directly to the Committee, as indicated in Rule 2b. of the Rules of the Committee**.** This because of complicity of the Panel (José A. Cabranes, Chester J. Straub, Peter W. Hall, JJ.) with the US Attorneys' misrepresentation and fabrication, in summarily deciding in favor of Defendants. Specifically, the Panel decided the appeal issuing a Summary Order: i. without first determining Kalderon's pending and unopposed motion to strike the misleading and untruthful portions from Defendants' brief; and ii. by relying exclusively on Defendants' brief and knowingly adopting the false version of fact and law produced by the US Attorneys. Moreover, the Panel intervened in —without having the power to do so— and denied Plaintiff's motion to cure the gross injustice: to strike the summary order and to assign a new panel that would first review the challenged veracity and validity of Defs-Appellees' brief.

The New York Rules of Professional Conduct (the "New York Rules"), provide, inter alia, that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or *misrepresentation*[.]" N.Y. Rules Prof'l Conduct R. 8.4(c) (emphasis added). The New York Rules further specify that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." N.Y. Rules Prof'l Conduct R. 3.3(a)(1), 3.3(f)(2). These Rules also bar a lawyer from knowingly "offer[ing] or us[ing] evidence that the lawyer knows to be false[.]" N.Y. Rules Prof'l Conduct R. 3.3(a)(3).

The subject US Attorneys have violated the above mentioned rules. For the investigation, attached are several appeal documents as explained below, which are listed at the end of this letter. The clear and convincing evidence for the misrepresentations, fabrications and false statements made by the US Attorneys in Defs.-Appellees' brief is provided in Plaintiff-Appellant's Motion to Strike the Misleading Sections from Defendants-Appellees' brief, Docket entry 244. This because of the self-evident presentation, of the false *vs.* the truth, as explained with a few examples below.

Exposing the US Attorneys' Misrepresentations False Statements and Deceit

I am a neuroscientist, who through my research I developed therapies for spinal cord injury; in support of this research I was awarded, by the National Institutes of Health ("NIH"), in August 2000, a grant at over $2.3 million. Defendants include, seven individual actors and an agency; five are grant administrators, part of a grant awarding unit who started handling my grant in early 2006 or later.

This promising funded research was stopped dead in its tracks by the Defendants who --in early 2006-- instead of transferring to a new institution I was supposed to move to, misused and diverted my NIH grant's funds into unauthorized purposes. Consequently, since April 2006 I do not have access to my grant's funds, my research projects were discontinued and scientific career has been decimated by the adverse and retaliatory actions of Defendants.

Defendants' brief which was produced by the US Attorneys, Docket entry No. 150, is replete with and its arguments rely upon deceptive and misleading statements of fact and law with respect to: i. Plaintiff's allegations in the underlying Complaint, identity of Defendants, and the stated causes of action; ii. the documents and evidence --confirming Defendants' wrongdoing and malfeasance-- which are contained in the record on appeal; iii. the Orders appealed from; and iv. the content, issues and arguments in Plaintiff's Brief.

In the Motion to Strike the Misleading Sections from Defendants-Appellees' brief which consists of memorandum and accompanying declaration, the major fabrication, misrepresentation etc., in Defendants' brief were exposed by placing in tables, side-by-side, Defendants' false statement vs. the relevant actual statement made in Plaintiff's Complaint and/or brief in which the analysis for deception is self-evident, as demonstrated in the three examples below.

Example 1

As indicated above, one of the Complaint's central charges is that of financial fraud committed by the Defendants in handling Plaintiff's federal research grant. Accordingly, the Complaint alleged fraud on the part of the Defendants. It was prepared following the heightened pleading requirements as set under Fed. R. Civ. P. 9(b) "*In alleging fraud* or mistake, *a party must state with particularity the circumstances constituting fraud* or mistake" and by this Court. *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir.1993). Nevertheless, the US Attorneys deceptively base their Argument in the Defendants' brief on the false cardinal statement that "[*b*]*ecause the complaint does not allege fraud on the part of the Defendants*, Kalderon was *not required to meet* the heightened pleading standard of *Rule 9(b)*," (emphasis added) Defs.-Br. 33 The Complaint contains dozens of paragraphs alleging fraud two of these are shown in below:

Misrepresenting the Complaint's Nature the Misleading Statement in Defs.-Br. p. 33.	**The Actual Statement made in the Complaint, by ¶ No., about Fraud Committed By Defendants**
Because the complaint does not allege fraud on the part of the Defendants, Kalderon was not required to meet the heightened pleading standard of Rule 9(b). See Br. 36.	1. ... Defendants are corrupt government actors who committed multiple acts of financial fraud in the handling of Kalderon's Grant, activities exposed and complained about by Kalderon.
Because the complaint does not allege fraud on the part of the Defendants, Kalderon was not required to meet the heightened pleading standard of Rule 9(b). See Br. 36.	**21**. . . . **(c)** Defendants illegally circumvented the March 9, 2006 order in three principal respects: . . **ii**. In addition to unlawfully reinstating the College as grantee institution, Defendants refused to consider an application for the transfer of the NS-Grant to a new grantee . . . Along with the fraudulent payment to College of **$124,707** Defendants also withdrew, without any legal authority, the sum of **$78,425** from the NS-Grant leaving zero dollars remaining in the NS-Grant killing Kalderon's research project and her livelihood.

The Panel adopted the above false version of the US Attorneys that "*the complaint does not allege fraud on the part of the Defendants"* and described the detail given in the Complaint about the mishandling of $203,132 NIH funds by the Defendants as rambling: "*Kalderon's rambling, 126-page complaint (though submitted by counsel) was neither short nor plain,"* Moreover, the Panel rebuked Kalderon's attorney for not adopting the US Attorneys version, forcing thereby the district court to do the "*yeoman's task*" of editing out all the fraudulent actions of Defendants. It noted that "*We take this opportunity to observe that the District Court would have acted well within its discretion in dismissing the complaint (with leave to replead) for failure to comply with Rule 8(a)(2) . . . In addition, dismissal in this case at the outset with instructions to counsel to replead in compliance with Rule 8 would in all likelihood have obviated the need for the District Court to perform the yeoman's task of doing what counsel was obligated to do in the first place*." Summary Order

Example 2

The US Attorneys knowingly offer false evidence in Defendants' brief misrepresenting that Kalderon was employed by NYU (New York University) when the Complaint alleges that due to Defendants' actions Kalderon was unemployed and unemployable since March 2006. Further, the Complaint alleges in detail the chronology of events and Defendants' actions that derailed the Grant transfer to, and obstructed the employment of Kalderon at NYU. Below shown are only 4 of these events, to make the point of the deliberate deception:

Fabrication of NYU & Kalderon Relationship and Chronology of Events the Misleading Statement in Defs.-Br. p. 3	**Actual Chronology of Events and the Deliberate Interference by Defendants in NYU & Kalderon Relationship as Stated in Complaint, by ¶ No.**
Kalderon was employed by . . . Kalderon then initiated [Oct 2006] *a whistleblower action against the College, . . .* *After the parties reached a settlement* [Aug 2007] *Kalderon entered into an employment relationship with NYU.*	221. Following NYU administrative regulations, . . . Only after the grant's transfer, would her appointment at NYU as a Research Scientist be initiated.
Kalderon was employed by . . . Kalderon then initiated [Oct 2006] *a whistleblower action against the College, . . .*	227. In May 31, 2007, the application for transfer to NYU was ready to be submitted . . . At that time, Kari was told by NINDS staff

After the parties reached a settlement [Aug 2007] *Kalderon entered into an employment relationship with NYU*.	that the submission of this application was embargoed.
Kalderon was employed by . . . Kalderon then initiated [Oct 2006] *a whistleblower action against the College, . . .* *After the parties reached a settlement* [Aug 2007] *Kalderon entered into an employment relationship with NYU*.	287. From the time [October 16, 2007] the 'Questionnaire' was submitted by Defendants DeCoster and Kvochak to NYU officials, the next five months developed into a nightmare ruining completely Kalderon's relationship with NYU. The NS-Grant was never activated at NYU, and by March 19, 2008 NYU decided to refuse to accept any rights to the NS-Grant returning the awarded funds to the NIH.
Kalderon was employed by . . . Kalderon was employed by . . . Kalderon then initiated [Oct 2006] *a whistleblower action against the College, . . .* *After the parties reached a settlement* [Aug 2007] *Kalderon entered into an employment relationship with NYU*.	288. At this time, since May, 2007 when NYU first was ready to submit the grant application Kalderon had remained without an appointment, did not get salary, and could not perform the funded research project.

Example 3

The US Attorneys fabricated and misleadingly present a section of "Issues Presented for Review" which contradicts and misrepresents —on fact and law— the true nature of Kalderon's appeal and the actual Issues presented by Kalderon in her brief for review by this Court. Shown here is the violation of First Amendment issue in which the US Attorneys misrepresent and falsely state that Plaintiff complained not about Defendants but about the "College" and misrepresent the Supreme Court *Garcetti* holding which is exclusively applicable to public employees.

The Fabricated Issues for Review Misleadingly Presented in Defs.-Br., p.6	**The Actual Statement of Issues Presented for Review of Kalderon's Brief, p.2**
1. Whether the district court properly dismissed Kalderon's First Amendment retaliation claim, where Kalderon's complaints about the College's alleged misuse of grant funds were made in her official capacity as a principal investigator pursuant to NIH policy and *where Kalderon failed to allege any plausible retaliatory acts by the Defendants.*	1. Did the district court fundamentally err when dismissing Kalderon's claim of violations by Defendants of her First Amendment rights by holding that Kalderon was effectively a public employee —subject to the *Garcetti* restricted protection— because she was a recipient of a federal (NIH) grant recipient and therefore prohibited from enjoying the entire spectrum of the First Amendment protections as the ordinary private citizens can?

"[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

Chronology of the Panel's Complicity with the US Attorneys' Misrepresentation

The misrepresentation and the false statements made by the US Attorneys in the brief for Defendants were exposed and brought to the attention of the Panel in Plaintiff's:
Reply brief, Docket entry No. 194; Motion for Oral Argument, Docket entry No. 210; and
the Motion to Strike Misleading Sections from Defendants' Brief, Docket entry No. 244.

The Reply Brief

Plaintiff's Reply brief primarily addressed the US Attorneys' advocacy and defense of the district court's dispositive actions, exposing that these are premised on blatant misrepresentation and fabrication of Plaintiff's arguments and pertinent law and precedent cases. For example, the Argument section presents under POINT III the following:

> DEFENDANTS' ADVOCACY OF THE DISTRICT COURT'S DISMISSAL OF KALDERON'S FIRST AMENDMENT CLAIM IS ***PREMISED ON BLATANT MIPRESENTATION OF KALDERON'S ALLEGATIONS AND OF THE GARCETTI SUPREME COURT HOLDING*** WITH REGARD TO CITIZEN'S SPEECH WHO IS NOT A PUBLIC EMPLOYEE

[emphasis added]

The Motion for Oral Argument

The Panel ignored Plaintiff's briefs and assigned it decision to "On Submission." Therefore, Plaintiff moved for oral argument requesting "Fair administration of the pending appeal allowing the mandatory Oral Argument per FRAP 34(a)(2); this as the Court erred in assigning the case 'on submission' as none of the exceptions per 34(a)(2)(A) -(C) is valid or applicable." Plaintiff argued that the mandatory oral argument should be granted to her because the dispositive issues *have not been authoritatively decided* by the court below; and, that the facts and legal arguments are *inadequately presented in the Defendants-Appellees' brief*.

Plaintiff presented and exposed some of the misrepresentations and fabrications in Defendants' brief, other than those discussed in the Reply brief, focusing primarily on one misrepresentation. Defendants' brief repeatedly states that Dr. Kalderon "concedes" or alleged in her Complaint that the Defendants agreed to her request to transfer her NIH grant to New York University ("NYU"), whereas, the Complaint states the opposite – it states that Defendants went to extraordinary lengths in the period April 2007 through March 2008 to prevent such a transfer, etc.

The Motion to Strike Misleading Sections from Defendants Brief

In light of the apparent unfair review process maintained by the Panel, Kalderon formally moved to strike from Defendants' brief the misleading and untruthful statements/portions of fact and law that were included in disregard and/or contrary to Fed. R. App. P. 28(b) and to 2d Cir. R. 28.1(a).

The motion to strike sections from Defendants' brief was made on August 21, 2012, Docket Entry No. 244. The US Attorneys, by Alicia Simmons, indicated they intend to oppose the motion, copy of the email is attached. Response papers to the motion were due on August 31, 2012. The US Attorneys did not submit any response; namely, they concede the claims of the motion are true. On August 30, 2012 the Panel issued the Summary Order and Judgment, Docket entry No. 253, this without reviewing the motion that challenged the veracity and validity of Defendants' brief. The motion itself was never reviewed by the Panel, it was still pending when the Mandate Judgment was issued on October 25, 2012.

The Motion to Strike the Summary Order by en banc hearing

On September 26, 2012, Kalderon filed a motion to "Strike Summary Order by *en banc* hearing", Docket entry No. 259. The relief sought in that motion is to restore fair administration of justice in reviewing Kalderon's appeal by: i. to strike the Summary Order and Judgment entered on August 30, 2012, this to cure the gross injustice --violation of the basic tenets of due process-- caused by the Panel's procedural errors; and ii. to assign a new panel in order to firstly determine the pending challenge --since August 21, 2012-- to the veracity and validity of Defendants' brief, and then fairly decide the entire scope of the issues on appeal. As discussed and argued in that motion, due to the extremely unusual and grave circumstances giving rise to the motion, only the full Court has the authority to grant the relief sought; and therefore the motion inevitably has to be heard *en banc*, as set under Fed. R. App. P. 35(a).

This motion was never reviewed as required by law: the Clerk's Office engaged --under color of law-- in actions for the sole purpose of defeating the due course of justice and depriving me of the equal protection of the laws in the appeal. Specifically, it engaged --starting on October 3, 2012, Docket entry 263, through October 26, 2012, Docket entry 288-- in converting the motion to strike into a petition for rehearing and instead of the mandatory *en banc* hearing of the motion diverting it back into the hands of the Panel. The Panel --without having the power to do so-- denied the request to assign a new panel, authority that rests only with the full court. These actions of the Clerk's office were brought to the attention of the Chief Judge, the Hon. Dennis Jacobs, and the Clerk, Ms. Catherine O'Hagan Wolfe, of the Court, Docket entry 286.

The documents attached here for the investigation are listed below, identified by their Docket entry No. In a few days all the case documents will be available at my website, to download as PDF files; at that time I shall email the link.

In conclusion, the Committee is presented with several of Plaintiff's documents which provide clear and convincing evidence about the gross misrepresentations, fabrications and false statements of fact and law made by the US Attorneys in Defs.-Appellees' brief. The major document for the investigation/examination by the Committee is the Motion to Strike Misleading Section from Defendants' Brief.

Please let me know whether any additional information and/or documents should be provided to the Committee.

I thank you for your attention to this matter.

Truly yours

Nurit Kalderon, Ph.D.
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Attachments:

Misconduct Complaint to the Grievance Committee
Docket of case 11-1227-cv.244.
Motion to Strike Misleading Sections from Defs Brief; 150. Defendants' Brief; 194. Plaintiff's Reply Brief; 210. Motion for Oral Argument; 259. Motion to Strike Judgment & Appoint New Panel; 253. Summary Order; 286. Letter to Chief Judge & Clerk; US Attorneys email intent to oppose motion jun-15-12.